

CHAPTER 3

SOUTH AFRICAN LEGISLATIVE FRAMEWORK REGARDING COLLECTIVE BARGAINING

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A Introduction

The purpose of this chapter is to highlight the objectives of the South African labour law dispensation and government policy regarding the labour market. The way the legislature has attempted to achieve these objectives will also be explained. The survey of the South African legislative framework with reference to collective labour law demonstrates that our legislature adopts a pluralist¹ approach to labour relations and therefore strongly supports trade unions and collective bargaining, especially at sectoral level. This brief overview of the regulation of collective labour law in terms of the Labour Relations Act² is necessary to explain the background and structures for subsequent chapters wherein the appropriateness of our legislature's approach will be discussed.

B Government Labour Policy

The government's social and economic policy is the basis of the labour law dispensation.³ At the outset it is of primary relevance to ascertain the labour policy of the government of the day. The present government's labour policy can be summarised as follows:⁴

- (i) the maintenance of peace in the sphere of labour;⁵
- (ii) full employment to counteract the problem of unemployment as far as possible;
- (iii) an improvement in the training skills and productivity of employees;
- (iv) workplace safety and social security for employees;

¹ See ch 2 par C for the meaning of this term.

² Act 66 of 1995 (hereinafter referred to as the LRA)

³ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) 11 and see Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) 4 ed 5 where the authors state: "Following the transition to political democracy, the LRA encapsulated the new government's aims to reconstruct and democratise the economy and society in the labour relations arena."

⁴ Van Jaarsveld, Fourie and Olivier *op cit* 11.

⁵ See Thompson and Benjamin *South African Labour Law* (1997) vol 1 A1-68 where the authors express the view that collective bargaining is one of the most appropriate means for the attainment of labour peace.

- (v) the promotion and implementation of affirmative action in the workplace;
- (vi) the democratisation of the workplace;⁶
- (vii) the promotion of orderly collective bargaining; and
- (viii) the economic development⁷ of South Africa and the promotion of social justice.⁸

⁶ Brassey *Employment and Labour Law* (2000) A1: 5 states: "Democratisation is the process by which those to whom decisions relate are given a greater say in the process of decision-making; the right to vote, which (for example) union members enjoy under s 4(2), is but one manifestation of the democratic process; others include the right to be consulted or heard before a decision is taken. The collective bargaining institutions of the act are underpinned by democratic conceptions and so, in a rather more obvious way, are workplace forums: ..." Earlier (A113) he also stated: "By making economic development a purpose of the Act, the legislature has sought to ensure that the Act is interpreted in a way that will promote the interests not merely of capital and labour but of the general public as well: *Business South Africa v COSATU* 1997 18 ILJ 474 (LAC) at 481 E-F. The main objective of economic development is to raise the living standards and general well-being of the people in the economy. The process refers to the growth in total and per capita income in developing countries accompanied by fundamental changes in the structure of their economies. These changes generally consist in the increasing importance of industrial as opposed to agricultural activity, migration of labour from rural to industrial areas, lessening dependence on imports for the more advanced producer and consumer goods, and on agricultural or mineral products as main exports, and finally a diminishing reliance on aid from other countries to provide funds for investment and thus a capacity to generate growth themselves." According to Thompson and Benjamin *op cit* vol 1 A1-68: "The principal way in which the statute promotes social justice is through satisfying the preconditions for successful collective bargaining providing for full freedom of association, and the freedom to withdraw labour. In this way a reasonable balance between organise labour and business can be achieved. Other statutes, already mentioned, assist by prescribing basic conditions of work and minimum health and safety standards. But the legislative preoccupation with collective bargaining also suggests a more fundamental principle of social justice: that industrial citizens should have the right to participate in decision-making which affects their lives. This is a powerful proposition, more than the administrative right to be heard not only because of the mutuality of the process but also because of the collective dimension. It is constitutive of a democratic society, and the courts are better placed than the legislature to give it meaningful content, and develop it over time." Brassey *op cit* A1: 4 states: "Social justice is concerned with the way in which benefits and burdens are distributed among members of society. Justice in this context postulates a substantive moral criterion or set of criteria by reference to which the distribution should be made. The choice of criterion or criteria is value-laden and provides fertile ground for argument and controversy over the years writers have constructed models that variously emphasise distributions based on need, status, merit and investment but, when investigated, each seems merely to reflect one specific vision of how the world should be. The most celebrated recent theorist within this field is John Rawls who advances a model of justice that would,

Since the democratic elections of South Africa in 1994 the government has undertaken extensive reforms in the labour law dispensation. Given the fact that the Confederation of South African Trade Unions (COSATU) was instrumental in bringing the African National Congress (ANC) to power, great influence was exercised by COSATU in the creation and promulgation of these statutes.⁹ The ANC's re-election commitment in the form of the Reconstruction and Development Programme (RDP), gave special attention to worker and labour rights. The object specifically was to provide for equal rights for all employees, the protection of organisational rights (including the right to strike and to picket on all social and economic matters, and the right of trade unions to information from employers); a centralised system of collective bargaining as well as the right to worker participation in decision-making at the workplace.¹⁰ Based on this statement of intent in the RDP, COSATU had high expectations that the gains made by labour through their struggles would be confirmed and fortified by the new government.¹¹

Shortly after having been elected to govern, the ANC government, through the assistance of the Department of Labour, put forward a five year plan for the radical transformation of labour legislation and the development of an active labour market policy. This five year plan is encapsulated by four items of labour legislation, namely:

- (ix) the Labour Relations Act¹² (hereinafter referred to as the LRA);
- (ii) the Basic Conditions of Employment Act¹³ (hereinafter referred to as BCEA);

within a liberal matrix, maximise the benefits of the least well off. Rawls claims his model would be favoured by rational people who were constructing a society without knowing what position each would occupy within the resulting society...Given the seemingly eternal uncertainty within this area, we must expect the courts to be modest in their use of this objective as an interpretive aid.

⁹ Du Toit *et al op cit* 16-17.

¹⁰ African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) pars 4.8.2, 4.8.3, 4.8.7, 4.8.8 and 4.8.9.

¹¹ Patel *Engine of Development? South Africa's National Economic Forum* (1993) 4; Du Toit *et al op cit* 17.

¹² Act 66 of 1995.

- (iii) the Employment Equity Act¹⁴ (hereinafter referred to as the EEA); and
- (iv) The Skills Development Act¹⁵ (hereinafter referred to as the SDA)

The LRA is the cornerstone of the transformation process. This view is confirmed by Du Toit *et al* in the following words: “the LRA encapsulated the new government’s aims to reconstruct and democratise the economy and society in the labour relations arena.”¹⁶ The BCEA provides a statutory minimum for employment standards for all employees.¹⁷ It serves to provide a safety net for employees whose working conditions are not covered by collective agreements.

The EEA serves to eliminate all forms of discrimination in the workplace and to redress the imbalances created by the past¹⁸ through the implementation of

¹³ Act 75 of 1997.

¹⁴ Act 55 of 1998.

¹⁵ Act 97 of 1998.

¹⁶ *Op cit* 5.

¹⁷ The Act applies to all employees and employers except members of the National Defence Force, the National Intelligence Agency and the Secret Service. An employee is defined in both the BCEA (s1) and the LRA (s 213)

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

Both the LRA (S200A) and BCEA (S83A) in terms of the 2002 amendments contain a rebuttable presumption that a person is an employee if one or more of the following factors exists (This presumption is not applicable to persons who earn in excess of approximately R 115 500 per annum)

- (i) Employer exercise control or direction in the manner of person works
- (ii) Employer exercises control or direction in a person’s hours of work
- (iii) Person forms part of the organisation
- (iv) An average of 40 hours per month has been worked in the last 3 months
- (v) Person is economically dependent on the provider of work
- (vi) Person is provided with tools and equipment
- (vii) Person only works for one person.

