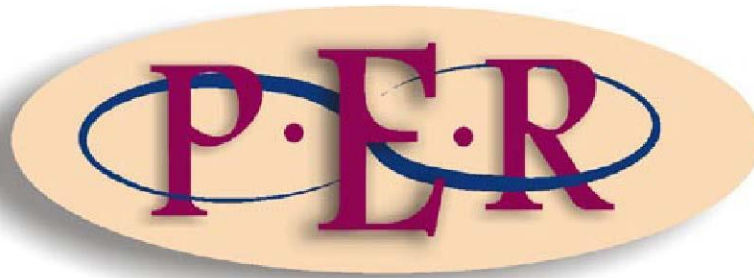


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ISSN 1727-3781



2014 VOLUME 17 No 6

<http://dx.doi.org/10.4314/pej.v17i6.10>

THE INTERPLAY BETWEEN INTERNATIONAL LAW AND LABOUR LAW IN SOUTH AFRICA: PIERCING THE DIPLOMATIC IMMUNITY VEIL

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1 Introduction

From time to time the media reports on diplomats residing in a foreign country, who are involved in a labour debacle about the unlawful treatment to their domestic employees in terms of the hours of over-time worked and related issues such as minimum wages or overtime-payment.¹ The questions that arise on this topic relate to the hierarchy of international law in relation to South African labour law. Does the diplomatic immunity of foreign diplomats prevail over the protection afforded to diplomatic employees in South Africa? Can a national citizen or a person lawfully residing in South Africa as a foreigner, who is involved in an employment relationship with a foreign diplomat in South Africa, claim protection under the *Basic Conditions of Employment Act* (BCEA)² for breach of their rights relating to overtime work and payment? In other words, is the employee working at the diplomatic premises included in the definition of an "employee"³ and therefore entitled to legislative protection? Does international law extend immunity or privileges to diplomats in their role as employers if an employee decides to take legal action against that employer?

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¹ See the report released by News24 on 15 January, 2014, where the domestic worker formerly employed by Thobeka Dlamini at the SA Embassy in Dublin laid charges against her for a 17-hour work day as well as wages below the minimum wages of similar workers in Ireland. She apparently received a minimum wage of R24.64 an hour (more than her SA colleagues) but far less than her Irish colleagues: Anon 2014 <http://m.news24.com/news24/SouthAfrica/News/SA-diplomat-in-slave-scandal-20140115>. See Weiser and Lee 2014 <http://mobile.nytimes.com/2014/01/10>. In this case an Indian diplomat was arrested for abusing her housekeeper and "mistreatment", but has since received diplomatic immunity and left the US for India. The German Institute for Human Rights published a 60-page study on the reported widespread humiliation, exploitation and abuse of private domestic workers in diplomatic households in Britain, Austria, Belgium, France, Switzerland and Germany. German lawyers are preparing what is referred to as "a landmark case aimed at stripping diplomats of immunity from prosecution". See Hall 2009 <http://www.dailymail.co.uk/news/article-2009105/Germany-attempts-overturn-diplomatic-immunity.html>.

² *Basic Conditions of Employment Act* 75 of 1997 (hereafter the "BCEA").

³ Section 213 of the *Labour Relations Act* 66 of 1995 (hereafter the "LRA").

This article seeks to establish the legal position of these employees, within the scope of the protection provided by both the definition of an "employee" and the applicable international law in South Africa.⁴ Neither the definition of an "employee" in the *Labour Relations Act*,⁵ nor that of "workplace", refers to nationality as a requirement for protection under the LRA. The exclusion from protection under the LRA of the right not to be unfairly dismissed⁶ does not extend to employers and their premises on the basis of diplomatic immunity. Can it therefore be accepted that the South African legislator intended to include diplomatic employment relationships in the scope of labour protection?

Another pertinent aspect concerning the topic of immunity is the principle of extraterritoriality extending sovereignty to the premises of the representing state. Is this principle applicable to labour matters or can it be regarded as a legal fiction? Can the residence of a diplomat, as a "workplace" where the "employment relationship" exists, be viewed as "foreign territory" within the borders of South Africa? If the principle of extraterritoriality applies, would it restrict or exclude the legal protection afforded to both South African and foreign nationals of the representing state who find themselves in such an employment relationship? Is diplomatic immunity extended to the premises of a diplomat on the basis that the law of the representing country applies?⁷

In this article, the interplay between the different sources of international law and labour law in South Africa are considered in order to determine the scope of the legislative protection provided to employees whose employment relationship at diplomatic premises might be affected by a veil of extraterritoriality or special privileges and immunity, against the jurisdiction of the courts and the Commission for Conciliation Mediation and Arbitration (CCMA).

⁴ Giving effect to s 23(1) of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*).

⁵ See s 213 of the LRA.

⁶ Section 185 of the LRA.

⁷ As opposed to South African law in the receiving country.

2 The impact of the *Constitution* on labour law in South Africa

2.1 A general perspective on constitutional rights

South Africa is governed by the *Constitution of the Republic of South Africa*, 1996 as "the supreme law" of "a society, based on democratic values, social justice and fundamental human rights". Section 7(1) clearly states that the Bill of Rights is "a cornerstone of democracy in South Africa. It enshrines the *rights of all people in our country*" (emphasis added) and affirms the democratic values of "human dignity, equality and freedom". Section 23(1) furthermore affords "[e]veryone the right to fair labour practices" (emphasis added).⁸ The importance of the constitutional rights milieu within which the interpretative framework and the definition of "employee" should be construed to interpret labour agreements and legislation more purposively⁹ was highlighted in *Discovery Health v CCMA*.¹⁰

As regards the interpretation of the Bill of Rights, section 39(1)(b) and (c) states that "a court, tribunal of forum must consider international law and may consider foreign law ... promoting the spirit, purport and objects of the Bill of Rights" (emphasis added).¹¹

"Customary international law is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament."¹² "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament."¹³ This

⁸ In *Discovery Health v CCMA* 2008 7 BLLR 633 (LC) the increased willingness of the courts to depart from the strict definition of "employee" and move to a more inclusive approach was confirmed.

⁹ In this regard also see the Code of Good Practice of the LRA giving effect to s 200A(4) of the LRA, stating that "NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those earning in excess of the amount determined in subsection (2) are employees".

¹⁰ *Discovery Health v CCMA* 2008 7 BLLR 633 (LC).

¹¹ "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are *consistent with the Bill*" (s 39(3) of the *Constitution* (emphasis added).)

¹² Section 232 of the *Constitution*.

¹³ Section 231(4) of the *Constitution*.

section supports the "harmonisation theory" of the monist school of thought followed in South Africa, which acknowledges that customary international law may be applied directly as part of the common law.¹⁴ Kirby J in the *Republic of Angola v Springbok Investments (Pty) Ltd*¹⁵ stated that:

[South Africa has] embraced the doctrine of incorporation, which holds that the rules of international law, or the *ius gentium*, are incorporated automatically into the law of all nations and are considered to be part of the law unless they conflict with statutes or the common law.

