

The Right to Strike in Respect of Employment Relationships and
Collective Bargaining

A Dissertation By

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DECLARATION

I declare that this study entitled

The Right to Strike in Respect of Employment Relationships and Collective Bargaining is my work, that all the authorities I have used or quoted have been indicated and acknowledged by names of complete references and that neither I nor anyone else in this university or any other educational institution previously submitted this study for degree purposes.

Cynthia Dithato Malebye

Signed at Pretoria on the 5th day of May 2014.



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SUMMARY

South Africa has in recent years seen employees embarking on strike actions from different employment sectors. This impacts adversely on *inter alia* the economy, investor confidence and the high rate of unemployment. As will be pointed out in the research, BMW took a decision in 2013 to stop production into South Africa as a result of the labour unrest that caused them to lose 13000 cars in production and to miss supply targets. The strike in the construction industry in August to September 2012, cost employers an estimated R2.7 billion in lost revenue.

The research is aimed at establishing the cause of the unrest that is affecting South Africa. The strike action should be the ultimate weapon when negotiations between the employer and employees have failed. Parties to the employment relationship are encouraged through the LRA and the Constitution to engage in collective bargaining.

Mechanisms such as organisational rights, bargaining forums, freedom of association, no duty to bargain are aimed at achieving orderly collective bargaining. Despite the current labour laws in place, which in my view are not onerous, negotiations still fail. Could it be that the trade unions are desperate to gain and maintain popularity and as a consequence present the employer with unreasonable demands? Could it be that collective bargaining process needs to be revisited? Educating trade union leaders should be considered as one of the factors in arriving at a solution.

Some employers are considering alternatives rather than increasing their labour force. With the high unemployment rate, this is a worrying reality and a solution is urgently required.

KEW WORDS

1. Labour Law
2. Strike
3. Collective bargaining
4. Employment relationships
5. Trade unions
6. Freedom of Association

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Chapter 1– Background and Purpose

1. Background

1.1 Employment Relationships

Employment relationships are characterised by an element of power. Workers are often at a disadvantaged position in relation to the employer. Therefore, the main aim of labour law is to counteract the inequality of bargaining power, which is inherent to the employer-employee relationship. By bargaining collectively with labour, management seeks to give effect to its legitimate expectation that the planning of production and distribution should not be frustrated through interruption of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectation that wages and other conditions of work should be such as to guarantee a stable form of existence.¹

This relationship is regulated by both national and international laws with the aim to achieve fairness. This fact is confirmed in the preamble of the constitution of the International Labour Organisation (ILO), which states that it is imperative to regulate working conditions with the aim of addressing the injustice in the conditions of labour. South Africa has ratified Convention 98 of 1949 of the ILO in respect to the right to organise and to bargain collectively. This is one of the core Conventions of the ILO, which is aimed at minimising the inherent power on the part of the employer in the employment relationship. As a member state, South Africa's national laws must be interpreted and applied to give effect to international laws. Both the current Labour Relations Act (LRA)² and the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) respectively provide that effect must be given to obligations incurred by the Republic as a member state of the ILO, and that consideration must be given to International law when interpreting the Bill of Rights in the Constitution.³

¹ *Fawu v Speckenhams* Supreme 1988 ILJ 628 (IC).

² 66 of 1995.

³ S 1 of the LRA 66 of 1995 and s 39 of the Constitution.

1.2 The Right to Strike and Collective Bargaining

The right of recourse to industrial action is regarded as a potential weapon that serves to maintain the equilibrium between labour and the concentrated power of capital.⁴ This right is enshrined in the LRA and the Constitution.⁵ If a party still cannot bargain or cannot bargain in good faith even after the rights as provided for by the Act have been exercised, then the option is industrial action.⁶ Industrial action is however not permitted in certain instances as provided for in section 65 of the LRA.⁷ In the SANDU case,⁸ Counsel for SANDU contended that by eliminating the right to strike in the military sector the law giver has removed the most powerful, if not the only incentive to the SANDF to bargain: The only way to get the latter to the bargaining table in these circumstances, it was argued, is through judicial compulsion. Conradie JA responded that there is merit in this contention insofar as it suggests that the right to bargain is meaningless, unless it is enforced by some mechanism to drive the parties to the bargaining table. The Judge held that ideally, economic retribution should fulfil this function, but in situations where it would be too costly or dangerous to permit parties to assail each other economically, the law provides for an alternative.⁹

Labour drives the economic hub and it is important to have mechanisms that enhance efficient working relationships. Collective bargaining is one of those mechanisms. However, it is true that collective bargaining cannot remain stagnant; it has been referred to as a “constantly mutating institution”.¹⁰

⁴ Van Niekerk *et al*/Law @ work (2008) Chapter 13.

⁵ S 64(1) of the LRA and s 23(2)(c) of the Constitution.

⁶ Grogan “Collective Bargaining” 1995 Employment Law Vol 12 No. 12.

⁷ Limitations on the right to strike in the LRA include: A collective agreement prohibiting a strike. An agreement requiring the issue in dispute to be referred to arbitration. A person having a right to refer the issue in dispute to arbitration or Labour Court provided the issue does not fall under sections 12 and 15. A person engaged in essential service or maintenance service. Subject to a collective agreement, a person is not allowed to take part in a strike if bound by a collective agreement, arbitration award, determination by the Minister in terms of section 44 regulating the issue in dispute, or where there is a determination in terms of the Wage Act regulating the issue in dispute, during the first year of that determination.