¹⁸ The preamble to the Act reads as follows: “Recognising that, as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.

Therefore in order to-

promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment;

affirmative action measures.¹⁹ Employment equity and affirmative action are beyond the scope of this contribution and will not be discussed herein.²⁰ The SDA aims to address the severe skills shortage and to provide the South African workforce with skills that are relevant and needed in the labour market. The SDA is also beyond the scope of this contribution.²¹

The discussion that follows is limited to the centrepiece of this transformation process, namely the LRA.

C The Labour Relations Act²²

1 Objectives of the LRA

The objectives of the LRA are rather ambitious and are stated as follows:²³

“The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

ensure the implementation of employment equity to redress the effects of discrimination;
achieve a diverse workforce broadly representative of our people;
promote economic development and efficiency in the workforce;
give effect to the obligations of the Republic as a member of the international labour organisation.”

¹⁹ S 15(1) of EEA.

²⁰ For a discussion of the EEA, see Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 589-705; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 700-751 and Grogan *Workplace Law* (2003) 7th ed 245-270.

For discussion of this Act see Du Toit *et al op cit* 37-38; Grogan *Workplace Law* (2003) 7th ed 8-9.

²² Act 66 of 1995. Only the provisions that deal with collective bargaining will be discussed hereunder i.e. the provisions dealing with unfair dismissals and unfair labour practices will not be addressed here. For a detailed explanation of the provisions of LRA see Grogan *Workplace Law* (2003) 7th ed 103- 374, Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 350- 555; 770- 1039; Du Toit *et al op cit* 165-474; Basson *et al Essential Labour Law* (2003) vol 1 121-302, Brassey *Employment and Labour Law* (2000) section A..

²³ S 1.

- (b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation;
- (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can -
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (ii) formulate industrial policy;
- (d) to promote -
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) employee participation in decision-making in the workplace; and
 - (iv) the effective resolution of labour disputes.”

The emphasis in the LRA is clearly on collective labour law as opposed to individual labour law.²⁴ The Act contains ten chapters. Chapter I is entitled “Purpose, Application and Interpretation”. Chapters II to VII inclusive all deal with collective issues. Chapter III, which is the longest chapter of the Act, is titled “Collective Bargaining”. Chapter VII deals with dispute resolution procedures, chapter VIII deals with individual labour law and covers unfair dismissals, while chapter IX is titled “General Provisions”. In short, only one chapter, a relatively short one at that, (chapter VIII) deals with individual labour matters while six of the chapters deal with collective issues.

The backbone of the LRA is its emphasis on collective bargaining especially at industrial or sectoral level.²⁵ The intention of the legislature was to create an orderly collective bargaining system with an emphasis on centralised bargaining forums representing all sectors.²⁶ It appears that the most important means of achieving the stated objectives of social justice, economic development and so

²⁴ See Mischke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in Terms of the LRA" 2004 *Contemp LL* vol 13 6 51.

²⁵ See Grogan *Workplace Law* (2003) 7th ed 293, 274.

²⁶ See Du Toit *et al op cit* 41, 244.

forth was perceived to be through collective bargaining especially at sectoral or industry level.²⁷

The LRA provides a framework that is conducive to collective bargaining.²⁸ It provides for simple registration procedures for trade unions and employers organisations;²⁹ the application of the principle of freedom of association;³⁰ the granting of extensive organisational rights to sufficiently representative trade unions,³¹ the creation of *fora* for collective bargaining;³² and the right to strike supplemented by the protection of employees from dismissal for partaking in a strike.³³

The hope of the legislature was that this enabling framework would result in employers and trade unions setting conditions of work in the different sectors and resolving their own disputes, thus resulting in social justice and economic development.³⁴

2 Freedom of Association³⁵

2.1 General

An entire chapter in the LRA is dedicated to the freedom of association.³⁶ This is in line with South Africa's obligations as a member of the International Labour

²⁷ See s 1(d) (ii).

²⁸ See Grogan *Workplace* 299, Du Toit *et al op cit* 167, Basson *et al op cit* vol 2 22-24.

²⁹ S 96.

³⁰ Ch II

³¹ Ch III part A.

³² Ch II part C, D and E.

³³ Ch IV.

³⁴ See Grogan *Workplace* 304; Du Toit *et al op cit* (2003) 227.

³⁵ For a discussion of this fundamental right see Basson *et al op cit* vol 2 26-34, Du Toit *et al op cit* 169-182, Brassey *op cit* A2 1-17, Van Jaarsveld, Fourie and Olivier *op cit* par 356-359, 370.

³⁶ See ch II.

Organisation³⁷ (ILO) and the Bill of Rights.³⁸ The concept of ‘freedom of association’ was given content in terms of s 23(2)-(5) of the Constitution as follows:

- “(2) Every worker has the right-
- (a) to form and join a trade union;³⁹
 - (b) to participate in the activities and programmes of a trade union;⁴⁰ and
 - (c) to strike.⁴¹
- (3) Every employer has the right -⁴²
- (a) to form and join an employers’ organisation; and⁴³
 - (b) to participate in the activities and programmes of the employers’ organisation.⁴⁴
- (4) Every trade union and every employers’ organisation has the right-⁴⁵
- (a) to determine its own administration, programmes and activities;⁴⁶
 - (b) to organise;⁴⁷
 - (c) to bargain collectively;⁴⁸ and

³⁷ ILO *Convention 87 Freedom of Association and Protection of the Rights to Organize* (1948).

³⁸ S 23 of the Constitution of South Africa Act 108 of 1996.

³⁹ In *SA National Defence Union v Minister of Defence & another* 1999 20 ILJ 2265 (CC) the Constitutional Court upheld an application challenging the constitutionality of a provision in the Defence Act 44 of 1957 that prohibited members of the South African National Defence Force from joining trade unions or participating in trade union activities. See also Basson "Die Vryheid om te Assosieer" 1991 SAMLJ 181-182. See also *Bader Bop (Pty) Ltd & another v National Bargaining Council & others* 2001 220 ILJ 2431 (LC); *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & others* 2002 23 ILJ 104 (LAC); *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & another* 2003 ILJ 305 (CC); Le Roux "Organisational Rights" 1993 *Contemp LL* 2 109.

⁴⁰ *SA National Defence Union v Minister of Defence & another op cit supra*

⁴¹ S 64(1) of the LRA; s 23(2) (c) of Constitution of the RSA Act 108 of 1996; Maserumule "A Perspective on Developments in Strike Law" 2001 ILJ 45; Brassey "The Dismissal of Strikers" 1990 ILJ 233; Van Jaarsveld, Fourie and Olivier *op cit* par 908; Craemer "Towards Asymmetrical Parity in the Regulation of Industrial Action" 1998 ILJ 1; Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 273.

⁴² S 6 (1) (a) (b) of the LRA also provides for these rights.

⁴³ S 23(2).

⁴⁴ S 23(3).

⁴⁵ S 8 of the LRA also provides for similar rights which are discussed *infra*.

⁴⁶ S 23(4).

⁴⁷ S 23(4).

⁴⁸ S 23(5).