Where there are conflicting rules, a country's own statutory rules and Acts may prevail over international law. Section 233 of the *Constitution* provides that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

In this regard Dugard reiterated that section 233 of the *Constitution* provides that "customary international law [is] no longer subject to subordinate legislation".¹⁶ Courts cannot be bound by the doctrine of *stare decisis* as a limitation on the application of a new rule of international law. In *Kaffraria Property Pty (Ltd) v Government of the Republic of Zambia*¹⁷ Eksteen J applied the principle emphasized by Lord Denning MR in *Trendtex Trading Corporation v Central Bank of Nigeria*¹⁸ that "international law knows no rule of *stare decisis*". The doctrine of incorporation allows for the development of international law rules by the courts to accommodate changes in this field of law.¹⁹

However, a limitation of the rights in the Bill of Rights is permitted in accordance with section 36 of the *Constitution*, but "only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and

¹⁴ As explained by Dugard *International Law* 43.

¹⁵ *Republic of Angola v Springbok Investments (Pty) Ltd* 2005 2 BLR 159 (HC) 162.

¹⁶ See Dugard *International Law* 79.

¹⁷ *Kaffraria Property Pty (Ltd) v Government of the Republic of Zambia* 1980 2 SA 709 (E) 715A.

¹⁸ *Trendtex Trading Corporation v Central Bank of Nigeria* 1977 1 All ER 881.

¹⁹ In addition see the *dictum* of Margo J in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 2 SA 111 (T) 124.

democratic society based on human dignity, equality and freedom, [and the rule of law] taking into account all relevant factors".²⁰

It is clear from a reflection on the aforementioned constitutional rights and values that these rights are extended to *all people*²¹ in the Republic of South Africa. The interpretation of the Bill of Rights and any limitation thereof must adhere to specific requirements provided for by the *Constitution* to protect and sustain the underlying values of our democratic society.

The right to fair labour practices is a fundamental right and not an exclusive right afforded to employees only.²² All employees and employers, whether or not they are South African citizens, natural or juristic persons, are afforded the right to fair labour practices within the context of "*everyone*".²³ The focus of section 23, as stated by Cheadle, is not on the recipients of the fundamental right in the first instance, but on the *contents of the right*.²⁴ Cheadle argues²⁵ in favour of an emphasis on "fair labour practices" rather than on "everyone". The focus of enquiry into the ambit should not be on the use of "everyone" but on the reference to "labour practices".

Fairness is the key element required within any labour relationship. All practices and policies must reflect a reasonable degree of fairness in the way that the parties deal with their own as well as the other party's interests, within the framework of the applicable law at the workplace. As stated by Ngcobo J:²⁶

[T]he focus of section 23(1) is, broadly speaking, [on] the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. It is important to bear in mind that the tension between the interests of the workers and the interests of the employers is an inherent part of labour relations. ... It is in this context that the LRA must be construed.

²⁰ Section 36 of the *Constitution*, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve its purpose.

²¹ My emphasis.

²² Section 23 of the *Constitution*.

²³ My emphasis.

²⁴ My emphasis.

²⁵ Cheadle "Labour Relations" 18-3.

²⁶ In *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC) para 19.

Most employees are not in a position to bargain on equal terms with their employers. It is usually the employer who is in a position of power in the bargaining process and the employment relationship. The purpose and aim of labour law should therefore be to accommodate, where possible, the interests of subordinate employees to maintain a fair balance between the right to fair labour practices and the privileges of an employer. As stated by Kahn-Freund: "The main object of labour law (is) to be a countervailing force to counteract the inequality in bargaining power which is inherent and must be inherent in the employment relationship."²⁷ This is applicable to employment relationships involving diplomats in South Africa. Where there is an interplay between international law and South African constitutional law, the immunity and privileges extended to diplomats should not bear more weight than the fundamental right of their employees to dignity, equality and fair labour practices.

2.2 Labour legislation: definitions, exclusions and the scope of protection

In order to find a meaningful answer to the question of whether a person who works for a foreign embassy in South Africa is regarded as an "employee" by the LRA and is therefore entitled to protection under the Act, regard should be had to the three basic concepts in the definition of an employment relationship. The three defining concepts, "employee", "employer" and the "workplace", do not shed much light on the scope of protection afforded to foreign "employees" by the LRA.

Against the background of the constitutional right to "fair labour practices" the court in *Discovery Health* made it clear that the scope of application and protection is wide enough to include foreign citizens within the definition of "employee" in section 213 of the LRA.²⁸ The LC held that it was not the intention of the *Immigration Act*²⁹ to exclude migrant workers from the protection afforded to "employees" in the event where an employer commits a criminal offence to employ an immigrant without the

²⁷ See Davies and Freedland *Labour and Law* 18.

²⁸ See n 8 above.

²⁹ *Immigration Act* 13 of 2002.

required permit. To render such contracts null and void would not serve the interest of justice and would encourage unscrupulous employers to abuse vulnerable persons as unprotected workers. The court made it clear that the definition of an "employee" does not explicitly require a valid contract of employment. The *essentialia* of a contract of employment require that a person should render a service in return for remuneration, and a person whose situation conforms with those requirements would fall within the protection and ambit of section 23 of the *Constitution* and section 213 of the LRA.

Section 213 of the LRA defines an "employee" as:

- a) any person, excluding an independent contractor, who works for any person or the State and who receives, or is entitled to receive, any remuneration;
- b) any person who in any manner assists in carrying on or conducting the business of the employer.

The above definition, as well as other definitions provided by other examples of labour legislation, such as the *Basic Condition of Employment Act*,³⁰ the *Compensation for Occupational Injuries and Diseases Act*,³¹ the *Employment Equity Act*,³² the *Employment Insurance Act*³³ and the *Skills Development Act*,³⁴ expressly exclude any reference to the nationality of an "employee", an "employer" and the territory of the "workplace". The only express exclusion from the definition of an "employee" and the consequential protection provided by labour legislation is the independent contractor.

Interestingly enough, no definition of an "employer" is currently provided by any of the abovementioned Acts. Section 1(a) and the first part of section 1(b) of the previous BCEA³⁵ defined "employer" in a similar manner as the current definition

³⁰ *Basic Conditions of Employment Act* 75 of 1997 (BCEA).

³¹ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

³² *Employment Equity Act* 55 of 1998 (hereafter the "EEA").

³³ *Employment Insurance Act* 63 of 2001.

³⁴ *Skills Development Act* 97 of 1998.

