IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)

Case No: J5396/00

In the matter between:

THE SOUTH AFRICAN DEMOCRATIC
Applicant

and

First Respondent

Second Respondent

Third Respondent
IN THE PROVINCIAL ADMINISTRATION OF THE PROVINCE OF THE EASTERN CAPE

ON Fourth Respondent
IN THE PROVINCIAL ADMINISTRATION OF THE FREE STATE PROVINCE

N Fifth Respondent
IN THE PROVINCIAL ADMINISTRATION OF THE PROVINCE OF GAUTENG

N Sixth Respondent
IN THE PROVINCIAL ADMINISTRATION OF THE PROVINCE OF KWA-ZULU/NATAL

ON Seventh Respondent
IN THE PROVINCIAL ADMINISTRATION OF THE PROVINCE OF MPUMALANGA

ON Eighth Respondent
IN THE PROVINCIAL ADMINISTRATION OF THE PROVINCE OF THE NORTHERN CAPE

N Ninth Respondent
IN THE PROVINCIAL ADMINISTRATION OF THE NORTHERN PROVINCE

ON Tenth Respondent

IN THE PROVINCIAL ADMINISTRATION OF THE NORTHWEST PROVINCE

N Eleventh Respondent

IN THE PROVINCIAL ADMINISTRATION OF THE PROVINCE OF THE WESTERN CAPE

JUDGMENT

LANDMAN J:

1.The "*Business Day"* reported on 19 October 1999 that "Asmal tightens strike rules for principals, managers". The South African Democratic Teachers' Union was aggrieved at what it regarded as a unilateral attempt to amend the terms and conditions of educators. Efforts to address the situation were fruitless. Subsequently regulations were promulgated. SADTU has launched proceedings in this court, by way of a stated case, inter alia, to have the strike regulations declared ultra vires.

The facts

2.The applicant is the South African Democratic Teachers' Union ("SADTU"), a trade union registered in terms of the Labour Relations Act No 66 of 1995 ("the LRA").

3.The first respondent is the Minister of Education ("the Minister"), who is cited in his official capacity. The Minister is the political head of the Department of Education in the national government ("the Department"). The other respondents are the Director-General of Education and the Heads of Education Departments of the Provincial Administrations of the Provinces of the Republic in their official capacity as the employers.

4.SADTU organises educators in South Africa and at present has more than 200 000 members. Most of its members are educators employed by the State. These educators teach at public educational institutions, in particular, at public schools - they are therefore educators covered by the Employment of Educators Act No 76 of 1998 as amended ("the EEA").

.SADTU (as well as other registered trade unions) and the State ("the employer"), represented by the second to eleventh respondents' departments are parties to the Education Labour Relations Council ("the ELRC"). The ELRC is a registered bargaining council in terms of section 37 of the LRA. SADTU is the majority union in the ELRC, with about 65% of all organised educators that fall under the scope of the ELRC being members of SADTU. There are no employer parties to the ELRC other than the second to eleventh respondents' departments.

.On 19 October 1999 an article entitled "Asmal tightens strike rules for principals, managers" appeared in the *"Business Day"* newspaper. The 'Asmal' identified in the article is the Minister. The article reported that the Minister had announced that he would implement stricter rules governing the conduct in relation to strikes of school principals and managerial employees in the education sector. Similar reports also appeared in other newspapers.

.In the light of these reports, SADTU sent a letter dated 24 October 1999 to the Minister in which it raised a number of concerns about the announcements attributed to the Minister concerning the strike rules for "education managers" and about the fact that there had been no negotiations or consultations on this matter before the announcement. SADTU received no written response from the Minister.

.On 3 February 2000 the representatives of the Department at the ELRC announced that the Minister intended to publish regulations regarding the role of managers during strike action. The representatives of the Department stated that these draft regulations were not for negotiation, but were being presented for information and consultation. The representatives of the Department invited the union parties to the ELRC to submit comments on the draft regulations. The draft regulations were referred to the ELRC's Legal Committee.

.At the same meeting of the ELRC, on 3 February, the employer tabled for negotiations a document entitled "Code of

good practice, procedures and rules in education on strike action, lock-outs and picketing at education institutions" ("the draft Code"). The employer recorded its objective as being to reach a binding agreement on the matter.