- (d) to form and join a federation.⁴⁹
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.⁵⁰
- (6) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements."⁵¹

The rights provided for in terms of the Bill of rights are also of relevance to individuals, trade unions and employer organisations in cases where the LRA is not applicable. In such situations an aggrieved party can rely on the rights provided for in terms of the Constitution.⁵²

In terms of the LRA freedom of association for an employee entails the following rights:⁵³

- (i) The right to participate in the founding of a trade union;⁵⁴
- (ii) the right to join a trade union of his/her choice;⁵⁵
- (iii) the right to participate in trade union activities;⁵⁶

⁴⁹ S 23(4).

⁵⁰ In *SA National Defence Union & another v Minister of Defence* 2003 24 ILJ 2101 (T) the court held that since s 23(5) of the Constitution granted trade unions, employers' organisations and employers the right to engage in collective bargaining it followed that the Minister of defence had a correlative duty to engage in the process of collective bargaining with the union. See also *Bader Bop (Pty) Ltd & another v National Bargaining Council & others supra*; *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & Others* 2002 ILJ 104 (LAC); *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305 (CC); Van Jaarsveld "Reg op Kollektiewe Bedinging: Nog Enkele Kollektiewe Gedagtes" 2004 *De Jure* 349.

⁵¹ Closed shops and agency shops are discussed *infra*, under sub-heading 3.4.

⁵² *SA National Defence Union v Minister of Defence* cases *supra*.

⁵³ See Du Toit *et al op cit* (2003) 170-172; Grogan *Workplace Law* (2003) 7th ed 277.

⁵⁴ S 4(1) (a); *SANDU v Minister of Defence* [1999] 6 BCLR 615 (CC).

⁵⁵ S 4(1)(b); see also *MEWSA v Alpine Electrical Contractors* 1997 ILJ 1430 (CCMA); *Oostelike Gauteng Diensteraad v Tvl Munisipale Pensioenfonds* 1997 ILJ 68 (T); *SA Defence Union v Minister of Defence* 1999 ILJ 299; *Nkutha v Fuel Gas Installations (Pty) Ltd* 2000 ILJ 218 (LC); Le Roux "Trade Union Rights for Senior Employees" 2000 CLL 58; Grogan "Double Cross - Manager's Right to Hold Union Office" 1999 EL 5; *FGWU v Minister of Safety and Security* [1999] 4 BCLR 615 (CC).

⁵⁶ S 4(2) (a).

- (iv) the right to participate in the election of trade union officials and office bearers;⁵⁷
- (v) the right to be appointed as an office-bearer, official or trade union representative.⁵⁸

Furthermore, no employee or job applicant may be prevented from being a trade union member or becoming a trade union member or exercising any rights granted in terms of LRA.⁵⁹ No employee or job applicant can be prejudiced against by an employer on account of the exercise of his/her association rights.⁶⁰

3 Organisational Rights⁶¹

3.1 Prerequisites for Acquisition of Organisational Rights

Organisational rights can be acquired by a trade union⁶² in terms of a collective agreement.⁶³ The statutory organisational rights act as a floor or minimum which can be demanded under certain circumstances (which will be discussed hereunder), and there is nothing precluding the existence of a collective agreement granting a trade union(s) more extensive organisational rights.⁶⁴

⁵⁷ S 4(2) (b).

⁵⁸ S 4(2) (c) and (d); *IMATU v Rustenburg Transitional Council* [1999] 12 *BLLR* 1299 (LC).

⁵⁹ S 5(2)(c)(i),(ii),(iii); *MEWSA v Alpine Electrical Contractors supra*; *Nkutha v Fuel Gas Installations (Pty) (Ltd) supra*; Grogan "Double Cross - Manager's Right to Hold Office" 1999 *EL* 5.

⁶⁰ S 5(1); *SAUJ v SABC* [1999] 11 *BCLR* 1137 (LAC).

⁶¹ See generally Du Toit *et al op cit* 198-223; Grogan *Workplace Law* (2003) 7th ed 282-291; Basson *et al Essential Labour Law* (2003) vol 2 35-55; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 370-387; Brassey *op cit* (2000) A3: 1-35; Thompson and Benjamin *South African Labour Law* (1997) AA2-5- AA2-11.

⁶² For a discussion on the definition of a trade union, see s 213 of the LRA and Du Toit *et al op cit* 167-168.

⁶³ S 21. See also Mischke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in Terms of the LRA" 2004 *Contemp LL* vol 13 No 6 51 53-60 for a discussion on the acquisition of organisational rights; Du Toit *et al op cit* 201-205; Van Jaarsveld, Fourie and Olivier *op cit* pars 372A-375 for an explanation of the different ways of acquiring organisational rights.

⁶⁴ Du Toit *et al op cit* 202.

Where an employer refuses to grant such organisational rights they can be obliged to, provided the union is registered⁶⁵ and it possesses the required threshold of representivity at the employer's workplace⁶⁶ for the organisational right(s) it seeks to enforce. Different thresholds of representivity are required for the different organisational rights. However unions that are parties to a bargaining council or a statutory council automatically have rights of access⁶⁷, and rights to stop order facilities⁶⁸, irrespective of the extent of their representivity⁶⁹.

3.2 Specific Rights

The LRA provides for the following organisational rights:⁷⁰

- (i) access to the employers premises for the purpose of recruiting new members and servicing their members⁷¹
- (ii) stop order facilities⁷²
- (iii) unpaid leave for union office bearers⁷³
- (iv) the right to elect a prescribed number of trade union representatives (shop stewards) depending on the number of employees⁷⁴

⁶⁵ For an explanation of the process of registration see Van Jaarsveld, Fourie and Olivier *op cit* pars 388-393; Du Toit *et al op cit* 183-185.

⁶⁶ For a discussion on the meaning of 'workplace', see Du Toit *et al op cit* 203-204; *Oil, Chemical, General and Allied Workers Union and Volkswagen of SA (Pty) Ltd* 2000 ILJ 220; *SACCAWU v Specialty Stores (Pty) Ltd* [1998] 4 BCLR 352 (LAC); *OCGAWU v Total SA (Pty) Ltd* [1999] BCLR 678 (CCMA); (2002) EL vol 18.

⁶⁷ S 12.

⁶⁸ S 13.

⁶⁹ S19.

⁷⁰ Ch III part A sections 11-19.

⁷¹ S 12; *UPUSA v Komming Knitting* [1997] 4 BLLR 508 (CCMA).

⁷² S 13; *UPUSA v Komming Knitting supra*; *NPSU v National Negotiating Forum* 1999 ILJ 1081 (LC); *SACTWU v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* 2000 ILJ 425 (CCMA).

⁷³ S 15; *NUMSA v Exacto Craft (Pty) Ltd* 2000 ILJ 2760 (CCMA); *CWIU v Sanachem* 1998 ILJ 1638 (CCMA).