³⁵ *Basic Conditions of Employment Act* 3 of 1983.

provided by the *Protected Disclosures Act*³⁶ and the mirror image of the definition of an "employee" in the LRA. "Employer" is defined as any person:

- (a) who employs or provides work for any other person and who remunerates, or expressly or tacitly undertakes to remunerate the other person; or
- (b) who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer.

The "workplace" on the other hand is merely defined "as the place or places where the employees of an employer work".³⁷ No reference is made to "workplace" in the context of a foreign embassy in the receiving State, either by an express inclusion or exclusion, or due to the fact that such premises are considered as foreign territory by the legislator.

In *Astral Operations Ltd v Parry*³⁸ the court had to determine whether the BCEA applied to an employee who worked in Malawi, although the head office of the employer was located in South Africa. The test applied by the court to determine the applicability of the Act was whether the work was carried out inside or outside South African territory. In this case the BCEA did not apply to the employee as the work was carried out in Malawi. It seems as if the defining point of the "workplace", here, was that it needed to be South African territory, within the boundaries of the State. The court in this case did not discuss the meaning and scope of "territory" with reference to the legal fiction of extraterritoriality and the premises of foreign diplomats.

It appears as if the legislator intended to include South African citizens, as well as non-citizens with a valid work permit³⁹ employed by a foreign embassy or consulate, in the definition of an employee. In the absence of an express exclusion to the contrary, it is recommended that the intention of the legislator regarding the definition of an "employee" should be sought according to a contextual

³⁶ *Protected Disclosures Act* 26 of 2000.

³⁷ See Reg 3(4) of GN R1394 in GG 20626 of 23 November 1999 and s 213(c) of the LRA in this regard.

³⁸ *Astral Operations Ltd v Parry* 2008 29 ILJ 2668 (LAC) 2678 para 19.

³⁹ Excluding independent contractors.

interpretation in the wide sense and in the wording of the Act.⁴⁰ The scope of protection provided by various examples of labour legislation is based upon the reality of an unequal power relationship between the parties, more so in the private sphere of diplomatic households. The risk of dependency, rights violation and various forms of abuse may all to some extent complicate matters for these vulnerable employees, in the absence of state intervention by the host country's jurisdiction, based on the immunity extended to diplomats by international law.

3 Application of international law

3.1 General

It is encouraging to note that the issue of human rights violation suffered by domestic workers labouring in diplomatic households has received the attention it needed over the past decade. The need to promote human rights and decent work for domestic workers in general has been acknowledged by the International Labour Organisation (ILO), as it is "synonymous with vulnerability because it is hidden from the public eye".⁴¹ The role of the ILO has been decisive in this regard, as remarked by the Director-General, Guy Ryder, on the ground-breaking influence of the *Domestic Workers Convention 189* and its *Recommendation 201* of 2011 to provide "better protection, particularly to female workers in both destination and countries of origin".⁴² The Convention promotes "effective protection against all forms of abuse, harassment and violence"⁴³ and fair terms of employment and decent living

⁴⁰ This approach was followed in *Birch v Klein Karoo Agricultural Co-Operative Ltd* 1993 30 SA 403 (A) 411E-H.

⁴¹ *Birch v Klein Karoo Agricultural Co-Operative Ltd* 1993 30 SA 403 (A) 411E-H. See *ILO Domestic Workers Convention 189 and its Recommendation 201* (2011), in force since 5 November 2013. The definition of a "domestic worker" states that such a person is "any person engaged in domestic work within an employment relationship", whether full-time or part-time: ILO date unknown http://www.ilo/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189.

⁴² ILO 2013 http://www.ilo.org/newyork/news/WCMS_223271/lang--en/index.htm. Discussion topic at the Global Action Programme on Migrant Domestic Workers: "Migration and Development: Empowering Migrant Domestic Workers" during the 2nd High-level Dialogue on Migration and Development by the UN, member states and others (3 October 2013 New York).

⁴³ Article 5 of the *ILO Domestic Workers Convention 189* (2011).

conditions".⁴⁴ The important issue of diplomatic immunity is not raised in the Convention. However, the Recommendation requires States to adopt policies and codes for diplomats, in order to stop abusive practices related to domestic workers, and to cooperate in providing the necessary protection.⁴⁵

Despite improved labour standards imposed by the ILO, a recent report released by the German Institute for Human Rights⁴⁶ confirmed the continuation of:

... the privileged status of diplomats to whom international law awards immunity from the host country's jurisdiction and the execution of judgments, [creating a "*de facto* impunity for rights violations"], an additional barrier for domestic workers [who seek] to access justice and compensation from their employers, [against the above background].

The new *Diplomatic Immunities and Privileges Act*⁴⁷ replaced the previous Act of 1989 and has removed any uncertainties concerning the scope of the application of the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*.⁴⁸ The *Vienna Convention on Diplomatic Relations* of 1961,⁴⁹ the *Vienna Convention on Consular Relations* of 1963, the *Convention on the Privileges and Immunities of the United Nations* of 1946 and the *Convention on the Privileges and the Immunities of Specialized Agencies* of 1947 "have the force of law in the Republic".⁵⁰ The *Vienna Convention on Diplomatic Relations* of 1961 and customary international law form the backbone of inter-state diplomatic relations. As stated by

⁴⁴ Article 6 of the *ILO Domestic Workers Convention 189* (2011). See the measures standards provided for by A 10 to promote equal treatment between domestic workers and workers in general regarding the hours of work and overtime compensation and daily and weekly rest periods, as well as annual leave. SA has ratified *Convention 189* on 20 June 2013. See ILO 2013 http://www.ilo.org/global/standards/information-resources-and-publications/news/WCMS_216613/lang--en/index.htm.

⁴⁵ See para 26(4) of the *ILO Recommendation 201* (2011), which is a non-binding ILO instrument that cannot be ratified by member States. In addition, see Albin and Mantoulou 2010 <http://www.ucl.ac.uk/laws/iri/papers/EinatAlbin-VirginiaMantoulou.pdf> 10.

⁴⁶ Research and investigation was launched as part of a three-year project "Forced Labour Today – Empowering Trafficked Persons", carried out in cooperation with the "Foundation: 'Remembrance, Responsibility, Future'" and compiled by Kartusch (author) and Rabe (academic advisor). See Kartusch *Domestic Workers* 12.

⁴⁷ *Diplomatic Immunities and Privileges Act* 37 of 2001.

⁴⁸ See Dugard *International Law* 259.

⁴⁹ Hereafter the "VCDR".

⁵⁰ See ss 1 and 2 of the *Diplomatic Immunities and Privileges Act* 37 of 2001 (hereafter the "DIPA").

Wouters and Duquet,⁵¹ "the VCDR and its contents have to a large extent become part of customary international law itself".