0. The draft Code was on the agenda at subsequent meetings of the ELRC. The respondents' attitude is (and remains) that the issues contained in the draft Code are separate and distinct from the issues contained in the regulations and that the draft Code is a matter which the parties could negotiate. SADTU's position is (and remains) that the issues contained in the regulations should form part of the Code and should be negotiated at the ELRC and that the two matters should not be dealt with separately. The draft Code remains on the ELRC's agenda.

1. On 8 February 2000 SADTU received a letter from the second respondent which enclosed a copy of draft "regulations regarding the role of managers during strike action". The second respondent invited SADTU to comment on these draft regulations by 21 February 2000.

2. On 21 February 2000 SADTU through its attorneys submitted its response. In its submissions, SADTU contended that the Minister had failed to follow the negotiation and dispute resolution procedures in the ELRC and further submitted *inter alia* that:

2.1. the Minister was not empowered to make these regulations in terms of section 35 read with sections 4(1) and 4(2) of the EEA;

2.2. many of the draft regulations were inconsistent with the LRA and the Constitution of the Republic of South Africa Act No 108 of 1996 as amended ("the Constitution") and were therefore invalid; and

2.3. the promulgation of these regulations would subvert collective bargaining and the right to strike.

3. On 8 March 2000, at a meeting of the ELRC, the Department indicated that it would consult further on the matter of the regulations.

4.On 31 March 2000, and without any further notice, the Minister published "Regulations regarding the role of managers prior strike action" as Government Notice No 327 in *Government Gazette* No 21050 ("the strike regulations").

5.The strike regulations were purportedly published in terms of the Minister's powers to determine terms and conditions of employment as set out in section 4(1) and (2) read with section 35 of the EEA. The strike regulations also stated that the Minister had consulted with the Council of Education Ministers and the trade unions, as contemplated in section 5 of the National Education Policy Act No 27 of 1996 ("the NEPA").

6.On 2 May 2000, SADTU through its attorneys sent a letter to the Minister demanding that he should repeal the regulations. SADTU indicated *inter alia* that:

6.1. SADTU did not agree to the unilateral changes to the terms and conditions of employment contained in the regulations and it did not recognise them as valid and binding amendments to its members' contracts of employment; and

6.2. SADTU was willing to negotiate these matters at the ELRC.

7.On 8 May 2000 the Minister replied to SADTU's letter of 2 May. In this letter the Minister:

7.1 expressed the view that the regulations did not infringe any conditions of service of any educator; and

7.2 stated that there was no "¼ intention to revoke these regulations, since the obligation to consult with all necessary role players prior to the promulgation thereof ¼[had] been complied with, as required in terms of the law."

8.On 19 May 2000 SADTU sent two letters to the ELRC with copies to the Department of Education, about *inter alia* the employer's draft Code and the employer's proposed amendments to legislation dealing with incapacity and

disciplinary codes and procedures for educators.

9. On 29 June 2000 SADTU lodged a dispute in the ELRC about the strike regulations. The ELRC requested that this be done in the prescribed form, which was done on 7 July 2000.

10. The ELRC arranged a meeting between SADTU and the Department on 30 August 2000 to discuss, among other things, how this dispute should be processed. The parties agreed that:

10.1. a facilitator, Mr Brian Currin, would facilitate a bilateral mediation process between the parties; and

10.2. if the facilitated bilateral mediation was unable to resolve the dispute, the ELRC would convene a formal conciliation meeting within 30 days of the dated of the breakdown of the facilitated process.

11. The first meeting facilitated by Mr Currin took place on 14 September 2000. The process broke down. SADTU accordingly requested that a formal conciliation meeting be arranged by the ELRC. The Department had indicated that it did not think that the ELRC had jurisdiction to conciliated this dispute. SADTU then requested the Department to indicated whether the Minister and the Department thought it worthwhile to proceed with a conciliation meeting or not. The Department recorded in a letter dated 2 October 2000 that it agreed that there would be no purpose in conducting the contemplated conciliation meeting and stated that the matter should be resolved through administrative law principles including section 158(1)(h) of the LRA.

