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

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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.