3.2 Diplomatic Immunities and Privileges Act⁵²

The purpose of the Act is to confer immunities based on the two *Vienna Conventions* on all diplomatic and consular missions and their families⁵³ in the Republic of South Africa in terms of section 3 of the Act. The Act obliges the Minister of Foreign Affairs⁵⁴ to keep a register of all persons entitled to immunity from civil and criminal jurisdiction in the courts of South Africa, whether by agreement or in the absence thereof by means of a notice and publication in the *Government Gazette*.⁵⁵ Any person⁵⁶ "who wilfully or without the exercise of reasonable care issues, obtains or executes any legal process against a person enjoying immunity", contravenes the Act and Conventions and is guilty of an offence.⁵⁷

Does this mean that an employee, protected by labour legislation, may not take recourse against a diplomat or consular employer who has infringed the "right not to be unfairly dismissed or subjected to an unfair labour practice"?⁵⁸

Article 22 of Schedule 1 of the *Vienna Convention on Diplomatic Relations*⁵⁹ provides that:

- 1 The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.
- 2 The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

⁵¹ Wouters and Duquet 2012 *Hague Journal of Diplomacy* 32.

⁵² *Diplomatic Immunities and Privileges Act* 37 of 2001.

⁵³ See the *Diplomatic Immunities and Privileges Amendment Act* 35 of 2008 *re* the definition of a family.

⁵⁴ Section 9(1) of DIPA.

⁵⁵ Section 9(2) of DIPA.

⁵⁶ Including an attorney, a party or officer concerned with issuing or executing such a process.

⁵⁷ Section 15(1) of DIPA, for which the punishment could be a fine or imprisonment not exceeding three years (s 15(2)).

⁵⁸ See s 185 of the LRA regarding these rights.

⁵⁹ *Vienna Convention on Diplomatic Relations* (1961) (hereafter the "VCDR").

3 The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

The immunity of a diplomat or consular employer in terms of the DIPA and the VCDR confers an obligation on South Africa as a receiving State to protect this right. Article 30 of the VCDR extends the immunity to "the private residence of a diplomatic agent [who] shall enjoy the same inviolability and protection as the premises of the mission". The consent of the head of a mission⁶⁰ to waive immunity⁶¹ is an option to consider in terms of the Act in exceptional cases. As stated by Dugard⁶² "it is submitted that 'immunity' is a 'privilege' with the result that heads of state will only enjoy immunity from criminal and civil jurisdiction in accordance with the rules of customary international law". South African courts have an obligation to consider immunity under these circumstances with a high degree of caution to ensure the application of restrictive rules to protect human rights.⁶³

3.3 The effect of the DIPA on the referral of a labour dispute

The referral of a dispute regarding an unfair labour practice or an unfair dismissal to a bargaining council or the CCMA is extended to employees in terms of section 191 of the LRA. Section 191(1)(a) states:

- (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to—
 - (i) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (ii) the Commission, if no council has jurisdiction.
- (b) A referral in terms of paragraph (a) must be made within—
 - (i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissals
 - (ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

⁶⁰ The sending State.

⁶¹ Section 8 of DIPA.

⁶² Dugard *International Law* 259.

⁶³ Dugard *International Law* 258.

Section 191(2A) of the Act regulates the position of the employee "whose contract of employment is terminated by notice" and states that the employee "may refer the dispute to the council or the Commission once the employee has received that notice".

The following obligation incurred by an employee who takes legal action against an employer in terms of section 191(3) of the LRA may be problematic to the employee in view of section 15 of the DIPA: "The employee must satisfy the council or Commission that a copy of the referral has been served on the employer." Section 15 of the DIPA clearly states any person "who wilfully or without the exercise of reasonable care" takes legal action against such a person contravenes the Act and could be found guilty of an offence. The employee who refers an unfair labour practice dispute or an unfair dismissal dispute to the CCMA is acting within the boundaries of the law and within that person's right to seek an appropriate remedy in terms of the law. Section 15 of the DIPA indirectly requires an employee who takes legal action against a diplomat or consular agent as an employer to take "reasonable care" in doing so. What can be considered as a yardstick or requirement for "reasonable care" in such an instance? Could it mean that an employee as the weaker bargaining party in the diplomatic employment relationship, needs to consider carefully whether to seek legal address in terms of the LRA and whether to exercise the constitutional right to fair labour practices, because the right of an employee has to succumb to the right of a diplomat-employer as the stronger party in the dispute? The latter party's right involves immunity and privileges in terms of the DIPA, while both parties can rely on a constitutional right to dignity and equality. Section 9(1) of the *Constitution* states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law" while section 10 affords "[e]veryone [the right to] inherent dignity and the right to have their dignity respected and protected". Can an employee's right to take legal action in terms of section 191 of the LRA be limited by section 15 of the DIPA, within the context of section 36 of the *Constitution*? Section 8(1) and (2) of the DIPA allows immunity to be waived and could in exceptional cases pierce the veil of immunity while balancing the conflicting rights of opposing parties involved in a civil claim instituted by an

employee against a diplomat or consular employer, or in terms of a legal action taken by an aggrieved employee involved in a labour dispute. A diplomat or consular employer is entitled to immunity in legal proceedings in a court of law.⁶⁴ The Director-General of Foreign Affairs has the authority and discretion to issue a certificate in a case of a dispute regarding a person's entitlement to immunity, which will serve as *prima facie* evidence of the person's right to immunity. A person entitled to immunity may have their immunity waived by a sending State, provided that they adhere to the requirement for a valid waiver: it must be "express and in writing".⁶⁵

The matter of the inviolability of a diplomatic mission was previously clouded by the perception that the territory of the sending state extended to the premises of a mission within the receiving state. Forsyth⁶⁶ refers to the origin of the rule of diplomatic immunity as follows:

The rule of diplomatic immunity may be traced to one of three theories. According to Grotius, it was based on the notion of extraterritoriality; ie the premises of a diplomatic mission represented an extension of the territory of the sending state. Closely related to this was the idea that the mission was a personification of the foreign sovereign and, on the same ground that the sovereign immunity might be claimed, so, too might diplomatic immunity be claimed. Today, however, it is more widely accepted that diplomatic immunity is based on the simple necessity of enabling the mission to perform its functions properly and efficiently. On this understanding, immunity is normally applicable only in respect of official acts connected with the mission.⁶⁷

In *Santos v Santos*⁶⁸ the court had to decide on the rule of diplomatic immunity. The court held that "diplomatic immunity had, in the past, been based on the notion of extraterritoriality, ie that the premises of a diplomatic mission in the receiving State represented an extension of the territory of the sending State". The court compared the views of a number of modern writers on international law⁶⁹ and held that "[i]t was recognised that diplomatic immunity formed an exception to the principle of

⁶⁴ Article 31(1) of the VCDR.

⁶⁵ Article 8(3) of the VCDR. See Dugard *International Law* 244.

⁶⁶ Forsyth *Private International Law*.

⁶⁷ Article 31(1) of the VCDR.