⁷⁴ S 14(2); *SACCAWU v Woolworths (Pty) Ltd* 1998 ILJ 57 (LC); *SATAWU and Autonet* [2000] 7 BLLR 83 (IMSSA). See also *Bader Bop (Pty) Ltd & Another v National Bargaining Council & Others supra*; *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & Others supra*; *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & Another supra*; Bosch "Two Wrongs Make it More Wrong, or a case for Minority Rule" 2002 SALJ 501; Grogan "Organisational Rights and the Right to Strike" 2002 11(7) *Contemp LL* 69; Grogan "Wagging the Dog: Minority Unions Strike Back" 2003 EL 19(1) 10; Grogan "Minority Unions (1): No Right to

- (v) paid time off for union representatives for the purpose of undergoing training for their union responsibilities⁷⁵
- (vi) the right of union representatives to monitor union compliance with labour laws⁷⁶ and access to information necessary for the performance of these functions⁷⁷
- (vii) the right to access to information which is necessary for meaningful negotiation and consultation.⁷⁸

3.3 Organisational Rights and Union Representativeness⁷⁹

A registered union that is 'sufficiently representative'⁸⁰ (which term is not defined in the Act) or two or more unions that are jointly 'sufficiently representative' have the right to the following organisational rights:

- (i) access to the workplace;⁸¹
- (ii) stop order facilities;⁸² and
- (iii) leave for trade union activities.⁸³

Strike" 2002 18(1) *EL* 4; Grogan "Minority Unions (2): Raising the Threshold" 2002 18(1) *EL* 10.

⁷⁵ S 14(5); *NACTWUSA v Waverley Blankets Ltd* 2000 *ILJ* 1910 (CCMA).

⁷⁶ S 14(4).

⁷⁷ S 16(2).

⁷⁸ S 16; *NUMSA v Atlantis Diesel Engines (Pty) Ltd* 1993 *ILJ* 642 (LAC); *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1994 *ILJ* 1247 (A); *NEWU v Mintroad Saw Mills (Pty) Ltd* 1998 *ILJ* 95 (LC).

See in general Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 205 -209.

⁸⁰ See *SACTWU v Marley supra*; *SACTWU v Sheraton Textiles (Pty) Ltd* [1997] 5 *BLLR* 662 (CCMA); *Bader Bop (Pty) Ltd & Another v National Bargaining Council & others supra*; *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & Others supra*; *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & Another supra*; *Bosch loc cit*; Grogan "Organisational Rights" 69; Grogan "Wagging the Dog" 10; Grogan "Minority Unions(1)" 4; Grogan "Minority Unions (2)" 10.

⁸¹ S 12; *SACTW U v Marley supra*; *NUMSA & others v Eberspacher SA (Pty) Ltd* 2003 *ILJ* 1704 (LC); *UPUSA v Komming Knitting supra*.

⁸² S 13; *UPUSA v Komming Knitting supra*, *SACTWU v Marley supra*; *NPSU v National Negotiating Forum supra*; *SACTWU v Sheraton Textiles supra*; *OCGAWU v Woolworths (Pty) Ltd* [1999] *BALR* 813 (CCMA).

⁸³ S 15; *NACTWUSA v Waverley Blankets Ltd supra*; *FAWU v Bokomo Feeds* [2001] 6 *BALR* 599 (CCMA); *NUMSA v Exacto Craft (Pty) Ltd* [2000] 11 *BALR* 126 (CCMA).

These rights are subject to “conditions as to time and place that are reasonable” and necessary to safeguard life or property or to prevent the undue disruption of work.⁸⁴

Majority representative trade unions have the right to the abovementioned organisation rights in addition to:

- (i) the right to elect trade union representatives;⁸⁵ and
- (ii) the right of access to information.⁸⁶

A majority representative trade union is a union or a number of unions acting jointly that represent 50% plus one of the employees at a particular workplace.⁸⁷ A ‘sufficiently representative’ trade union is not defined in the Act. Arbitrators dealing with disputes over whether a union is sufficiently representative “must seek to:

- (i) minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace,⁸⁸ and
- (ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union”.⁸⁹

⁸⁴ S 12(4); *NUMSA & others v Eberspacher supra*; *NF Dye Casting (Pty) Ltd (Wheel Plant) v NAWUSA* [1998] 2 *BALR* 60 (CCMA).

⁸⁵ These trade union representatives may assist employees at grievance and disciplinary procedures; monitor an employer’s compliance with employment laws and collective agreements; report workplace contraventions to their union and the responsible authorities; perform any other function agreed to by the employer and union concerned.

⁸⁶ S 16; See Brand and Cassim "The Duty to Disclose - A Pivotal Aspect of Collective Bargaining" 1980 *ILJ* 249; Rycroft "The Duty to Bargain in Good Faith" 1998 *ILJ* 202; Landman "Labour's Right to Employer Information" 1996 *Contemp LL* 21; Promotion of Access to Information Act 2 of 2000; *CWIU v Sanachem* [1998] 7 *BALR* 827 (CCMA); *NACTWUSA v Waverley Blankets* [2000] 6 *BALR* 692 (CCMA).

⁸⁷ S 14; Regarding the concept 'workplace', see *OCGAWU v Total SA (Pty) Ltd* 1999 *ILJ* 2176 (CCMA); *Specialty Stores v CCAWU* 1997 *ILJ* 192 (LC); *FAWU v Wilmark (Pty) Ltd* 1998 *ILJ* 928 (CCMA); *SACTWU v The Hub* 1999 *ILJ* 479 (CCMA); *OCGAWU v Volkswagen of South Africa (Pty) Ltd* 2002 *BLLR* 60 (CCMA).

⁸⁸ *OCGAWU v Woolworths (Pty) Ltd* [1999] 7 *BALR* 813 (CCMA).

The commissioner (arbitrator) is also obliged to consider:⁹⁰

- (i) the nature of the workplace
- (ii) the nature of the organisational rights sought
- (iii) the nature of the sector
- (iv) the organisational history of the workplace or of any other workplace of the employer.⁹¹

However, the parties to a bargaining council⁹² or a majority representative trade union, may by collective agreement with the employer establish the thresholds of representativeness for the acquisition of organisational rights.⁹³

As discussed above, once it is established or accepted that a trade union is 'sufficiently representative' or that it represents the majority of the employees at a particular workplace that union is entitled to certain organisational rights. Where it is accepted that such trade union is not 'sufficiently representative', the question as to whether that union will be in a position to embark on protected strike action in order to demand certain organisational rights has arisen. Recently the Labour Court,⁹⁴ the Labour Appeal Court⁹⁵ and the Constitutional Court⁹⁶ have all had an opportunity to pronounce on this vexed issue.⁹⁷ These decisions all concerned the same set of facts: Bader Bop (Pty) Ltd employed 1 108 employees. The majority of

⁸⁹ S 21 (8) (a); See also *SACTWU v Sheraton Textiles supra*; *SACTWU v Marley supra*; *SADTU v Ebrahim's Taxis* [1998] 11 BALR 1480 (CCMA); *SACCAWU v The Hub* [1998] 12 BALR 1590 (CCMA).

⁹⁰ S 21(8) (b); *SACTWU v Sheraton Textiles supra*; *SACTWU v Marley supra*.

⁹¹ *SACTWU v Sheraton Textiles supra*; *SACTWU v Marley supra*; *CCAWU v Specialty Stores* 1998 ILJ 557 (LAC); *SACCAWU v The Hub supra*.

⁹² Bargaining councils are forums for collective bargaining at sectoral level and are discussed hereunder in par 4.

⁹³ S 18.

⁹⁴ *Bader Bop (Pty) Ltd & Another v National Bargaining Council & Others* 2001 ILJ 2431 (LC).

⁹⁵ *Bader Bop (Pty) (Ltd) v National Union of Metal & Allied Workers of SA & Others* 2002 ILJ 104 (LAC).

⁹⁶ *National Union of Metal & Allied Workers of SA v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305 (CC).