⁸ *SA National Defence Union v Minister of Defence* 2006 27 ILJ 2276 (SCA) at 2286-2287.

⁹ The Judge held that the alternative is not for a court (or other tribunal) to compel the parties to bargain. The alternative is compulsory arbitration.

¹⁰ Brown and Oxenbridge “Trade Unions and Collective Bargaining” in Barnard, Deakin and Morris *The Future of Labour Law Liber Amicorum Sir Bob Hepple QC* (2004) at 63.

2. Research Questions

- 2.1 What are the causes of the concerning labour unrest in South Africa?
- 2.2 Is industrial action the ultimate solution to a dead-lock or has the time come to re-look at collective bargaining?

3. Significance of the research

Labour unrest has been a dominant feature in South Africa recently. The state has in certain instances intervened in an attempt to prevent unemployment resulting from the employers' inability to carry the labour force and production costs under lengthy periods of industrial action. The research will look into factors contributing to labour unrest and the importance of the right to strike. Of particular interest is how other countries are regulating industrial action and what mechanisms are being used. Another aspect which the research will focus on is the impact of labour unrest on investors. Collective bargaining will be considered to establish if it enhances the working relationships and whether change is needed.

4. Preliminary Literature

4.1 A comparative study involving research done by prominent scholars in the field of labour law will form a framework in arriving at the answers to the questions posed. The literature will highlight factors adversely affecting the employment relationship, significance of industrial action and its impact on the economy and collective bargaining.

4.2 The literature to be used will address the following aspects:

4.2.1. The Purpose of Labour Law.

The definition and evolution of the right to strike. The constitutional right to strike and the right to freedom of association and to bargain collectively. The requirements and limitations to the right to strike. The literature will further look into the justifications to a right to strike.¹¹

¹¹ *R v Smit* 1995 1 SA 239 (K); *Raad van Mynvakbonde v Die Kamer van Mynwese* (1984) 5 ILJ 344 (IC); Myburgh "100 Years of Strike Law" (2004) 24 ILJ 962-976; *Certification of the Constitution of*

- 4.2.2. The system of *laissez-faire* and its principles will be analysed. Its appropriateness to the South African labour law system will be looked at and the trends in collective bargaining. A comparison between our system of collective bargaining and that of other countries.¹²
- 4.2.3 The freedom of association and the right to strike. The effect of organisational rights on the employee organisations and on the employer. The voluntarist nature of collective bargaining and the reasons thereof. The purpose of collective agreements.¹³
- 4.2.4. The purpose of collective bargaining. The supportive role of collective bargaining to labour law. Is collective bargaining an enhancer to an efficient employment relationship? The right to lockout. The future of collective bargaining.¹⁴
- 4.2.5. International perspective on collective bargaining and the right to strike.¹⁵ How does collective bargaining and industrial action impact on the economy? Whether South African labour law is achieving its purpose as set out in the Constitution and in the LRA.¹⁶

5. Methodology

The research will entail the analysis of legislation, case law, journals and articles. A comparison will be made on the applicable laws in South Africa and other countries

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- the Republic of South Africa*, 1996, In Re (1996) 17 ILJ 821 (CC); LRA; Thompson and Benjamin South African Labour Law Volume 1 AA1-305. The Constitution.
- ¹² Davies & Freedland Kahn-Freund's Labour and the Law (1993) 3rd ed Chapter 1 "Some Reflections on Law and Power" 12-28; Du Toit "What is the Future of Collective Bargaining (and Labour Law) in South Africa?" (2007) ILJ 1405-1435; Maree "Trends in collective bargaining: Why South Africa differs from global trends".
- ¹³ LRA 66 of 1995; Van Jaarsveld *et al* Principles and Practice Chapter 8; Mischke "Getting a foot in the Door" (2004) CLL Vol 13 6 5; *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 ILJ 305 (CC); Van Jaarsveld Chapter 11 Part E; Landman "The Closed Shop born again: a Surprise from the Labour Relations Act" (1995) Vol 5(2) Contemporary Labour Law 11; Van Niekerk Chapter 11; Landman "No free ride: The Agency Shop in South Africa" (1996) Vol 6(1) Contemporary Labour Law 1; SA *National Defence Union v Minister of Defence* 2007 9 BLLR 785 (CC).
- ¹⁴ Thompson and Benjamin AA1-302; *Ex Parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at 795; Davies and Friedland Labour law (Wiedenfeld & Nicholson) 1979 at 132-3.
- ¹⁵ Summers (eds Engels & Weiss) Labour Law and Industrial Relations at the turn of the Century (1998) "Exclusive representation: A Comparative enquiry into a 'unique' American principle" 569-591.
- ¹⁶ Finnemore Van Rensburg Contemporary Labour Relations 2nd ed 2002.

with the aim to identify any loopholes in our labour laws governing strikes and collective bargaining.

6. Proposed Structure

The research will comprise of the following chapters:

Chapter 1

This is an introductory chapter which outlines the research.