⁶⁸ *Santos v Santos* 1987 4 SA 150 (W).

⁶⁹ For example, but not limited to Forsyth *Private International Law* 144; Booyesen *Volkereg* 220; Schwarzenberger and Brown *Manual of International Law* 81.

territorial jurisdiction, and this exception rested on the rule of international customary law".

In conclusion the court based its judgment on the view of Akehurst,⁷⁰ confirming that: "[D]iplomatic premises are not extraterritorial: acts occurring there are regarded as taking place on the territory of the receiving State, not on that of the sending State". The fiction of extraterritoriality has thus been cleared. "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."⁷¹ The premises of the diplomatic and the consular corps are regarded as the territory of the receiving country. The laws of South Africa apply to citizens as well as to foreigners who are employed in South Africa.

The extent of diplomatic immunities is regulated by articles 29 and 30 of the VCDR. "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." The private residence of a diplomat is also protected by the same right to inviolability as the person and the mission's premises. Article 31 affords diplomatic agents and their families⁷² immunity from criminal jurisdiction by the receiving state, from giving evidence as a witness, and from civil and administrative jurisdiction. There are three exceptions to article 31(1) of which sub-section 31(1)(c) may be relevant to this article: diplomatic immunity is not granted in cases of "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions". "Commercial activity" is not defined in the VCDR, given the practical nature of international law.

Article 38 grants limited immunity to diplomats who have obtained permanent residency in South Africa or who are nationals of South Africa in respect of "official acts performed in the exercise of his functions".

⁷⁰ Malanczuk *Modern Introduction to International Law* 119. Malanchuk confirmed that the modern trend in terms of customary international law has shifted from an absolute state of immunity to a doctrine of qualified immunity.

⁷¹ Section 232 of the *Constitution*.

⁷² Article 37(1) of the VCDR.

A decisive English law principle regarding the liability of diplomats⁷³ was approved in *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues*,⁷⁴ where the court held that diplomats are not immune from legal liability, but only from being sued or prosecuted when pleading diplomatic immunity. A sending state may waive immunity on behalf of a diplomat by adhering to article 32, which requires such a decision to be express and in writing. Consuls enjoy the same inviolability as diplomats in terms of the *Vienna Convention on Consular Relations* 1963,⁷⁵ albeit to a lesser degree. The head of a consular post may grant the receiving state entrance to the consular premises,⁷⁶ may be arrested or detained in "case of a grave crime" only,⁷⁷ and enjoys immunity from the jurisdiction of the courts only in respect of acts related to his or her official functions.⁷⁸

This immunity is exercised within the discretion of the head of the sending state and may be waived.⁷⁹

3.4 Foreign States' Immunities Act⁸⁰

Section 2(1) of the Act extends general immunity to foreign states from the jurisdiction of South African courts. Although the Act acknowledges a general sovereign immunity, it distinguishes between proper sovereign acts and "commercial transactions"⁸¹ by following the restrictive approach of the English courts since the late 1970s.

The United Kingdom deals with the aspect of sovereign immunity in terms of the *State Immunity Act*, 1978. In *Owners of Cargo Lately Laden on Board the Playa Larga v 1 Congreso Del Partido*,⁸² Lord Wilberforce expressed the view that the

⁷³ See *Dickinson v Del Solar* 1930 1 KB 379.

⁷⁴ *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodrigues* 2001 1 SA 1285 (W) 1293.

⁷⁵ Schedule 2 of the *Vienna Convention on Consular Relations* (1963).

⁷⁶ Article 31 of the *Vienna Convention on Consular Relations* (1963).

⁷⁷ Article 41 of the *Vienna Convention on Consular Relations* (1963).

⁷⁸ Article 43 of the *Vienna Convention on Consular Relations* (1963).

⁷⁹ Article 45 of the *Vienna Convention on Consular Relations* (1963).

⁸⁰ *Foreign States Immunities Act* 87 of 1981.

⁸¹ As stated in s 4 of the *Foreign States Immunities Act* 87 of 1981.

⁸² *Owners of Cargo Lately Laden on Board the Playa Larga v 1 Congreso Del Partido* 1981 2 All ER 1064 (HL).

restrictive approach arose from a state's willingness to conclude commercial or other private law contracts with individuals. The underlying principle for restricting sovereign immunity in terms of the immunity doctrine is two-fold. In the first instance the interests of justice are being served by bringing commercial or private law claims before the courts and secondly, to summon a state to appear before a court neither violates the dignity of that state nor does it impede its sovereign functioning.

Recently, in *Benkharbouche v Embassy of the Republic of Sudan*⁸³ the question was raised on appeal whether a person employed in the UK by a foreign diplomat as a member of domestic staff may bring a claim to assert employment rights against the foreign country (the Sudanese and Libyan embassies respectively), despite the state immunity afforded to diplomats in terms of the *State Immunity Act, 1978* (SIA) in the UK. In what can be regarded as a ground-breaking decision by the Employment Appeal Tribunal (EAT), the appellants, members of domestic staff of two embassies, successfully appealed against the defence of immunity in terms of SIA, which denied them access to their right to bring an employment claim to the employment tribunal. The appellants relied on the recent judgments⁸⁴ by the EU Court of Human Rights, where it was held that the denial of access to enforce the right to an employment tribunal was a breach of Article 6 of the ECHR. As their claims fell within the scope of EU law, the SIA argument proved unsuccessful as both the *Human Rights Act of 1998* (HRA) and the *Charter of Fundamental Rights of the European Union (2000)* (*EU Charter*) applied to this case. The appellants relied in the alternative on Article 47 of the *EU Charter* (regulating the same principle as Article 6 of the ECHR), which is recognised as applicable law in the UK as it is a member state of the EU. The Tribunal was bound by the judgments of *Kucukdevicci* 2009 EUECJ C-555/07 and *Aklagaren* 2013 EUECJ C-617/10 to withhold the application of conflicting domestic law that infringes the right of litigants to access courts and tribunals in an

⁸³ *Benkharbouche v Embassy of the Republic of Sudan* 2014 1 CMLR 40.