12. SADTU submits that the unilateral alteration of terms and conditions of employment of managers through the promulgation of the regulations in Government Notice 327 of 31 March 2000, without negotiating the subject matter of these regulations in the ELRC ("the Minister's unilateral action"), and after the Department had tabled the draft Code for negotiation in the ELRC is unconstitutional and invalid because:

the Minister's unilateral action is *ultra vires*;

the Minister's unilateral action is unlawful and invalid because it is inconsistent with section 51 of the LRA;

the Minister's unilateral action violates the fundamental right of educators, including managers, to fair labour practices as protected by section 23(1) of the Constitution; and

the Minister's unilateral action violates SADTU's fundamental right to engage in collective bargaining as protected by section 23(5) of the Constitution.

The strike regulations

23.It is important at the outset to have regard to the content of the strike regulations. Its essential provisions may be summarized as follows (I rely on the heads of argument prepared by Mr Kennedy SC (with him Ms Kooverjie), who appeared for the Minister) -

23.1 Regulations 3 and 4 confirm that the employer has the responsibility to ensure the functioning of public schools and other educational institutions and related offices, and that managers act on behalf of the employer to ensure the smooth running of those institutions.

23.2 Regulation 5 recognizes the right of managers to participate in strike action, but requires that they should 'in the performance of their management responsibilities, communicate in advance their intention to participate in such action called by the union through a notice of intention to embark on such action'.

23.3 Regulations 6 and 7 specify to whom and when such notice must be given by managers intending to participate in a strike: this must be given to the office of the employer at the management level immediately above that of the relevant manager 'in order to enable the employer to make arrangements to meet its constitutional obligation to provide education'. Such notice must be given within 48 hours of the notice of intention to strike being served by their union.

23.4 In terms of Regulation 8, district or regional managers are then required to convey the information contained in the notices received from managers, within 24 hours of receiving these, to the head of department or the director general as the case may be.

23.5 The object underlying the need for such information is apparent from Regulations 6 and 9, which refer to the employer, in discharging its constitutional obligation to provide education, having to make arrangements which may include the temporary appointment of managers to act in the stead of those who have given notice that they intend to participate in a strike.

23.6 In terms of Regulations 10, 11 and 12, managers who are not participating in the strike action (whether the person normally occupying the post of manager who has decided not to join in the strike, or acting appointees who have been appointed from either within that institution or from outside its ranks to act in the place of a striking manager) are required to perform the normal managers' duties, including the functions referred to in Regulation 13.

23.7 Regulation 13 requires that they should keep an accurate record of the situation at the institution, they should maintain a register as prescribed in Regulation 14, that they should organize the learners in such a manner that there is effective control and that they should take responsibility for the management of the institution.

23.8 Regulation 14 provides that every manager shall keep a register recording the

names of educators participating or not participating in the strike; an indication of the period when no service was rendered as a result of the strike action; attendance of learners during the period of the strike action; any form of violence or intimidation during the strike action including the names of individuals involves therein; and any damage to property including the names of persons suspected of having caused such damage.

23.9 Regulation 15 provides that failure to comply with these provisions will result in disciplinary action in accordance with the EEA.

ature of the strike regulations

preamble to the regulations indicates that the Minister made the strike regulations pursuant to section 4(1) and (2) read with section 35 of the EEA. The relevant provisions of these sections state:

"4 **Salaries and other conditions of service of educators**

(1) Notwithstanding anything to the contrary contained in any law but subject to the provisions of this section, the Labour Relations Act or any collective agreement concluded by the Education Labour Relations Council, the Minister shall determine the salaries and other conditions of service of educators.

(2) Different salaries and conditions of service may be so determined in respect of different ranks and grades of educators, educators appointed at or outside educational institutions or educators appointed in different sectors of education."

"35 **Regulations**

The Minister may make regulations which are not inconsistent with any law relating to-

...