⁹⁷ Grogan "Organisational Rights and the Right to Strike" 2002 *Contemp LL* 11(7) 69.

these employees belonged to GIWUSA, a registered trade union, while another registered trade union, NUMSA, had a membership of 26% of the total workforce. Bader Bop (Pty) Ltd had granted GIWUSA as a majority union the organisational right provided for in s 14 of the LRA⁹⁸. NUMSA had been granted the organisational rights in terms of s12⁹⁹ and s13¹⁰⁰ but not those in terms of s14. NUMSA demanded s14 organisational rights and Bader Bop refused to grant them these rights on the basis that only majority representative trade unions are entitled to these rights. The union declared a dispute over the question of organisational rights and referred the matter to the CCMA. The matter remained unresolved and the union informed Bader Bop (Pty) Ltd of its intention to embark on strike action in support of its demand to be granted the right to elect trade union representatives.

Bader Bop (Pty) Ltd approached the Labour Court for an interdict prohibiting the strike. The application was dismissed whereupon Bader Bop appealed to the Labour Appeal Court. The majority view of the Labour Appeal Court per Zondo JP and Du Plessis AJA was that only majority representative trade unions are entitled to the organisational rights provided for in terms of s 14 and that consequently, trade unions that do not enjoy majority representation can neither demand these organisational rights and nor can they embark on lawful strike action to pursue such a demand. Although Du Plessis AJA conceded that the LRA does not specifically preclude trade unions that are not sufficiently representative from attaining organisational rights through collective bargaining, or even striking, he nevertheless concluded that such insufficiently representative trade unions were precluded from embarking on protected strike action to attain organisational rights. The basis for this conclusion is that this would be tantamount to permitting trade

⁹⁸ These rights relate to the election of trade union representatives.

⁹⁹ These rights relate to access to employer premises. Grogan "Wagging the Dog: Minority Unions Strike Back" 2003 *EL* 19 1) 10; Grogan J "Minority Unions (1): No Right to Strike" 2002 *EL* 18(1) 4; Grogan "Minority Unions (2): Raising the Threshold" 2002 *EL* 18(1) 10.

¹⁰⁰ These rights relate to deduction of union subscriptions from employees who are members of a 'sufficiently representative' trade union.

unions to circumvent the provisions of part A of ch III of the LRA.¹⁰¹ In his view the purpose of these provisions is to avoid disputes and therefore to allow trade unions the ability to ignore these provisions would render these provisions meaningless. Both Zondo JP and Du Plessis AJA therefore concluded that this limitation on the right to strike did not constitute an unacceptable inroad into the constitutional right to strike.

Davis AJA delivered a dissenting minority judgment. He stated:¹⁰²

“The argument in favour of prohibition must run as follows: A strike can only take place regarding an issue in dispute. The issue in dispute concerns organisational rights as contained in part A of chapter III. The only dispute which can take place insofar as those rights are concerned is a dispute regarding representivity. Once a union concedes that it is not sufficiently representative as defined in the Act, there can be no issue in dispute regarding the obtaining of such rights. Accordingly there can be no right to strike for there is no issue in dispute of a kind which would give rise to the right to strike in terms of s 64 of the Act. This argument misconstrues the nature of the dispute in the present case. In the present case respondents employed industrial action namely a strike, in order to fortify a demand that certain union members be afforded representative status so that they too could perform some or all of the functions which trade union representatives have the right to perform in terms of s 14 of the Act.” Davis AJA then concluded that it would constitute an unjustified limitation on the constitutional right to strike to read such limitation on the right to strike into the LRA.

The matter was then referred to the Constitutional Court. The applicants argued that the interpretation of the Labour Appeal Court of the relevant provisions of the LRA constituted an inroad into the constitutional right to strike, or, in the alternative, that if such interpretation was correct, the LRA was unconstitutional in that it unjustifiably limited the right to strike. O’Regan J, for the majority of the court

¹⁰¹ In terms hereof, where there is a dispute as to whether a trade union is sufficiently representative the matter must be determined by means of arbitration provided the conciliation procedure did not result in settlement of the matter.

¹⁰² 140 G-J.

emphasized the relevance of the right to strike as part and parcel of any successful system of collective bargaining. The court opined that there is nothing in part A of chapter III of the Act that precludes unions that admittedly do not meet the requisite threshold membership levels from concluding a collective agreement with the employer in terms of which they are granted these rights. In the light of the purpose of the LRA as contained in s 1 and South Africa's obligations in terms of international law, and the fact that the right to strike is part of the collective bargaining system, the court preferred a more expansive interpretation of the LRA that would not limit the constitutional right to strike.

It is my view that the fact that the LRA provides for the dispute resolution process of conciliation followed by arbitration in order to establish whether a union meets the required threshold of representivity, does not prevent a union that admittedly does not meet that required threshold of representivity from pursuing those rights by means of collective bargaining and hence striking. This must be so because the LRA specifically provides that a union can obtain organisational rights in terms of a collective agreement.¹⁰³ In other words, what is arbitrable is whether or not the trade union is sufficiently representative, not whether the employer should grant the union the organisational rights it demands. In *casu* the trade union conceded that it was not sufficiently representative, but it nevertheless wanted the organisational rights that majority representative trade unions are automatically entitled to. Whether or not the employer should grant a union which is not 'sufficiently representative' these organisational rights is not an arbitrable issue and therefore it is an issue that is subject to collective bargaining and ultimately, if the union deems it necessary, a strike. The fact that trade unions that represent a minority of the employees do not automatically become entitled to these rights does not signify that they cannot become entitled to them through the process of collective bargaining.¹⁰⁴

¹⁰³ S 20; see also *Federal Council of Retail and Allied Workers v Edgars Consolidated Stores* 2002 ILJ 1796 (LC).

¹⁰⁴ See O'Regan's judgement in *National Union of Metal & Allied Workers of SA v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305 (CC) and the dissenting judgement of

3.4 Closed Shops and Agency Shops¹⁰⁵

The LRA makes provision for both closed shops¹⁰⁶ and agency shops¹⁰⁷. Only trade union(s) that represent a majority of the workers at a workplace may enter into such collective agreements with the employer.¹⁰⁸ A closed shop agreement is an agreement between an employer and a majority representative trade union (or 2 or more unions acting jointly that represent a majority) in terms of which all employees at the particular workplace are obliged to become members of the trade union or one of the trade union acting jointly.¹⁰⁹ An agency shop agreement is an agreement between an employer and a majority representative trade union or number of trade unions acting jointly which together represent a majority, in terms of which all employees at a particular workplace are obliged to pay union fees irrespective of whether they are union members¹¹⁰. The provision regarding the granting of organisational rights and closed shops and agency shops demonstrate the legislature's preference for majoritarianism, an attempt to prevent a proliferation of smaller trade unions, and a definite bias in favour of the creation and maintenance of power of the super unions.¹¹¹

Davis AJA in *Bader Bop (Pty) Ltd v National Union of Metal & Allied Workers of SA & Others* 2002 ILJ 104 (LAC).

¹⁰⁵ See generally Basson *et al Essential Labour Law* (2003) vol 2 69-75; Grogan *Workplace Law* (2003) 7th ed 175-181; Brassey *Employment and Labour Law* vol 3 A3: 44- A3: 57; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 360-368; Landman "The Closed Shop Born Again: A Surprise From the New LRA" 1995 *EL* 10.

¹⁰⁶ S 26(1).

¹⁰⁷ S 25(1).

¹⁰⁸ S 25(2) and S 26(2); *National Manufactured Fibres Association v Bikwani* [1997] 10 *BLLR* 1076 (LC).