⁸⁴ *Cudak v Lithuania* 2010 51 EHRR 15; *Sabeh el Leil v France* 2012 54 EHRR 14.

employment dispute between private litigants. Permission to appeal to a higher court was granted to the foreign embassies, in the interest of justice.⁸⁵

Absolute sovereign immunity is denied in terms of the South African *Foreign States Immunity Act* in the following cases:

- (a) where the foreign state expressly waived immunity, or if the foreign state has instituted the proceedings or intervened in any way, or has taken any steps in the proceedings which would be considered as "deemed to have waived its immunity";⁸⁶
- (b) in terms of specific "commercial transactions" by considering their purpose and not their nature;⁸⁷
- (c) contracts of employment;⁸⁸
- (d) personal injury and damage to property caused by an act or omission in the Republic of South Africa;⁸⁹
- (e) miscellaneous.⁹⁰

Section 5(1) and (2) is of particular relevance for the purposes of this article. Proceedings relating to contracts of employment between a foreign state and an individual may be brought before a South African court. Jurisdiction is granted in terms of section 5(1) and (2) of the Act, provided that the contract between the parties was concluded in the Republic of South Africa or the work is partially or in whole performed in South Africa. The Act requires the employee instituting the claim to have South African nationality or residency at the time of entering into the

⁸⁵ See the judgment by Mr Justice Langstaff (President) sitting alone at the UK Employment Appeal Tribunal in the case of *Benkharbouche v Embassy of the Republic of Sudan* 2014 1 CMLR 40, 4 of 30.

⁸⁶ Excluding procedures to claim immunity in ss 3(1) and 3(3) of the *Foreign States Immunities Act* 87 of 1981.

⁸⁷ A contract of employment between a foreign state and an individual as stated by s 4(3)(c) is not considered by the Act as a "commercial transaction".

⁸⁸ Section 5(1)(2) of the *Foreign States Immunities Act* 87 of 1981.

⁸⁹ Section 6 of the *Foreign States Immunities Act* 87 of 1981.

⁹⁰ See ss 7-13 of the *Foreign States Immunities Act* 87 of 1981. For a complete discussion of the Act, see Dugard *International Law* 244.

contract, and requires that the claimant shall not be a national of the foreign state when instituting the claim.

However, where the contractual "parties ... have agreed in writing that the dispute or any dispute relating to the contract shall be justiciable by the courts of the foreign state, immunity will apply to the foreign state against the jurisdiction of South African courts".⁹¹ In addition, section 5(2)(b) clearly states that subsection (1) shall not apply if "proceedings relate to the employment of the head of a diplomatic mission, or any member of the diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post".

In *Bah v Libyan Embassy*⁹² the court applied the restrictive doctrine of sovereign immunity in the employment context and held that the breach of an employment contract and/or the violation of a right in terms of employment legislation amounts to a private law matter. The court applied the DIPA and held that the embassy was not immune from a law suit as the employment matter involved compliance with employment law as opposed to a governmental act. The privilege of immunity therefore vests in the sending state, not in the individual.⁹³ Although the court dismissed the applicant's claims as "frivolous and vexatious" and "opportunistic and unsustainable in law",⁹⁴ it held that international labour standards apply to sovereign states. In this regard the court of Botswana confirmed its status as a court of law and equity, applying international labour standards despite the non-ratification of the *Termination of Employment Convention*⁹⁵ to foreign sovereigns. Guidelines for fair

⁹¹ Section 5(2)(a) of the *Foreign States Immunities Act* 87 of 1981.

⁹² *Bah v Libyan Embassy* 2006 1 BLR 22 (IC).

⁹³ See the concurring views of Ebrahim-Carstens ICJ in *Dube v American Embassy* 2010 2 BLR 98 (IC) on the issue of diplomatic immunity and court proceedings. The learned judge held that foreign sovereign states are not immune from legal proceedings arising from contracts of employment under the *Employment Act* where the responding party failed to attend the court proceedings.

⁹⁴ *Bah v Libyan Embassy* 2006 1 BLR 22 (IC) para 38.

⁹⁵ *ILO Termination of Employment Convention* 158 (1982).

retrenchments are applied in terms of *Recommendation 166* and *Reports of the Committee of Experts of the ILO*.

The position of an employee who needs to rely on legal protection in terms of labour law within the framework of diplomatic immunity seems to be extremely vulnerable in view of the limitation of their employment rights and the lack of liability afforded to diplomats and consular employers by the various international law instruments. To echo the words of Cicero: *Summum ius summa iniuria*: the best law may breed the highest forms of injustice. Unfairness or strict laws need to be tempered by equity.⁹⁶

4 Does diplomatic immunity present a constitutional issue?

In *Begum v Saleh and Saleh*,⁹⁷ the plaintiff worked as a domestic servant for the Second Secretary of the Permanent Mission of the State of Bahrain to the United States. The plaintiff alleged⁹⁸ that she was subjected to "abusive working conditions". She brought a civil claim for damages against her two employers, who failed to pay her the minimum wages prescribed under federal and state laws, who assaulted her, held her in involuntary servitude prohibited by the Thirteenth Amendment and on the grounds of false imprisonment, conversion and trespass to chattels. The defendants raised the defence of diplomatic immunity, which was certified by the State Department, which confirmed that the defendant and his wife were entitled to the same privileges and immunities in the US as was accorded to diplomats by the *Vienna Convention* in the US. Their status included immunity from the civil jurisdiction of the US courts, which had to be "construed as a non-reviewable political decision" that was binding on the court.

The court referred to the applicable treaties,⁹⁹ the Headquarters Agreement, the *Convention on the Privileges and Immunities of the United Nations* and the *Vienna Convention*. The status of the treaties was confirmed "as the supreme law of the

⁹⁶ Van Zyl *Justice and Equity* 150.

⁹⁷ *Begum v Saleh and Saleh* No 99 Civ 11834 (RMB).

⁹⁸ Complaint dated 7 December 1999.

⁹⁹ *Charter of the United Nations* (1945).

land, and the Constitution sets forth no order of precedence to differentiate between them".¹⁰⁰

In addition, the court confirmed that the specific level of immunity of the defendants¹⁰¹ did not constitute a constitutional issue as they were not in conflict with the *Constitution*. Although international agreements are subject to constitutional limitations, the court held that a constitutional right does not always guarantee a judicial remedy. Diplomats are under an obligation to adhere to the law of the receiving state even though it cannot be judicially enforced. The court confirmed that an extremely serious view on allegations of any abuses of diplomatic privileges is taken by the US. Compliance can be enforced in a formal or informal way in the course of the diplomatic process. Moreover, the *Vienna Convention* allows that in certain circumstances the State Department may request a sending state as a member who has the right and the obligation to waive immunity in respect of a representative of that state "in any case where in the opinion of the member the immunity would impede the course of justice".¹⁰²

The challenge posed to a state by allegations of the abuse of diplomatic immunity is the failure to respect diplomatic immunity, which could result in serious consequences in the international community. The state has the obligation not to downplay any harm inflicted upon its nationals in order to maintain diplomatic immunity to representatives of member states. But a state as a member of the international community has a material duty to maintain the peaceful international relationships that are vital to international harmony, national security and the global nature of the economy. The court upheld the immunity of the defendants from the civil jurisdiction of the court and the plaintiff's case was dismissed.

In *Araceli Dotarot Montuya v Antoine Chedid and Afife Nicloe Chedid*,¹⁰³ a domestic servant of the defendants brought various claims under the *Fair Labor Standard Act*

¹⁰⁰ In *United States v Palestine Liberation Organization* 6955 F Supp 1456 (SDNY 1988) citing *US Constitution*, Art VI, cl 2)

¹⁰¹ As employers.