Chapter 2

This chapter will focus on the following:

1. Background and purpose
2. International perspective and Conventions 87 and 98 of the ILO
3. Definition and evolution of the right to strike
4. The Constitution and the LRA

Chapter 3

The following aspects will be looked at in this chapter:

1. The right to strike and freedom of association
2. Definition, requirements and limitations to the right to strike and the right to lockout
3. The *laissez faire* approach, its principles and appropriateness in South Africa.
4. The trends in collective bargaining and comparisons with other countries
5. Importance of collective bargaining

Chapter 4

The chapter discusses the following:

1. The right to strike and the majoritarian system
2. Organisational rights
3. Collective agreements
4. No duty to bargain in the LRA and the Constitution
5. Bargaining forums

6. Collective bargaining, its supportive role, enhancing employment relationships and its future

Chapter 5

In conclusion, an analysis is made on the following:

1. The rise of labour unrest
2. Collective bargaining and the causes of strike actions
3. Impact of strikes and collective bargaining on unemployment and the economy
3. Comparison of our labour laws with other countries
4. Is change eminently required?

Chapter 2 – Evolution of the Right to Strike and Applicable Legislation

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Chapter 2 – Evolution of the Right to Strike and Applicable Legislation

1. Background and Purpose of Labour Law

Employees embark on a strike action when negotiations with the employer have failed. The employment relationship is characterised by the employer's dominance and the employee's most powerful weapon to fight against the employer is a strike action. The important role of labour law is to regulate this unequal relationship between the employer and the employee and to promote a healthy and efficient working environment. Since the result of labour, in terms of products or services rendered, has economic value, there will be someone willing to pay for the labour needed to produce these products and services. One of the primary reasons why people offer their labour is to obtain remuneration. Extrinsic remuneration in the form of salaries or wages motivates people to sell their labour.¹⁷

The main aim of labour law and labour legislation is therefore to counteract the inequality of bargaining power which is inherent in the employer-employee relationship.¹⁸ Employees are not in a position to bargain on equal terms with their employers, and most often the employer is in a position to dictate the terms of the relationship. The traditional function of labour law is to address this imbalance.¹⁹ The result of labour will not be sufficiently enhanced in an environment where one of the parties is unable to properly contribute to decisions affecting the working relationship.

In South Africa there are mechanisms aimed at addressing the imbalance of power in the employment relationship. The Basic Conditions of Employment Act 75 of 1997 (BCEA), adopts this mechanism by fixing statutory basic conditions of employment that constitute a term of any contract of employment, unless more favourable terms are either agreed or imposed by another regulatory measure.²⁰ The Labour Relations Act 66 of 1995 (LRA) is another mechanism. The LRA guarantees employees the right to join trade unions and to participate in their activities, affords representative trade unions a set of organisational rights, establishes collective bargaining

¹⁷ Finnemore Van Rensburg *Contemporary Labour Relations* 2002 76.

¹⁸ *Fawu v Speckenham Supreme* 1988 ILJ 628 (IC).

¹⁹ Van Niekerk *Law @ work* (2008) 4.

²⁰ *Ibid.*

structures, recognises and gives effect to collective agreements and upholds the right to strike.²¹

2. International Perspective

South Africa is a member of the International Labour Organisation (ILO) and has ratified the ILO's Conventions 87 and 98 which promote the right to freedom of association and the right to organise and bargain collectively. Collective bargaining affords the employee an opportunity to engage with the employer on issues of mutual interest and to avert industrial action. By bargaining collectively with labour, management seeks to give effect to its legitimate expectation that the planning of production and distribution should not be frustrated through interruption of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectation that wages and other conditions of work should be such as to guarantee a stable form of existence.²²

Conventions 87 and 98 do not explicitly deal with the right to strike. However, Convention 87 provides for the right of workers' organisations "to organise their administrations and activities and to formulate their programmes". The strike is interpreted as one of the essential activities of the unions. The Freedom of Association Committee of the ILO has laid down the basic principle that the freedom to strike is one of the essential and legitimate means through which workers and their organisations may further defend their social and economic interests.²³ The constitution of the ILO provides that it is imperative to regulate working conditions with the aim of addressing the injustice in the conditions of labour. The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) and the LRA recognise and endorse international standards and practices.²⁴ The protection of the right to strike and the regulation of a protected strike by the LRA, have played an imperative role in South African labour law.²⁵

²¹ Fn 3. See s 4 of the LRA on employees' right to freedom of association, s 12-16 on organisational rights, s 27- 48 on bargaining councils and statutory councils, s 23-26 on collective agreements and s 64(1) on the right to strike.

²² *Fawu v Speckenham Supreme*.

²³ Finnemore Van Rensburg 368.

²⁴ S 39 of the Constitution, LRA's preamble and s 1.

²⁵ Landis A practical guide for the workplace 2nd ed (2005) 1.