¹⁰⁹ The constitutionality of such agreements has often been questioned. See Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 175-178 (closed shops) and 179-181 (agency shops); and Olivier and Potgieter "The Right to Associate Freely and the Closed shop" 1994 *TSAR* 289-305 and 1994 *TSAR* 443-469.

¹¹⁰ For discussion of the statutory requirements for closed and agency shop agreement see *National Manufactured Fibres Association v Bikwani supra* and Du Toit *et al op cit* 175-177 and 179-180.

¹¹¹ Despite this theme of majoritarianism throughout the LRA, as seen above under the sub-heading "Prerequisites for the Acquisition of Organisational Rights", the Constitutional Court in the case of *National Union of Metal Workers of SA v Bader*

As will be seen hereunder the theme of majoritarianism is repeated with reference to the creation of *fora* for collective bargaining such as bargaining councils and workplace forums.

4 Forums for Collective Bargaining

4.1 General

Aside from the provision of organisational rights and the protection of freedom of association the Act makes provision for *fora* for collective bargaining as well as the enforcement of collective agreements. The Act unashamedly encourages collective bargaining particularly at sectoral or industrial level.¹¹² It provides for the creation of bargaining councils and statutory councils.

4.2 Bargaining Councils

The key institution of the LRA is the bargaining council. Its primary functions are collective bargaining, the conclusion of collective agreements and the resolution of

Bop (Pty) Ltd supra nevertheless held that it was not unlawful for a trade union that did not enjoy majority representation at a particular workplace to pursue the attainment of organisational rights ordinarily reserved for majority representative trade unions by means of collective bargaining and consequently and ultimately strike action.

¹¹² S1(d)(ii) of LRA provides that one of the purposes of the LRA is “to promote collective bargaining at sectoral level; see also O’Regan J in *National Union of Metal Workers of SA & another v Bader Bop (Pty) Ltd supra* at 322 where she states: “Finally the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level...”. In *Milltrans and National Bargaining Council for the Road Freight Industry 2002 ILJ 1930 (BCA)*, and *Ram International Transport (Pty) Ltd & National Bargaining Council for the Road Freight Industry 2002 ILJ 1943 (BCA)* where in both instances exemption from a bargaining council collective agreement by a non-party was sought, and the exemption body justified its refusal to grant exemption on the basis that the principle of centralized collective bargaining is a paramount and primary objective of the LRA. In *Profal (Pty) Ltd & National Entitled Workers Union 2003 ILJ 2416 (BCA)*, a bargaining council agreement had been extended to non-parties, these non-parties were bound by the provisions in the agreement prohibiting plant-level bargaining. See also Du Toit *et al op cit* 29-30 and Grogan *Workplace* 293.

disputes.¹¹³ Bargaining councils are voluntarily created, on application by one or more registered trade unions and one or more registered employers' organizations and/or the state if it is an employer in the sector and area for which the bargaining council is established.¹¹⁴

Collective agreements reached at a bargaining council are binding on the following parties:

- (i) the parties to the bargaining council who are also parties to the collective agreement;

¹¹³ The functions of bargaining councils are provided for in s 28 as follows:

- (a) to conclude collective agreements;
- (b) to enforce those collective agreements;
- (c) to prevent and resolve labour disputes;
- (d) to perform the dispute resolution functions referred to in section 51;
- (e) to establish and administer a fund to be used for resolving disputes;
- (f) to promote and establish training and education schemes;
- (g) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to be bargaining council or their members;
- (h) to develop proposals for submission to the National Economic, Development and Labour Council or any appropriate forum on policy and legislation that may affect the sector and area;
- (i) to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or lock-out at the workplace; and
- (j) to confer on workplace forums additional matters for consultation."

See also *Adonis v Western Cape Education Department* 1998 ILJ 806 (LC); *Kemlin Fashions CC v Brunton* 2000 ILJ 1357 (LC), 2000 ILJ 109 (LAC); *KwaZulu-Natal v Sewtech CC* 1997 ILJ 1355 (LC); *Mandhla v Belling* [1997] 12 BLLR 1605 (LC); *Seardele Groups Trading (Pty) Ltd v Andrews NO* [2000] 10 BLLR 1605 (LC); *Portnet v La Grange* 1999 ILJ 916 (LC); *NUMSA v Driveline Technologies (Pty) Ltd* 1999 ILJ 2900 (LC), 2000 ILJ 142 (LAC); *BCFMI v Unique Kitchen Designs* 2000 ILJ 419 (CCMA). The 2002 amendments to the LRA have further extended the functions of bargaining councils to include (s 33 of Act 12 of 2002):

- (i) the provision of industrial support services; and
- (ii) the extension of the service and functions of bargaining councils to informal and domestic workers.

¹¹⁴ S 27. For a detailed explanation concerning the procedures and requirements for the establishment of a bargaining council see Du Toit *et al op cit* 245-247 Van Jaarsveld, Fourie and Olivier *op cit* pars 439-450.

- (ii) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
- (iii) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party,
- (iii) if the collective agreement regulates –
 - (aa) terms and conditions of employment; or
 - (bb) conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.¹¹⁵

Section 32 of the LRA provides that a collective agreement reached at a bargaining council can be extended and made applicable to non-parties who fall within the registered scope of the council provided the following requirements are met:

- (i) One or more unions whose members constitute a majority among the unions which are party to the council, and one or more employers' associations whose members employ the majority of employees employed by party employers, have voted in favour of such extension.¹¹⁶
- (ii) The Minister must be satisfied that the union parties represent a majority of employees within the registered scope of the council and that the employer parties employ a majority of employees in the council's registered scope.¹¹⁷
- (iii) Non-parties to whom the request is applicable fall within the registered scope of the council.¹¹⁸

¹¹⁵ S 32; See as well *Bargaining Council in the Clothing Industry (Natal) v COFESA* 1999 ILJ 1695 (LAC).

¹¹⁶ S 32(1) (a) and (b).

¹¹⁷ S 32(3) (b) and (c).

¹¹⁸ S 32(3) (d).

- (iv) Originally the Act provided that the agreement should make provision for exemption to be granted by an independent body. However, the 1998 amendments to the Act provide that applications for exemptions must be made to the council itself. The role of the independent body is now to hear appeals brought against a bargaining council decision not to grant an exemption.¹¹⁹
- (v) The agreement must contain criteria which must be applied in granting such exemptions. Also, there is the requirement that the agreement does not discriminate against non-parties.¹²⁰
- (vi) The Minister can extend a collective agreement where the parties enjoy mere “sufficient representation”, if he is satisfied that failure to extend the agreement would be detrimental to collective bargaining at sectoral level.¹²¹ Since the term “sufficiently representative” is not defined in the Act and the other requirements are also vague and open to subjective interpretation by the Minister, the Minister has *quasi* legislative power to impose the terms of collective agreements on non-parties wherever he deems fit.¹²²

The 2002 amendments to the LRA¹²³ provide bargaining councils with extensive powers for the promotion, monitoring and enforcement of bargaining council

¹¹⁹ S 32(3) (e) and (f); Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) 4th ed 266.

¹²⁰ S 32(3) (a).

¹²¹ S 32(5).

¹²² See Du Toit *et al op cit* 266-267 where the view is taken that the extension of an agreement of a bargaining council whose parties are merely sufficiently representative "is particularly vulnerable to Constitutional challenges on the grounds of violation of the employer's property rights or the right to engage in economic activity." In *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another 2003 ILJ 2017 (CCMA)* the argument that if a bargaining council agreement is extended to non-parties in terms of s 32 of the LRA, this would offend against the employer's constitutional right to free economic activity, was put forward by the employer.