(c) the conditions of service of educators;

(d) any matter required or permitted to be prescribed by regulation under this Act; and

(e) in general, any matter which the Minister may consider necessary or expedient to prescribe or regulate in order to achieve the objects of this Act."

ion 4(1) and (2) empowers the Minister to determine "the salaries and other conditions of service of educators". It may reasonably be inferred that in enacting regulations under this section the Minister intended conditions of service to be the subject matter of the strike regulations. It is not in dispute that the regulations do not deal with salaries.

re conditions of service?

comes necessary to decide whether the strike regulations deal with conditions of service. If they do, the next question is whether the Minister has complied with the pre-conditions before promulgating the regulations. If not are they ultra vires? However, if the regulations do not deal with conditions of service then the question may arise whether they are nevertheless ultra vires.

t are conditions of service? The phrase has been considered in the context of s 64(1) of the Industrial Conciliation Act 36 of 1937. See **Godwin v Minister of Labour and others** 1951 (2) SA 605 (N) and the comment in Wallis **Labour and Employment Law** (issue 5) para 45 fn 10. Several possible meanings were considered in **Godwin**. The wider meaning of conditions of employment, on which I shall rely (as it favours the validity of the regulations), comprehends: "all the circumstances of an employee's employment, not merely the legal rights and obligations flowing from the contractual terms, express or implied." At 609F-G. To this must be added the view of the court that: "the engagement, suspension, discharge, etc., of employees may fall within the ambit of the expression conditions of employment.'" At 611D-E.

lis in his thorough exploration of the variation of contracts of employment pauses and says:

"Before exploring further the topic of contractual terms it is necessary to highlight one of the most difficult elements involved in a consideration of this topic namely the identification of those matters which constitute terms and conditions of the employee's contract of employment. Put differently which working practices are matters of contract and which not? This question is of great importance as the answer to it in every case will determine the scope of the so-called management prerogative that is, the power vested in the employer to require the employee to act in accordance with its requirements on pain of disciplinary action based on a failure or refusal by the employee to obey a lawful order. Where an employer requires the employee's consent before embarking upon a particular course of action the employee is to some extent at least a joint decision maker with the employer in regard to the affairs of the enterprise. Where the employees are represented by a trade union the scope and extent of the collective bargaining process will be determined largely by identifying issues on which management and therefore the employer concede that decisions cannot properly be taken without prior negotiation with the union. If a particular matter arises from a contractual provision and its attempted amendment requiring the consent of the employees the union's entitlement to demand collective bargaining on the matter can hardly be challenged"

use to observe that one could look at the Personnel Administrative Measures ("the PAM") and the existing Regulations regarding the terms and conditions of employment of educators in terms of the EEA ("the CTC"). Both are promulgated; the one in terms of the EEA the other in terms of its predecessor. They represent the terms and conditions of educators. But they are the product of section 4(1) and (2) and cannot decisively inform the wording in their enabling section.

erial instructions

behalf of the Minister it was contended that the strike regulations do not bring about any changes in the terms and conditions of educators. The instructions contained in the regulations now challenged simply represent the exercise by management of its powers and rights in terms of or pursuant to those conditions of service. This is accordingly a matter which is one 'relating to' conditions of service. The Minister was accordingly empowered to make regulations which relate to conditions of service in the sense that they were pursuant to and not inconsistent with such conditions of service and without amending them as occurred in the present case. In any event, the content of the regulations challenging these proceedings concern matters which the Minister considered necessary or expedient to prescribe or regulate in order to achieve the objects of the EEA as contemplated by section 35(e) thereof. Mr Kennedy submitted that the strike regulations are merely instructions issued in terms of the employer's managerial prerogative.

all assume for the moment that Mr Kennedy is correct that the strike regulations are merely managerial instructions encapsulated in the form of regulations. He may possibly be correct about the obligation to give advance warning of the intention to be absent from the public school etc is concerned. But if the strike regulations are mere instructions (and not conditions of employment) why were they promulgated in terms of section 4(1) and (2) read with section 35 of the EEA? It was submitted that the strike rules could have been promulgated in terms of section 35 (e). But, assuming that it is permissible to disregard the fact that they were promulgated in terms of section 4(1) and (2), it has not been shown that the Minister considered them necessary or expedient to prescribe or regulate in order to achieve the objects of the EEA. See section 35 (e) of the EEA. The result is that if the strike regulations are mere instructions this does not save them from being ultra vires section 4(1) and (2) read with section 35 of the EEA.

nditions

Kennedy submitted that the content of the strike regulations is consistent with the terms and conditions of employment in PAM and the CTC. He submitted that the following provisions of the CTC and PAM are relevant for present purposes -

32.1 Section 23(2) of the CTC requires educators to give their full attention to the duties entrusted to them.

32.2 Section 27 of the CTC provides that educators (including principals and other managers) shall carry out lawful instructions given to them by an authorized person.