3. Definition and Evolution of the Right to Strike

3.1 Definition

The LRA defines a strike as:

*the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are, or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime, whether it is voluntary or compulsory.*²⁶

3.2 Evolution of the Right to Strike

3.2.1 The Period between 1924 to 1956

Up to 1924, the right to strike was affected by two sets of legislation. The Railway Regulation Act of 1908, which prohibited strikes by white workers, thus railway employees were not allowed to strike. A penalty for an illegal strike action by these employees resulted in criminal prosecution. The second piece of legislation was the Transvaal Industrial Dispute Bill of 1909 which required that when an employer or employee proposed changes in working conditions, such changes were to be preceded by one month's notice.²⁷ In the event of a dispute, no strike or lockout could take place until an investigation was conducted by a conciliation board appointed by the Government and a month's notice had elapsed from the date of publication of the notice. The Bill excluded non-whites and public servants and it was passed into law.²⁸

The period from 1924 to 1979 was governed by the Industrial Conciliation Bill. This Bill allowed the creation of Standing Industrial Councils. Councils had wide powers in negotiations and wage determination. This Bill was passed into law and was called the Industrial Conciliation Act 28 of 1956 (referred to as the ICA).²⁹ The ICA entrenched the exclusion of black employees from the statutory system, introduced

²⁶ S 213.

²⁷ Myburgh “100 Years of Strike Law” 2004 24 ILJ 962-976.

²⁸ *Ibid.*

²⁹ Fn 11.

statutory job reservation and established measures to segregate those unions that were non-racial.³⁰

The period from 1979 to 1995 was dominated by strikes by black people particularly in Natal. Young idealistic lawyers and trade unions were involved. Big business accepted that blacks should be included in the ambit of the ICA. The Wiehahn Commission was established as a consequence.³¹ The Commission noted that consequent to the economic boom of the late 1960s, the increased rate of industrialisation and the demand for skilled labour had resulted in black employees moving into skilled occupations. The Commission considered that this had placed strain on the racially-exclusive industrial council system and exposed the limitations in the Black Labour Relations Regulation Act 48 of 1953, a statute that conferred limited powers on workplace committees to represent black employees. The Commission issued a report that culminated in amendments to the 1956 Act. The most significant of these was the extension of trade union rights to black employees, the enactment of a definition of unfair labour practice, and the establishment of the Industrial Court.³²

The Labour Relations Act 28 of 1956 which was introduced after the ICA, had provisions governing strikes. Protection of striking employees was not provided for. The Act did not deal with the fairness of a striking employee. Industrial Courts had jurisdiction to determine disputes in regard to unfair labour practices. Their jurisdiction was wide. Where employees were striking, the Industrial Court would establish whether it was unfair labour practice to dismiss them. This reduced the employer's right in terms of common law to dismiss a striking employee on the basis of breach of contract.³³

³⁰ Van Niekerk 11.

³¹ Fn 11.

³² Fn14.

³³ Fn 11.

3.2.2 The Common Law Position of Striking Employees

The common law position regarding striking employees was determined in the case of *R v Smith*.³⁴ In the Smith case, it was held that the employer had a right to dismiss an employee who refused to work. The refusal constituted a breach of contract. The argument on behalf of the employees that the Industrial Conciliation Amendment Act 36 of 1937 had the effect of prohibiting an employer from dismissing an employee on the ground of the employee's refusal to work, if such refusal arose out of his participation in a legal strike was dismissed by the court. The court held that Act 36 of 1937 did not legalise a strike action. The aim of the Act was to provide that in certain circumstances a strike would constitute a criminal offence and that if those limited circumstances were absent, then no criminal offence was committed and in that limited sense the strike was legal. It did not however follow that the employer is deprived of his common law right to dismiss an employee who refuses to work.

3.2.3 The Protection of Striking Employees

The protection of a striking employee was first considered in the case of *Raad van Mynvakbonde v Die Kamer van Mynwesse*.³⁵ The Industrial Court had to determine a clause in the employment contract which allowed the automatic termination of the contract if an employee participated in a strike whether lawful or unlawful. The court held that our legal system recognises the liberty of freedom to strike. That neither the common law or the Labour Relations Act limit the employer's common law right to view an employee's participation in a strike as a breach of the employment contract and to terminate the contract. The court held that it will however be a logical development in our courts' unfair labour practice jurisdiction that a dismissal of an employee participating in a lawful strike is an unfair labour practice. The court held that the deciding factors will depend on the different circumstances of each case. Examples of such factors would be the duration of the strike, conduct of the striking employees, reasonableness of the employees' refusal to accept the employer's offer at the time of dismissal and the degree of flexibility shown by the employer.

The case of *Raad van Mynvakbonde v Die Kamer van Mynwesse* had the consequence of putting the focus of fairness on dismissals. This signifies the

³⁴ 1955 1 SA 239 (K).

³⁵ (1984) 5 ILJ 344 (IC).

Industrial Court's move away from the common law position of determining whether a dismissal was lawful to the fairness of the dismissal by determining whether or not the dismissal constituted an unfair labour practice.