¹²³ S 33 inserted in terms of the Labour Relations Amendment Act 12 of 2002 provides for the appointment of agents to promote, monitor and enforce compliance with bargaining council agreements. It further provides that an agent may:

- (i) publicize the contents of an agreement

agreements. According to commentators “this provision addresses difficulties experienced by many bargaining councils seeking to enforce the terms of their collective agreements. One of the significant policy considerations underlying the LRA 1995 was to decriminalize labour law. The Act gave effect to this policy by abolishing the jurisdiction of the criminal courts in respect of failures to comply with a collective agreement entered into by a bargaining council and introduced a system of arbitration to enforce these agreements. In many instances this created practical difficulties for councils that lacked the infrastructure to establish panels of arbitrators, and in some instances bargaining councils appointed their own officials as arbitrators, thus becoming judges in their own cause....”¹²⁴

4.3 Statutory Councils

- (ii) conduct inspections
- (iii) investigate complaints
- (iv) use any other means adopted by the council for enforcement
- (v) perform any other functions conferred or imposed by the council.

¹²⁴ See Van Niekerk and Le Roux “A Comment on the Labour Relations Amendment Bill 2001 and the Basic Conditions of Employment Bill 2001” 2001 *ILJ* 2164, 2165-2166 ; Du Toit *et al op cit* 267-268 state the following in this regard: "Against a background of controversy surrounding the enforcement of bargaining council agreements the 2002 amendments to the LRA inserted a provision that, despite any other provision of the Act, a bargaining council may monitor and enforce compliance with its collective agreements [s 33A(1)]. The amendments fill a hiatus that has existed since the LRA took effect. Prior to the amendment, bargaining councils were confined to requesting the Minister of Labour to appoint designated agents with powers of investigation but limited possibilities of enforcement. Section 33 now states that the functions of designated agents are 'to promote, monitor and enforce compliance with the council's collective agreements' [s 33(1)]. A collective agreement may authorise a designated agent to issue compliance orders requiring a person bound by the agreement to comply within a specified period [s 33A (3)]. A designated agent may also secure compliance by publicising the contents of the agreements, conducting inspections, investigating complaints or any other means the council may adopt [s33(1A)(a)]. He/she may also perform any other functions conferred on him/her by the council [s33 (1A) (b)] and exercise the powers set out in Schedule 10 within the council's registered scope [s33 (3)]. Prior to the above amendments it was accepted, though not without controversy, that a council may be party to arbitration proceedings through which it seeks to enforce a collective agreement, at least where arbitration is conducted by an independent body appointed by the council. It is now provided expressly that a council may refer an unresolved dispute regarding compliance with its collective agreement to arbitration by an arbitrator appointed by the council [s33A (4) (a)]. If a party to the dispute who is not a party to the council objects to the arbitrator, the council must request the CCMA to appoint an arbitrator [s33A (4) (a)]. Such an arbitrator must be paid for by the council and the arbitration will not fall under the auspices of the CCMA [s33A (4) (c)]."

The provisions relating to statutory councils were the result of a compromise between government and the big unions to allay union fears that bargaining councils would not do enough to promote centralised collective bargaining.¹²⁵ Only 30% representivity on the part of trade unions and employers organisations is sufficient for the establishment of a statutory council. Its functions are more limited but similar to those of a bargaining council. They also include dispute resolution and the entering into of collective agreements.¹²⁶

Unlike bargaining council membership, which is voluntary, membership of statutory councils by unions or employer organisations can be enforced by ministerial order.¹²⁷ Another inroad into voluntarism and flexibility is the fact that a statutory council that has less than 30% representivity can still impose its agreements on other parties in the sector by submitting the agreements to the Minister, who may promulgate the agreements as if they were determinations under the BCEA.¹²⁸

As seen above, the legislature was intent on enforcing sectoral regulation of conditions of employment by conferring *quasi* legislative powers on the Minister by the extension of bargaining council and statutory council agreements to non-parties in the sector.¹²⁹

4.4 Workplace Forums¹³⁰

¹²⁵ See Grogan *Workplace Law* (2003) 7th ed 302-303.

¹²⁶ In terms of s 43 other functions include the promotion and establishment of training and education schemes, the establishment and the administration of social security schemes. These powers can be extended by agreement (s 43(2)).

¹²⁷ S 41.

¹²⁸ S 44.

¹²⁹ For critical comments regarding these provisions see Barker “The Implications of Labour Legislation for the Performance of the Labour Market” in Finnemore and Van Rensburg *op cit* 2000 156-157; Bendix *Industrial Relations in the New South Africa* (2002) 286-287; Du Toit *et al op cit* 266-267 and Du Toit *et al Protecting Workers or Stifling Enterprise? Industrial Councils and Small Business* (1995) 2-5.

¹³⁰ See generally Grogan *Workplace* 293-298 ; Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 323-359; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 495-524; Basson *et al Essential Labour Law* (2003) vol 2 182-195.

The idea behind workplace forums is that worker participation will result in workplace democracy¹³¹ which in turn would engender high rates of productivity and labour peace enabling South African companies to compete globally.¹³² The Act makes provision for the establishment of workplace forums¹³³ for the promotion of worker participation at the workplace in order to achieve the legislature's stated objective of workplace democracy.¹³⁴ The intention of the legislature was that there should be a dual system of collective bargaining: more antagonistic forms of negotiation concerning distributive issues such as wages and benefits should not occur at plant level but rather at industrial or sectoral level (i.e. at bargaining councils).¹³⁵ Co-operative joint problem solving and decision making with worker

¹³¹ See Basson *et al op cit* vol 2 25.

¹³² Olivier "Workplace Forums: Critical Questions from a Labour Law Perspective" 1996 *ILJ* 812 813; Finnemore and Van der Merwe *Introduction to Labour Law in South Africa* (1996) 154-155; Bendix *op cit* 338; Summers "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 803 where it is stated "Examination of various labour relations systems shows, I believe that no industrial society can compete and prosper in the world market unless there is cooperation and mutual problem solving between management and workers. Workers – even unskilled and uneducated workers – know things about the reality of production processes in their workplaces, the causes of defective products, lost time and work injuries, and the potential for improvement which management never learns.... Every knowledgeable personnel expert agrees that giving the workers a voice in the decisions which affect their working life is essential for productivity and profitability. And giving workers a voice is equally essential for improving the quality of employees' working life and providing a democratic workplace. The worker's voice cannot be shouts of protest or demands, answered by the employer's assertion of management prerogatives. The workers' voice must be one which answers management's seeking of assistance with a willingness to share in problem solving and a willingness to consider employees not as suppliers of hours of labour but as partners in the enterprise."

¹³³ S 213 defines a workplace as the place or places where the employees of an employer work. If an employer conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace. See also in this regard Van Jaarsveld, Fourie and Olivier *op cit* par 500. Ch V of the LRA regulates workplace forums and defines who an employee is for the purposes of a workplace forum. In this context an employee is any person, except a managerial employee whose contract of employment or status confers the authority to represent the employer in dealings with the workplace forum or determine policy or take decisions that may be in conflict with the representation of the employees in the workplace. See Van Jaarsveld, Fourie and Olivier *op cit* par 499 in this regard.

¹³⁴ See Basson *et al op cit* vol 2 182-183.