32.3 Section 31 of the CTC provides that a report on a form determined by the Minister is to be drawn up and submitted to the employer by the head of the relevant institution or office in respect of any educator as often as the employer may require.

32.4 Chapter 3 of the CTC contains various provisions dealing with leave of absence. Such leave has, in terms of s 36 thereof, to be classified under the range of categories referred to in the section, which include 'special leave and extraordinary circumstances'.

32.5 In terms of s 58(1) of the CTC, leave which is unauthorized is to be regarded as special leave in extraordinary circumstances and such leave is to be without pay.

32.6 In terms of the PAM, reference is made to the various duties and responsibilities of educators. Section 3 sets out the duties of educators who are school based which includes core duties referred to in s 3.1(b) and other duties allocated by the principal (s 3.2).

32.7 Section 4 of the PAM refers to further duties and responsibilities of educators. In the case of principals, s 4.2(d) refers to the aim of the principal's job as being -

'(i) to ensure that the school is managed satisfactorily and in compliance with applicable legislation, regulations and personnel administration measures as prescribed;

(ii) to ensure that the education of the learners is promoted in a proper manner and in accordance with approved policies.'

32.8 Section 4.2(e) of the PAM refers to the core duties and responsibilities of principals as being individual and varied, depending on the approaches and needs of the particular school and including but not being limited to *inter alia* the responsibility for the professional management of a public school, keeping records, and ensuring that the school premises and equipment are being used properly and that good discipline is being maintained (s 4.2(e)(i)).

32.9 In terms of s 4.2(e)(ii) of the PAM, various duties in respect of personnel are set out including the duty of guiding and supervising staff and the preparation of reports on teaching and other staff.

32.10 Section 4.2(e)(vi) of the PAM refers to various duties in relation to communication which include liaison with the circuit/regional office, personnel section, etc. concerning the administration, staffing and updating of statistics in respect of educators and learners.

32.11 The duties of office based educators are set out in s 4.6 of the PAM. Subparagraph (d) thereof refers to the aim of the job being *inter alia* to facilitate curriculum delivery. Paragraph (e) refers to core responsibilities which include administration, communication, which includes the duty to liaise with other education offices for the purpose of coordination and curriculum delivery (para (vii)) which involves the duty *inter alia* to assist in equitable deployment of staff and resources to facilitate teaching and learning. Under the general duties referred to in paragraph (ix) is the duty to keep and update records of the office district or area under his or her control.

32.12 Chapter C of the PAM refers to a system of development appraisal. It is relevant for present purposes to have regard to the criteria set out in the various tables which appear as part of this chapter. The criteria relevant to principals are to be found in section 3.3 of Chapter C which refers to recording and analyzing data (paragraph 1.6) and record keeping (paragraph 1.19). The definition of the latter criterion is set out in the table in the following terms -

"This is a brute bureaucratic requirement but an essential element in keeping track of the school's development. Though eventually a means of corroboration, verification and reporting, records of the school's activities are part of management control, accountability, access to information and optimum use of resources, including the use of funds."

32.13 Section 3.4 of Chapter C of the PAM refers to the criteria applicable to office based educators which likewise includes communication, record keeping, etc.

32.14 Chapter G of the PAM deals with time off and secondment. Section 1 thereof acknowledges the labour rights entrenched in the Constitution and the Labour Relations Act as well as the ELRC constitution. Section 2.1(a) requires that a reasonable period of notice must be given to the responsible person designated by the employer for time off to attend meetings, training courses and other agreed to activities. Section 2.1(d) requires that an efficient record system be kept in respect of time off allowed. Section 2.3 requires as part of the responsibility of managers that they should keep registers of employees with details of time off allowed with full pay and without pay.