3.3 Unfair Labour Practice in Terms of the 1956 LRA

The question whether and when the dismissal of strikers constituted an unfair labour practice in terms of the 1956 LRA generated copious amounts of litigation in the labour courts, and elicited an abundant, complex and sometimes confusing jurisprudence.³⁶ One issue was clear, employers could no longer rely solely on their common law right to dismiss strikers, or on the fact that strikers had conducted themselves illegally. Beyond that, there was no short or definitive answer as to whether and when strikers could be fairly dismissed. The courts took into account a host of factors, circumstances and considerations to answer that question in each specific case.³⁷

The 1956 LRA presented problems due to its broad unfair labour definition. This had a consequence of placing a duty to bargain collectively, a tool essential to avoid strike actions. In terms of the Act, the Industrial Court could order that a party had committed an unfair labour practice where such party has failed to bargain collectively or to bargain in good faith.³⁸ Vettori³⁹ says that the court had jurisdiction or power to force the parties to bargain and it could prescribe what constitutes bargaining in bad faith, what may or may not be put on the bargaining table, at what level the party should bargain and with whom the employer should bargain.

In my view, the above illustrates a dictatorship role that the Act placed in the hands of the Industrial Courts. The parties to collective bargaining represent the interests of their members and have the precise understanding of what will work best in a particular workplace and sector. For a court, which is not at all involved in the affairs of the parties to the employment relationship, to determine the terms at which the parties must bargain, defeats the whole purpose of collective bargaining.

³⁶ *NUM v Marievale Consolidated Mines* (1986) 7 ILJ (IC), *NUMSA v Vetsak Co-operation Ltd* (1996) 17 ILJ 455 (A), *NUM v Black Mountain Mineral Development Co (Pty) Ltd* (1997) 18 ILJ 439 (SCA), *Raad van Mynvakkbonde v Die Kamer van Mynwesse*, *R v Smith*.

³⁷ Grogan Workplace Law (2010) 398.

³⁸ Vettori "A Judicially Enforceable Duty to Bargain?" 2005 *De Jure* 382.

³⁹ *Ibid.*

The enforceable duty to bargain was criticised as causing uneven, often subjective rulings, which left litigants uncertain as to when, with whom and in respect of which topics the duty to bargain would arise, a proliferation of eligible agents with rights to bargain at plant level, a duality between centralised and plant level bargaining, and a vague and often subjective concept of good faith bargaining⁴⁰

The Industrial court's broad unfair labour practice was illustrated in the case of *NUM v East Rand Uranium Co Ltd*,⁴¹ where the court declared the employer's conduct an unfair labour practice. The employer in this case, who was in negotiations with the trade union, directly negotiated an offer with the employees, which was materially different from the offer it presented to the trade union. This happened at the time when the trade union was still the negotiating agent and was still regarded as such by the employer. The Appellate Division upheld the decision of the Industrial Court that the employer's conduct of bypassing the trade union and directly dealing with the employees amounted to unfair labour practice.

3.4 The Right to Strike and Unfair Labour Practice in Terms of the 1995 LRA

The right to strike is one of the significant changes brought about by section 64 of the LRA of 1995. The Act unlike its predecessor, clearly defines unfair labour practice in section 186(2) (a), (b), (c), (d). The importance of the right to strike was correctly emphasised by the Constitutional Court where an objection was raised on the provision of the new Constitution, which included the employee's right to strike and excluded the employer's right to lockout.⁴² The court rejected the objection and held that the right to strike is often included in constitutions as a fundamental right. The court held that the right to strike and the right to lockout do not mirror each other and are therefore not always equivalent. The court further held that employers have various weapons to use against employees such as dismissal, replacement labour, unilateral change of terms and conditions and employees only have the right to strike.

Before the implementation of the new Constitution in South Africa, employees only enjoyed the freedom to strike but not the right to strike. This past situation implied

⁴⁰ Du Toit *et al* Labour Relations Law A Comprehensive Guide (2003) 228-229.

⁴¹ 1991 ILJ 1221 (A).

⁴² *Certification of the Constitution of the Republic of South Africa, 1996, In Re* (1996)17 ILJ 821(CC).

that the employees who embarked on a strike, even if it was a legal strike were not protected from dismissal as in effect they were in breach of their employment contracts in terms of common law.⁴³ A fundamental right contained in the Constitution is that workers will have “the right to strike for purposes of collective bargaining”. In other words the right must be functional to collective bargaining.⁴⁴

The right to strike is based on the philosophical argument that without the power to affect the course of events, a person or group lacks the responsibility to reach decisions. Power is the source of responsibility. Without the right to strike, unions will lack the foundation for voluntary negotiation and agreement. If collective bargaining, as a means of resolving conflict, is in the public interest then so is the right to strike which is a fundamental underpinning of the power base of most unions involved in negotiations.⁴⁵

Item 6 of schedule 8 of the LRA provides for guidelines to be followed prior to dismissing an employee participating in an unprotected strike action.⁴⁶ A strike will be protected if it complies with procedural and substantive requirements provided in sections 64 and 65 of the LRA.

4. The Constitution and the LRA

Legislation regulating the right to strike has advanced throughout the years, with the consequence of the right being protected by both section 23 in the Constitution and section 64 of the LRA of 1995. This highlights the important role the industrial action plays in employment relationships. The impact of an industrial action touches on various aspects such as politics, economy, investor confidence etc, hence the Constitutional Court in the *Certification of the Constitution of the Republic of South Africa*,⁴⁷ correctly referred to this right as fundamental.