¹³⁵ Grogan *Workplace* 293.

participation concerning matters of mutual interest between employer and employees, such as strategic business decisions, the introduction of new technology, health and safety, affirmative action measures and the like should be reserved for collective bargaining at the workplace itself.¹³⁶

Some trade unions especially the larger ones felt that consultative bodies at the workplace might threaten their position in the collective bargaining system.¹³⁷ Trade union leaders felt that a workplace forum might usurp their functions since workplace forums represent all employees irrespective of whether they are trade union members or not.¹³⁸ In order to allay these trade union fears the legislature made provision only for union initiated workplace forums.¹³⁹ Furthermore, in line with the legislature's stance in favour of majoritarianism, only a trade union or a number of trade unions that jointly represent the majority of employees at a workplace can initiate the creation of a workplace forum.¹⁴⁰ Another requirement is that there must be a minimum of 100 employees at the workplace.¹⁴¹

The Act provides for certain matters over which the employer is obliged to:

- (i) consult with the workplace forum;¹⁴²
- (ii) give information to the workplace forum¹⁴³; and
- (iii) make joint decisions with the workplace forum.¹⁴⁴

In line with the legislature's stance on voluntarism the parties can through collective bargaining regulate matters for consultation¹⁴⁵ and joint decision making¹⁴⁶ by the workplace forum.

¹³⁶ Bendix *op cit* 564, 307, 343, 565; Summers "Workplace Forums From a Comparative Perspective" 1995 *ILJ* 803.

¹³⁷ Olivier *op cit* 812 813.

¹³⁸ S 79(a); Van Holdt "Workplace Forums: Can They Tame Management or Not?" (1995) *SA Labour Bulletin* 19(1) 32, 61; Du Toit "Collective Bargaining and Worker Participation" 1996 *ILJ* 1547.

¹³⁹ S 80(2)

¹⁴⁰ S 80(2); See Olivier *op cit* 810-812 for a discussion of the manner in which the LRA provides for majority union preference with reference to workplace forums.

¹⁴¹ S 80(1).

¹⁴² S 84.

¹⁴³ S 89.

¹⁴⁴ S 86.

5 **Collective Bargaining Through Industrial Action**

Without the right to strike, unions have very limited bargaining power in the collective bargaining process.¹⁴⁷ In *National Union of Metal Workers of SA & others v Bader Bop (Pty) Ltd* ¹⁴⁸ the Constitutional Court states: “The right to strike is essential to collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle”. Van Jaarsveld, Fourie and Olivier explain: “The right to strike must not be seen in isolation but viewed and understood against the background and in the context of employees’ right to associate and organise themselves and then to exercise the right to bargain collectively.”¹⁴⁹ The authors then quote Basson to support their argument: “Once employees are organised in trade unions, they are able to conduct negotiations with the employer on a more or less equal footing. But effective collective bargaining can still take place only if the demands made by the trade union are accompanied by the capacity to embark upon collective action in the form of collective withdrawal of labour as a counterweight to the power of the employer to hire and fire employees or to close its plant.”¹⁵⁰

The Constitution provides that every worker has the right to strike.¹⁵¹ The right to strike is also provided for in the LRA.¹⁵² Although the Constitution does not make provision for the employer’s right to lock out the LRA does; the definition of a lock-

¹⁴⁵ S 84(1).

¹⁴⁶ S 86(1).

¹⁴⁷ *Bendix op cit* 522.

¹⁴⁸ *Supra* 355.

¹⁴⁹ *Op cit* par 908.

¹⁵⁰ Basson “The Dismissal of Strikers in South Africa (Part 1) “ 1992 *SAMLJ* 292.

¹⁵¹ S 23(2) (c); *Ex parte Chairperson Constitutional Assembly: In re Certification of the Constitution of the RSA*, 1996 1996 *ILJ* 821 (CC), *Betha v BTR Sarmcol CA Division of BTR Dunlop Ltd* 1998 *ILJ* 459 (SCA); Maserumule “A Perspective on Developments in Strike Law” 2001 *ILJ* 45; Basson “Die Vryheid om te Assosieer” 1991 *SAMLJ* 181-182.

¹⁵² S 64(1).

out however, is more limited than the definition of a strike¹⁵³ and is consequently of more limited practical application.¹⁵⁴

Where employees strike over matters that they are entitled to strike (*inter alia* disputes of interest),¹⁵⁵ and the prescribed procedure is followed,¹⁵⁶ strikers are protected from dismissal for partaking in the strike, and the employer cannot claim damages for loss of income resulting from the strike either from the trade union(s)

¹⁵³ S 213.

¹⁵⁴ See too s 64(1) of LRA.

¹⁵⁵ S 65 provides:

- (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-
 - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
 - (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
 - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
 - (d) that person is engaged in-
 - (i) an essential service; or
 - (ii) a maintenance service.
- (2)
 - (a) Despite section 65 (1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.
 - (b) If the registered trade union has given notice of the proposed strike in terms of section 64 (1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.
- (3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-if that person is bound by-
 - (i) any arbitration award or collective agreement that regulates the issue in dispute; or
 - (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
 - (iii) any determination made in terms of the BCLA and that regulates the issue in dispute, during the first year of that determination.

¹⁵⁶ S 64 (1); see also Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 296; Basson *et al Essential Labour Law* (2003) vol 2 104; Grogan *Workplace Law* (2003) 7th ed 331; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 916.

or the strikers themselves.¹⁵⁷ Where an employer dismisses an employee for taking part in a protected strike i.e. a strike where the correct procedure has been followed and where striking is the appropriate dispute resolution procedure it will constitute an automatically unfair dismissal.¹⁵⁸

The legislature's stance therefore with reference to industrial action is that it has a legitimate role to play in the system of collective bargaining provided it is preceded by attempts at reaching settlement through negotiation and conciliation and no other remedies are available.¹⁵⁹

D Conclusion

This brief overview of the sections of the LRA that deal with collective labour law serves to demonstrate the legislature's faith in the ability of collective bargaining to achieve the Act's ambitious objectives. The legislature provided a framework which encourages collective bargaining by 'super' unions¹⁶⁰ especially at sectoral level with the intention of achieving the following:

- (i) minimum conditions of work and wages could be collectively bargained and set by employers and trade unions within each sector. This would result in uniformity and equality within industries; and
- (ii) the parties themselves would settle their own disputes resulting in a type of self-governance within industries.¹⁶¹

¹⁵⁷ S 67.

¹⁵⁸ S 187(1) (a); *Adams v Coin Security Group (Pty) Ltd supra*; *SACWU v Afrox Ltd* 1999 ILJ 1718 (LAC).

¹⁵⁹ Grogan *op cit* 326 and Basson *Essential Labour Law* (2002) vol 2 103.

¹⁶⁰ An exception is illustrated by the fact that even unions that do not enjoy 'sufficient representivity' are entitled to bargain collectively with the employer and even strike in order to attain organisational rights (*Bader Bop (Pty) Ltd v National Union of Metal and Allied Workers of South Africa & Others* 2002 ILJ 104); *National Union of Metal & Allied Workers of Sa v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305.

¹⁶¹ See Baskin "South Africa's Quest for Jobs Growth and Equity in a Global Context" 1998 ILJ 986.

Finally as Summers suggests,¹⁶² successful implementation of workplace forums would result in democratisation of the workplace accompanied by enhanced cooperation between the parties and consequently higher rates of productivity.¹⁶³

¹⁶² *Op cit* 812.

¹⁶³ See Basson *et al op cit* vol 2188.