33. Mr Kennedy further advanced his contention that there is no inconsistency between the contents of the strike regulations and the contents of the CTC and the PAM by pointing out:

33.1 As is clear from the CTC and the PAM, all educators including principals and other managers are required to comply with instructions given to them. They are also required to comply with the duties assigned to them in terms of the CTC or the PAM, or additional duties assigned from time to time.

33.2 There is nothing in the content of the CTC or the PAM which suggests that the employer cannot give instructions to its managers such as those contained in the regulations challenged in these proceedings.

33.3 On the contrary, specific provision is made, as noted above, for educators to comply with the duties entrusted to them and to carry out lawful instructions given. The CTC do not, for obvious reasons, specify what instructions may or may not be given (subject to such instructions being lawful). This clearly leaves the assignment of duties and the giving of instructions to the employer, which is clearly consistent with managerial prerogative. Failure to comply constitutes misconduct in terms of s 18(1)(I) of the EEA.

33.4 Accordingly the requirement that managers should give notice of their own participation in strike action and that district or regional managers should convey this information to the head of department of the director general, falls within the ambit of duties and instructions given by the employer, acting in terms of its managerial prerogative.

33.5 Regulations 10, 11 and 12 of the regulations challenged in these proceedings require that managers or acting managers who do not participate in strike action must perform the normal duties of the manager during the course of such strike. There can be no complaint about this requirement, for it simply reaffirms and does not add anything to the normal requirement that an employee should perform his or her duties if not on strike.

33.6 Similarly, there can be no difficulty with the requirement of Regulation 13(c) and (d) that managers or acting managers who do not participate in the strike should organize learners to ensure that there is effective control and take responsibility for the management of the institution. This involves responsibilities which are inherent in the function of being a manager.

33.7 The temporary appointment of acting managers to replace managers who are participating in the strike action is likewise not in conflict with the provisions of the CTC or the PAM or any other relevant

provision of legislation: the employer is clearly entitled to make such appointments. See for example sections 8 and 9 of the EEA.

33.8 The requirement that managers should keep registers setting out the information referred to in Regulation 14 is consistent with the requirements of the CTC and the PAM that proper records should be kept and information conveyed to regional or other offices. This is part of the management function as specifically contemplated and provided for in the CTC and the PAM. The specific type of information and the form and frequency with which it is to be provided is a matter which is properly left to the discretion of the employer, which discretion is exercised by means of the regulations which SADTU now challenges in these proceedings.

the strike regulations conditions of service? What the regulations do is to empower the Minister to implement a contingency plan in the event that public school principals, heads of colleges, further education and training institutions, adult basic education and training centres, early childhood developmental centres, all office based educators, heads of districts, circuits or regions (termed managers) take part in a strike as defined in s 213 of the LRA (presumably a protected strike). These managers must give notice to their respective superiors if they will be taking part in a strike. The employer (undefined but see s 1 of the EEA) is entitled to do take one of two courses of action. One is to appoint an outsider to act as the manager of a public school etc. The other is to unilaterally appoint an educator temporarily as a manager of a public school etc.

educator chosen for the task (who may be a non-striking manager of another institution) is compelled, on pain of being charged and disciplined for misconduct, to act as a manager and perform the duties of a manager. Disciplinary action can lead to dismissal. See s 18 of the EEA. The duties include the keeping of an accurate record of the situation at the institution; maintaining a register as prescribed in regulation 14; organising the learners in such a manner that there is effective control; and, taking responsibility for the management of the institution.

Managers must also keep a register in which:

1.the names of educators participating or not participating in the strike action for the duration of such strike action, must be recorded;

2.an indication of the exact number of days, including parts of a working day, during which no service was rendered as a result of the strike action;

3.the attendance of learners during the period of strike action;

4.any form of violence or intimidation during the strike action including but not limited to, the names of individuals involved in such violence or intimidation; and

5.any damage to property including the names of persons suspected of having caused such damage in instances where such persons are known.