¹⁰² Article IV, s 14 of the *Vienna Convention on the Law of Treaties* (1969).

¹⁰³ *Araceli Dotarot Montuya v Antoine Chedid and Afife Nicloe Chedid* 779 F Supp 2d 60 (DDC 2011).

(1938) as amended and the District of Columbia's minimum wage law for a breach of contract arising from her employment at the Lebanese Embassy to the US. The court accepted the State Department's determination that the defendants had diplomatic status and were entitled to immunity based on Articles 31, 37 and 42 of the *Vienna Convention on Diplomatic Relations*. In addition, the *Diplomatic Relations Act*¹⁰⁴ provides that any action brought against a person entitled to immunity under the *Vienna Convention on Diplomatic Relations* shall be dismissed. The defendants relied on their status and entitlement to diplomatic immunity, and succeeded with their motion to dismiss.

5 The role of the Department of Foreign Affairs

The Department of Foreign Affairs is involved in procedures and the regulation of a foreign mission's period of service in South Africa in terms of the DIPA. A document released by the Government on the protocol and application of the DIPA¹⁰⁵ provides the following practical guide:

5.1 All personnel to whom immunity of the South African law has been granted, have the duty, "without prejudice to their privileges and immunity to respect the laws and regulations of the receiving State" according to Article 41 of Schedule 1 of the *Vienna Convention on Diplomatic Relations*, 1961 and Article 55 of Schedule 2, of the *Vienna Convention on Consular Relations*, 1963.

5.2 Diplomatic immunity is based on the principle of granting the sending State immunity to allow the "duly accredited members" of a diplomatic mission to pursue official duties "free from harassment, possible intimidation and impediment". Immunity "is not a licence for misconduct of any kind". It is afforded "to benefit the functioning of the Mission, not to personally benefit its individual members".

¹⁰⁴ *Diplomatic Relations Act* 22 USC 254d.

¹⁰⁵ Department of International Relations and Cooperation 2012
<http://www.dfa.gov.za/department/prot1.htm>.

5.3 It is the duty of the head of a mission to inform and advise staff and family members who enjoy "derivative immunity" to respect and obey the laws and regulations of South Africa.

5.4 Private gainful employment:

a) In exceptional instances, private gainful employment will be considered by the Department of Foreign Affairs, in consultation with the authorities concerned.

b) The overriding factor in dealing with an application for work permits is whether employment can be done by South African nationals or an approved immigrant.

5.5 Locally recruited staff:

a) "Missions are required to enter into formal written conditions of employment with South African nationals employed as locally recruited staff."

b) Missions are furthermore required "to observe the provisions of the South African *Labour Relations Act* in the personnel administration of South African nationals".

c) "Missions are required to administer locally recruited personnel on foreign passports in a similar manner." The Department of Home Affairs regulates the position of these locally recruited foreign personnel, in terms of the *Aliens Control Act*,¹⁰⁶ the *Aliens Control Amendment Act, 1993*¹⁰⁷ and the *Aliens Control Amendment Act, 1995*.¹⁰⁸

d) Aliens can accept employment in South Africa only if they obtain a valid work permit in their countries of origin before entering South Africa, to be employed by a specific mission for a specific period of time.

e) In the event of the approval of an application for a work permit, the mission has to return the certificate of identity issued in terms of the *Diplomatic Immunities and*

¹⁰⁶ *Aliens Control Act* 95 of 1991.

¹⁰⁷ *Aliens Control Amendment Act* 3 of 1993.

¹⁰⁸ *Aliens Control Amendment Act* 76 of 1995.

Privileges Act for the relevant endorsement of diplomatic or consular immunity in respect of gainful employment.

The value of the following text in *Inst* 3 24 5 lies not only in its reflection on the terms and conditions of the contract of hire or the contract of service during the Principate period of Roman law (160–284 AD), but also in the interpretation of the law:

Conductor omnia secundum legem conductionis facere debet et, si quid in lege praetermissum fuerit, id ex bono et aequo debet praestare – The hirer ought to do everything according to the law of hire, and if anything has been omitted in the law, he ought to perform according to the dictates of goodness and equity.¹⁰⁹

One does not have to be a Romanist to agree with Gaius that there is merit in the application of underlying values or principles such as goodness and equity.¹¹⁰ In the absence of a specific ruling on dispute resolution in diplomatic employment relationships relating to the conflicting powers emanating from international and labour law, solutions ought to be found as a matter of "equity and goodness".

6 Conclusion and recommendation

The interplay between labour law and international law is a fundamentally important and extremely sensitive subject. It is based upon a compromise between powerful economic agreements and complex international law on the one hand, and the sensitive and equally powerful issue of human rights and labour law on the other hand. To illustrate the complexity and the sensitivity even further, regard should be had to the challenge of balancing the rights and privileges afforded to the parties within a diplomatic employment relationship. The overriding effect of section 23(1) of the *Constitution* and the right to "fair labour practices" afforded to "everyone" is a fundamentally important aspect of any employment relationship. In addition, all persons,¹¹¹ irrespective of their nationality and citizenship, who can be defined as

¹⁰⁹ See the translation by Sanders *Institutes of Justinian* 370.

¹¹⁰ Section 3 of the LRA gives effect to the primary object and purpose of the LRA (s 1), "to advance economic development, social justice, labour peace and democratisation of the workplace" in compliance with the underlying values of the *Constitution* and South Africa's public international law obligations.

¹¹¹ Excluding independent contractors.

"employees" in terms of the labour legislation, and whose workplace is at the premises of a foreign embassy or consulate in South Africa, are regarded as "employees" in terms of the legislation and are therefore entitled to protection under the Act. However, when labour law and international law join forces in the arena of the diplomatic employment relationship to protect the interests of individuals versus the interests of a state, the application of two equally important sources of law becomes an extremely sensitive and controversial subject. Not only does it reflect on the legal protection afforded to both parties to the employment relationship in terms of the fundamental right to fair labour practices, but it also reflects on the exceptional privileges afforded to the stronger party, who is acting on behalf of a foreign state. In this regard, the foreign state indirectly joins the employment relationship as a third party. The international relationship between two states becomes the overriding framework in which the employment relationship functions. International law limits the employer's liability, not only in terms of labour law, but also in the application of fundamental basic human rights. The rights in the Bill of Rights of the *Constitution* of South Africa and the South African labour legislation are afforded to all "employees" irrespective of their place of work.