Industrial action is a powerful weapon which employees can utilise against the employer in instances where a dispute cannot be resolved by negotiations. Although it has adverse effect for both parties in the employment relationship, it is at times

⁴³ Finnemore Van Rensburg 368.

⁴⁴ *Ibid.*

⁴⁵ Finnemore Van Rensburg 367.

⁴⁶ The requirements of a strike and item 6 are dealt with in detail in chapter 2 of this study.

⁴⁷ *Certification of the Constitution of the Republic of South Africa.*

essential to achieve certain goals. Denying employees the right to strike, amounts to them being deprived of the important tool to be utilised against the employer. If a party cannot bargain or cannot bargain in good faith, even after the rights as provided for by the Act, have been exercised, the option is industrial action.⁴⁸

The right to strike is never absolute or unconditional since the exercise of this right can conflict with the interest of the larger society, especially where essential services are affected. Under certain circumstances strikes could lead to the collapse and bankruptcy of the employer with a resultant loss of job opportunities and devastating consequences on the local community,⁴⁹ hence it is necessary to have this right regulated by statute.

⁴⁸ Grogan “Collective Bargaining” 1995 Employment Law Vol 12 No.12.
⁴⁹ Fn 24.

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Chapter 3 – The Right to Strike and Freedom of Association

1. The Right to Strike and Freedom of Association

Most industrialised countries recognise the right or freedom to strike, although this may not be explicitly embodied in legislation. Democratic South Africa, along with Italy, France and Spain, is one of the countries to enshrine this right in its Constitution. Workers who are prevented from withdrawing their labour to strengthen their bargaining position are deprived of a crucial element of their bargaining power.⁵⁰ The right to strike will be meaningless if employees and their organisations are not allowed to form and join a trade union and to participate in its activities. The right of employees to associate freely is enshrined in the Constitution and in the Labour Relations Act.⁵¹ This right is also internationally acknowledged and was confirmed as follows by the ILO: “Employees and employers without any distinction whatsoever shall have the right ... subject only to the rules of the organisation concerned, to join the organisation of their own choosing without previous authorisation.”⁵²

A relationship exists between freedom of association and freedom of expression. The Constitutional Court in *Case & another v Minister of Safety and Security & others*⁵³, held that freedom of expression is one of a “web of mutually supporting rights” in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15), the right to dignity (section 10), as well as the right to freedom of association (section 18), the right to vote and stand for public office (section 19) and the right to assembly (section 17). The link between these rights protects the rights of individuals to form and express opinions, as well as collectively to establish associations and groups of people fostering and propagating their viewpoints.

Freedom of association is a universal human right. It gives rise to the establishment of democratic institutions such as trade unions which promote democracy, both in

⁵⁰ Cooper “Strikes in Essential Services” 1994 (15) *ILJ* 903.

⁵¹ S 18 of the Constitution and s 4 of the LRA.

⁵² Article 2 of Convention 87 of 1948. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, 5th ed (revised). S 23(2) of the Constitution gives every worker the right to form and join trade unions, to participate in their activities and programmes and to strike.

⁵³ 1996 (3) SA 617 at 631, par 27.

the workplace and in society at large.⁵⁴ Employees have the freedom to associate for the purpose of collective bargaining.⁵⁵ Freedom of association provides a basis for employees to *inter alia* form and join a trade union. A legal scheme aimed at protecting employees' and their unions' right to bargain collectively with their employer will be meaningless if the underlying right to first belong to that union were not safeguarded.⁵⁶ Conversely, freedom of association would remain an ineffective right if the right to bargain collectively and the right to strike were not recognised as well. These rights have the balancing of the unequal bargaining position of employees and employers in common. For this reason it is often accepted that the right to strike, for example, must be inferred from the right to associate freely, even though the right to strike is not explicitly mentioned.⁵⁷

The ILO's Convention 87 on freedom of association is one of the core conventions. The high regard to this convention is confirmed by the establishment of the Committee on Freedom of Association. The committee was established in 1951 to examine allegations of breaches of freedom of association submitted by an ILO member state, an employers' organisation or a worker's organisation.⁵⁸ Conventions 87 and 98 of the ILO, have been ratified by South Africa. These two conventions promote the right to freedom of association, and the right to organise and to bargain collectively. However, they do not deal explicitly with the right to strike, although Convention 87 provides for the right of workers' organisations "to organise their administration and activities and to formulate their programmes".⁵⁹ The strike is interpreted as one of the essential activities of unions. The Freedom of Association Committee of the ILO has laid down the basic principle that the freedom to strike is one of the essential and legitimate means through which workers and their organisations may further defend their social and economic interests.⁶⁰ The right to strike as protected in section 23(2) (c) of the Constitution and section 64(1) of the

⁵⁴ Landman "Freedom of Association in South African Labour Law" 1990 AJ 89.

⁵⁵ *Ibid* 91.

⁵⁶ S 23(2) and (3) of the Constitution grants every worker and employer the right to form and join a trade union and an employers' organisation respectively, and to participate in the activities and programmes of that trade union and employers' organisation. S 23(4) grants every trade union and every employers' organisation the right to determine its own administration, programmes and activities, to organise and to form and join a federation. S 4 and s 6 of the LRA regulate the employees' and employers' right to freedom of association respectively.