These are onerous duties at the best of times. In a strike situation they can be potentially hazardous or at least uncomfortably difficult.

obligation to collect information and maintain a register in terms of regulation 14 compels the acting manager to actively become actively involved as a witness to a strike situation. As a witness the acting manager may be called upon to testify against fellow educators and others in civil, criminal and disciplinary proceedings. The educator who is dragooned into service may be obliged to act for a brief period or for a long period depending on the length of the strike or possibly the return of the incumbent of the post. The acting manager may well not be accustomed to managing a school or other institution although it may be inferred that the employer would tend to choose an experienced administrator where possible.

clauses of PAM and the CTC shows that although the subject matter of the strike regulations and the instruments to

which I have referred can be broadly collated. But there is one major difference. A comparison of the strike regulations with the provisions of PAM and the CTC mentioned above convinces me that the terms and conditions of the strike regulations deal with a different state of affairs; one not contemplated by PAM or the CTC. PAM and the CTC regulate the normal situation. A strike situation is a significant departure from the normal one and necessitates contingency planning. The plan of action which the strike regulations envisages, adds and imposes additional terms and conditions of employment on all educators including managers.

e result I am satisfied that the strike regulations not only deal with conditions of employment of educators but varies, supplements or imposes new conditions of employment.

tion to negotiate?

being so it was incumbent on the Minister, in terms of section 4(1) and (2) of the EEA to comply with the LRA or any collective agreement concluded by the ELRC. Essentially the two processes are yoked together. The LRA permits the conclusion of collective agreements at the ELRC and the collective agreements concluded at the ELRC themselves, as will be shown, bind the Minister to negotiate on matters of mutual interest which feeds any proposal to amend, vary or introduce new terms and conditions into the ELRC through the medium of both the constitution of the ECLR and the LRA.

e for the constitution of the ELRC no collective agreements have been placed before me. But, under the heading "LEGAL SUBMISSIONS" in the stated case, it is recorded:

"The Personnel Administration Measures ("the PAM") and the consolidated regulations regarding the terms and conditions of employment of educators (the consolidated terms and conditions) give expression to

collective agreements which were negotiated within the ELRC and were designed to deal exhaustively with the terms and conditions of educators."

41. I take it that although this fact appears in the context of legal argument I am entitled to accept it as a common cause fact. Mr Tipp (with him Mr Chaskalson), who appeared for SADTU strongly contended that paragraph 1.2 of PAM required any amendment or supplementing measure of PAM to be amended only after negotiation in terms of the LRA. It is common cause that no negotiations took place. There may have been an opportunity for consultation but that does not constitute negotiation and need not be considered any further.

42. Were these instruments complied with or, more pertinently, were the processes enshrined in the collective agreements or the LRA followed?

Matter of mutual interest

43. Mr Kennedy dealt with the argument for SADTU that the regulations in issue deal with 'matters of mutual interest' and that this gave rise to a dispute about a matter of mutual interest which required to be dealt with in terms of the dispute resolution mechanisms provided in the constitution of the ELRC. He submitted that this argument is without merit and seeks to give an artificially extended meaning to the term 'matter of mutual interest'. And so he submitted there was no obligation on the Minister to negotiate with the union parties at the ELRC. In developing this argument he contended that:

43.1 Clause 14 of the ELRC constitution, according to the heading of that clause, deals with 'disputes of interest'. The subsections of the clause deal with procedures in relation to 'matters of mutual interest'. The term 'matter of mutual interest' is not defined in the constitution.

43.2 It is accordingly appropriate to have regard to how that term has been interpreted in the cases in the field of labour relations. Generally speaking a dispute relating to proposals for the creation of new rights or the diminution of existing rights is a dispute of mutual interest, ordinarily to be resolved by collecting bargaining.

Gauteng Provincial Administration v Scheepers 2000 (7) BCLR 756 LAC at 760 B - D

See also **Hospersa v Northern Cape Provincial Administration** 2000 (21) ILJ 1066 (LAC) at 1070 I - 1071 D

43.3 The term 'dispute of interest' has been stated to be a term of art. Although it is widely used in the labour relations community, it has never been precisely defined but the term generally is well understood.