The principle of extraterritoriality in customary international law is regarded as an example of a legal fiction. It does not extend the territory of a specific state (the sending state) to the territory of another state.¹¹² Protection is afforded to diplomats and consular agents by the various instruments of international law. The DIPA of 2001 contains the international principles of four conventions and regulates the position of diplomats and consular agents. This Act affords detailed privileges and immunity to diplomats and consular agents and confers an obligation on South Africa as the receiving state to protect these rights in accordance with the relevant *Vienna Conventions* referred to. The waiving of immunity is an option not likely to be considered in terms of the liability that may then be incurred by diplomats/consular agents or their families, as contracting parties to the employment relationship. In exceptional cases, seeking consent from the head of a mission for the waiving of

¹¹² The receiving state.

immunity executed by the Director-General of Foreign Affairs on behalf of the protected party is an option to consider in terms of the DIPA.

It is submitted that an employee is not prevented from taking legal action against a diplomat or consular employer in South Africa in terms of the LRA or the DIPA, as in the *Benkharbouche* case in the UK. Diplomatic employees and diplomatic employers should be made aware of their rights and obligations. Employees should be registered and afforded interviews to assess their employment.¹¹³ The most important requirement regarding immunity and privileges afforded to diplomatic corps in terms of the DIPA is based on the premise that an employee may institute legal action in the absence of "wilfulness" and in the exercising of "reasonable care". The dominant impression gathered from the sources of international law discussed in this article is that immunity is afforded to diplomats/consular agents as employers. The intention of the legislator to afford the right to fair labour practices to *all employees* in terms of the Bill of Rights and labour law is a matter in pressing need of revisiting. Employees working for diplomats and consular employers are citizens entitled to the minimum protection based on fundamental rights in the Bill of Rights.

How can it be justified that a group of vulnerable employees, who might be exposed to an infringement of their labour rights in an abusive employment relationship, are left without a remedy if the employer is protected by immunity and privileges in terms of international law? It is therefore submitted that employees should have access to compulsory private arbitration in terms of an amendment to the DIPA, or in terms of a treaty as a "legally binding, enforceable agreement" with reciprocal effect, to bind a diplomat/consular employer from South Africa as the sending state in a foreign state, as well as a foreign diplomat/consular employer to South Africa,

¹¹³ See Kartusch *Domestic Workers* 49.

as the receiving state, to protect employees.¹¹⁴ In *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*,¹¹⁵ Steyn CJ confirmed that:

... the conclusion of a treaty, convention or agreement by South Africa with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process ... In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject.

In addition, a provision or clause to this effect should be included in diplomatic contracts of employment, after the ratification of a treaty, even before its enactment into relevant legislation in South Africa. Private arbitration could serve as a dispute resolution procedure to the parties. It provides an acceptable alternative to the general options available in terms of the CCMA, the labour court and the high court, not only to respect the employer's immunity and privileges within a reasonable limitation in terms of the DIPA, the *Vienna Conventions* and the *Foreign Immunities Act*. Employees' fundamental rights to fair labour practices and protection under labour legislation will remain accessible. Lifting the veil of diplomatic immunity could provide a satisfactory interplay between labour law and international law to support the interests of both parties within an extraordinary employment relationship.

¹¹⁴ For the definition of a treaty see A 2 of the *Vienna Convention on the Law of Treaties* (1969); Dugard *International Law* 63; *S v Harksen* 2000 1 SA 1185 (C) 1201 para 52, regarding the parties' intention to be governed by the international agreement.

¹¹⁵ *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A) 161C-D.

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LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation Mediation and Arbitration
DIAP	Diplomatic Immunities and Privileges
DIPA	Diplomatic Immunities and Privileges Act 37 of 2001
EEA	Employment Equity Act 55 of 1998
EAT	Employment Appeal Tribunal
ECHR	European Charter of Human Rights
EU	European Union
EUECJ	European Union Court of Justice
HRA	Human Rights Act 1998 (UK)
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
SIA	State Immunity Act 1978 (UK)
UKEAT	United Kingdom Employment Appeal Tribunal
VCDR	Vienna Convention on Diplomatic Relations (1961)

THE INTERPLAY BETWEEN INTERNATIONAL LAW AND LABOUR LAW IN SOUTH AFRICA: PIERCING THE DIPLOMATIC IMMUNITY VEIL

SB Gericke*

SUMMARY

This article investigates the interplay between labour law and international law in the context of the diplomatic employment relationship. The overriding effect of the *Constitution of the Republic of South Africa, 1996* as supreme law to protect the labour rights of employees is weighed against the effect of various binding international legal instruments aimed at protecting diplomats' right to immunity. In view of the competing rights of employees and diplomatic employers, the question in this regard is to what extent employees in a diplomatic employment relationship can rely on their right to "fair labour practices" in the broad sense and the overall protection afforded to employees whose rights are infringed. In view of the perception that diplomatic employers can hide behind a veil of diplomatic immunity and in the absence of judgments by the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court, answers and guidelines were sought from various international courts and legal instruments.

However, it is pointed out that the application of labour law and international law to protect the interests of individuals against a state is an exceptionally sensitive and controversial issue. It is suggested that the international relationship between two states be used as a holistic framework, but it is cautioned that international law limits the diplomat employer's liability both in terms of the Bill of Rights and South African labour laws.

The author shows that protection is afforded to diplomats/consular agents by international law. Moreover, the *Diplomatic Immunities and Privileges Act (DIPA)* of 2001 is discussed. It is submitted that employees are not prevented from taking legal action against a diplomat/consular employer in South Africa in terms of the *Labour Relations Act (LRA)* or the DIPA. The author suggests that diplomatic

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employees and employers should be made aware of their rights and obligations in this regard.

In essence what really matters to any labour lawyer is how it can be justified that a group of vulnerable employees (diplomatic employees) is left without a remedy while the employer as the stronger bargaining party is protected in terms of international law. The author submits that employees should have access to compulsory private arbitration in terms of an amendment to the DIPA or in terms of a treaty. This must bind a diplomat/consular employer from South Africa (as the sending state) in a foreign state, and a foreign diplomat/consular employer in South Africa (as the receiving state) to protect employees. It is suggested that such a provision should be included in diplomatic contracts of employment after ratification of a treaty, even before it is enacted into relevant laws in South Africa.

In view of the sensitivity and international consequences of labour disputes for states, it is suggested that private arbitration could serve as a useful dispute resolution procedure and an acceptable alternative to the general options available in terms of the CCMA, the labour court and the high court. It is suggested that the full protection of diplomatic employees' labour rights cannot be based on the status of their employers.

Finally the author argues that lifting the veil of diplomatic immunity could provide a satisfactory interplay between labour law and international law to support the interests and rights of both parties to the diplomatic employment relationship.

KEYWORDS: Constitutional rights; diplomat; diplomatic immunity; employee; employer; extraterritoriality; foreign embassy; international law; interplay; inviolability; labour law; principle of extraterritoriality; receiving state; representing state; sending state; sovereign immunity; territorial jurisdiction; workplace.