⁵⁷ Ben-Israel International Labour Standard: The Case of Freedom to Strike (ILO 1987) 27.

⁵⁸ Van Niekerk Law @ work (2008) 25.

⁵⁹ S 23(4) of the Constitution and fn 7.

⁶⁰ Finnemore Van Rensburg Contemporary Labour Relations (2002) 368.

LRA, is a collective right which requires organised employees to exert pressure on the employer. Individually, the right will fail to have an impact on the employer and thereby lose its purpose. It is for this reason that freedom of association is integral to the right to strike; it is a solid foundation to collective bargaining and to ultimately embark on industrial action.

The LRA grants freedom of association to employees, their trade unions, employers, employers' organisations and job seekers.⁶¹ The Act protects the employees, and job seekers against interference by employers, trade unions or any party. Employees and persons seeking employment may not be discriminated against for exercising the rights conferred by the LRA.⁶² The Act further protects employees and persons seeking employment against threats and prejudicial treatment for exercising their rights conferred by the Act.⁶³ The constitutional right to freedom of association is said to apply even where employees are not covered by the LRA.⁶⁴

In *South African National Defence Union v Minister of Defence and Another*⁶⁵, the Constitutional Court used the kind of a relationship contemplated by the common law contract of employment as a benchmark for determining the type of a working person protected by the right. In determining whether or not a soldier was a worker for the purposes of section 23, the court held that the relationship between a member of the permanent force and the Defence Force is “akin to an employee relationship” and “in many respects mirrors those of people employed under a contract of employment”. The court held that section 23(2) should be interpreted to include members of the armed forces, even though the relationship they have with the defence force is unusual and not identical to an ordinary employment relationship. This peculiar character of the defence force, the court held, may well mean that some of the rights conferred upon “workers” and “employers” as well as “trade unions” and “employers’ organisations” by section 23 may be justifiably limited.

The Constitutional Court in *Khosa and Others v Minister of Social Development and Others* held that the word “everyone” is a term of general import and unrestricted

⁶¹ S 4-6.

⁶² S 5(1).

⁶³ S 5(2) and 5(2)(c).

⁶⁴ Van Niekerk 322 fn 8.

⁶⁵ 1999 (6) BCLR 615 (CC) 2275 – 2280.

meaning. It means what it conveys.⁶⁶ The focus of the enquiry in regard to which working person is protected by section 23 should not be on the use of “everyone” but on the reference to “labour practices”. Labour practices are the practices that arise from the relationship between workers, employers and their respective associations.⁶⁷

The question that is often asked is whether employees in managerial positions are protected by freedom of association? Case law has clarified this and the right as granted by the LRA and the Constitution extends to senior employees. In *IMATU & Others v Rustenburg Transitional Local Council*⁶⁸, the Local Council passed a resolution prohibiting employees in senior executive and managerial officials of the Council from serving in executive positions for the trade union. The Court held that the legislature did not intend to draw a distinction between employees namely, senior and non-senior employees. Senior employees are entitled to participate in union activities. The Court further held that organisational rights in Part A of Chapter III legitimise acts which would otherwise constitute breach of contract by employees. It was held that such employees who join a trade union must tread carefully, especially in handling confidential information and they are in a delicate position as they have to serve both the employer and the union in such a way that they do not compromise either. The Court further held that the LRA gives such employee the right to enter this minefield if he chooses.⁶⁹ In a further case, the Labour Court held that the promotion of employees who had resigned from the union constituted unlawful discrimination and was prejudicial against union members.⁷⁰

⁶⁶ 2004 (6) SA at 550.

⁶⁷ Cheadle “Labour Relations” in Cheadle, Davis and Haysom South African Constitutional Law: The Bill of Rights (2006) at 18-4.

⁶⁸ 2000 ILJ 377 (LC).

⁶⁹ At 385 par 19.

⁷⁰ *Nkutha v Fuel Gas Installations (Pty) Ltd* (2000) 2 BLLR 178 (LC).

2. Definition, Requirements, Limitation to the Right to Strike and Lockouts

2.1 Definition

The definition of a strike comprises of three elements, namely, non-performance of work, by employees and for a stated purpose.⁷¹

2.1.1 Refusal to Work

The refusal to work can be partial or complete. On this basis go-slows have been held to constitute a strike.⁷² A partial refusal means that employees perform some duties but not others. The retardation of work is manifested in the so-called go-slows, where employees continue to work but at a slower pace and the work-to-rule where employees only do the work they are contractually obliged to do and no more. The obstruction of work refers to the situation where the workers affect production in one way or another by being obstructive.⁷³ Other forms of industrial action that fall short of a total refusal to work, such as blacking, could also constitute a strike. Overtime bans now count as strikes whether or not the overtime in question is contractually obliged.⁷⁴ Zondo AJ in *Simba (Pty) Ltd v Food & Allied Workers Union*⁷⁵ held that the word “work” in the phrase “retardation of work” ... does not include work of an illegal nature. To hold otherwise would be contrary to public policy and would sanction a contravention of the BCEA.

2.1.2 The Employee, a Concerted Refusal and the Purpose of a Strike

The employee in the strike definition includes both current and ex-employees.⁷⁶ The right to strike is a collective action. An individual employee cannot take strike

⁷¹ *CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1998) 12 *BLLR* 1191 (LAC). S 213 of the LRA.