Hlope v Transkei Development Corporation 1994 (15) ILJ 207 (IC Tk) at 209 D - 212 H

NUMSA v Fry's Metal (Pty) Ltd 2001 (22) ILJ 701 LC at 706 F - H and 707 A - B and 707 G

Mineworkers Union v AECI Explosives and Chemicals Ltd Modderfontein Factory 1995 (3) BLLR 58 IC at 64 H - 66 D and 65 F - G

National Union of Mineworkers v Goldfields of SA (1989) 10 ILJ 86 (IC) at 99 C - G

43.4 A matter of mutual interest has been held to be one which can fairly and reasonably be regarded as calculated to promote the wellbeing of the industry concerned: **Rand Tyres & Accessories v Industrial Council for the Motor Industry (Tvl)** 1949 TPD 108 at 115. It was held in **Durban City Council v Minister of Labour & Anoi** 1948 (1) SA 220 (N) at 226, that the term "matter of mutual interest" cannot be without limitation, for otherwise the result would often be absurd.

43.5 The courts have approved the following passage from a paper delivered by Professor PAK Le Roux 'Criteria in Interest Arbitrations', (delivered at the 1992 Independent Mediation Service of South Africa Conference):

'The meaning of the terms "dispute of right" and "interest disputes" have been the subject of some debate. Rights disputes are normally seen as disputes concerning the existence, content and extent of legal rights and the interpretation of a legal rule. Disputes of interest, on the other hand, are generally regarded as being concerned with the creation of new rights rather than the interpretation and application of existing rights'.

Approved in cases such as **Sithole v Nogaza NO &Ors** 1999 (12) BLLR 1348 (LC) at 1356 A - C.

43.6 The content of the regulations challenged in these proceedings does not give rise to any dispute of interest nor does it concern matters of mutual interest, in the sense described above. It does not concern the creation of new rights or the diminution of existing rights. It does not involve a change in terms and conditions of employment, for the reasons set out above.

43.7 As the case law demonstrates, the typical situation in which matters of mutual interest are raised is where, for example, workers demand changes in salary or remuneration or other conditions and benefits of employment such as working hours, shift arrangements, allowances, etc.

43.8 On the approach advanced for SADTU, there would be no limit to the scope of matters of mutual interest which would be negotiable.

43.9 It is submitted that it is quite artificial and unrealistic to suggest that the type of instruction given by the Minister in terms of the regulations in issue in these proceedings is a matter which is subject to negotiation and that the Minister is precluded from issuing the type of instruction which is contained in the regulations.

Kennedy's exposition of the law regarding the meaning of a dispute of mutual interest cannot be faulted. But the submission rests on the supposition that the content of the strike regulations do not constitute the creation of new rights or new terms and conditions of employment. For the reasons already set out I am of the opinion that, save possibly for the obligation to give notice of intended absence, the strike regulations deal with new terms and conditions or at best a variation and amendment of existing terms and conditions. These are

comprehended by the term "matters of mutual interest". It follows that the Minister is not entitled to utilise his statutory powers without following the negotiating procedures of the ELRC.

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he circumstances the promulgation of the strike regulations were ultra vires the powers of the Minister. They must be declared invalid and set aside. It is unnecessary to deal with the other grounds for the invalidity of the strike regulations. It was not argued that the strike rules are severable and no request was made to approach them on this basis.

parties were agreed that costs should follow the result and that costs should include the costs of two counsel.

following order is granted:

1. The Minister of Education's unilateral action of promulgating regulations entitled "Regulations regarding the role of managers prior to strike action", Government Notice No 327 in *Government Gazette* No 21050 is declared invalid and *ultra vires.*

2. It is declared that the Minister of Education may not promulgate regulations relating to conditions of employment of educators including those referred to in paragraph (1) without first following the negotiation procedures contained in the Constitution of the Education Labour Relations Council read with the Labour Relations Act 66 of 1995.

3. The Minister of Education is ordered to pay the costs of this application. The costs are to include the costs of two counsel.

Signed and dated at BRAAMFONTEIN this 12th day of September 2001.

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A A Landman

Judge of the Labour Court of South Africa

K Tip SC and M Chaskalson, instructed by Cheadle Thompson & Haysom.

nt: P M Kennedy SC and H Kooverjie, instructed by the State Attorney.

6 September 2001.