⁷² Myburgh J in *Ceramic Industries Ltd t/a Betta Sanitary v National Construction Building & Allied Workers Union* (1996) 17 *ILJ* 1094 (LAC) at 1098 par G held that the go-slow action is a strike as defined in s 1 of the 1956 LRA and s 213 of the 1995 LRA.

⁷³ Van Niekerk at 373.

⁷⁴ Thompson and Benjamin South African Labour Law Vol 1 AA1-305.

⁷⁵ (1997) 5 *BLLR* par G at 612.

⁷⁶ In *FGWU v The Minister of Safety & Security* (1999) 4 *BLLR* 332 LC, the court had to establish whether once employees taking part in a protected strike have been dismissed, they cease to be “employees”, and the strike, together with any protection they enjoyed, therefore comes to an end. The court held that, in the context of protected strike action, the employment relationship must extend beyond termination because a protected strike suspends the operation of the contract of employment and also because the dismissal of protected strikers is a nullity.

action.⁷⁷ The purpose of a strike must be to remedy a grievance or to resolve a dispute. Where employees had taken strike action demanding the dismissal or removal of a supervisor after giving an undertaking that they would report to the supervisor, following an earlier dispute over the same issue, the Court held that through such an undertaking, the employees had by implication abandoned their demand, thus rendering the strike unprotected.⁷⁸ If employees refuse to work, but are not seeking to remedy a grievance or resolve a dispute, there is no strike in terms of the definition.⁷⁹ A court must have regard to substance rather than form and “ascertain the real underlying dispute”.⁸⁰ The purpose of industrial action determines whether it qualifies as a strike action. What began as a strike can change its character once the initial purpose has fallen away. The moment the strike ends so does statutory protection.⁸¹

2.1.3 A Matter of Mutual Interest

The strike definition does not impose a requirement that there must be mutual interest amongst strikers. In *CWIU v Plascon Decorative (Inland) (Pty) Ltd*⁸² the employer sought an interdict preventing union members who were not part of the relevant bargaining unit from participating in a protected strike. The Court found that constitutional rights conferred without express limitation cannot be restricted by reading implicit limitations into them. The Court further held that employees can take part in protected strike action called by their union even if they have no material interest in the outcome, provided the further conditions of the Act have been met. The union is free to call out its members at other branches of the same employer as the strike progresses, provided it pertains to the same issue that had been referred to conciliation.⁸³ The would be strikers must identify and declare the issue in dispute prior to setting in motion the procedure prescribed by section 64(1)(a). Once that issue has been identified and dealt with in conciliation, the would be strikers can only

⁷⁷ *Schoeman v Samsung Electronics (Pty) Ltd* (1997) 10 *BLLR* 1364 (LC) at 1367 par I.

⁷⁸ *National Union of Metalworkers of SA v Hendor Mining Supplies* (2007) 28 *ILJ* 1278 (LC).

⁷⁹ Van Niekerk 375. In *FAWU v Rainbow Chicken Farms* (2000) *BLLR* 70 (LC), employees refused to work on a religious holiday. The court held at 75 par 24 that even though the actions of the employees were collective, the employees did not conduct themselves as they did, to remedy a grievance or to solve a dispute. They made no demand. The refusal to work was found not to be a strike.

⁸⁰ *SATAWU v Coin Reaction* (2005) 26 *ILJ* 1507(LC).

⁸¹ Thompson and Benjamin AA1-308.

⁸² (1998) 12 *BLLR* 1191 (LAC) at 1197 – 1199 pars 20-27.

⁸³ *Afrox Limited v SACWU* (1997) 4 (*BLLR*) 375 (LC).

strike over that issue. They cannot change the goal posts when they issue the notice in terms of section 64(1)(b).⁸⁴

2.2 The Requirements of a Strike

The Act gives effect to the right to strike as guaranteed in the Constitution and required by its international law obligations. Although the right is announced in bold terms, it is hedged by both procedural and substantive limitations.⁸⁵ The right to strike like any other right is not absolute. It must be regulated in a way that takes account of the social and economic costs that flow from its exercise. A ban on strikes may reduce collective bargaining to “collective begging” by employees, but an unrestricted right to strike may well reduce the country to international investment begging in the global economic order.⁸⁶

2.2.1 Procedural Limitations

The Act requires that the issue in dispute be referred to the CCMA or a bargaining council, if any, for conciliation.⁸⁷ A certificate is issued if the dispute remains unresolved or a period of 30 days or such other extended period as agreed to by the parties has elapsed from the date of the referral.⁸⁸ Upon the occurrence of either the issuing of a certificate or the elapse of the 30 days or extended period, a 48 hour notice to strike must be given to the employer.⁸⁹ The right to strike arises upon the expiry of the notice period. If the issue in dispute relates to a collective agreement to be concluded in a council, a notice to strike must be given to that council. Notice must be given to an employers’ organisation if the employer is a member of an employers’ organisation that is party to the dispute.⁹⁰ A seven day notice must be given if the employer is the state.⁹¹ If the issue in dispute concerns a refusal to bargain an advisory award must have been made before a notice to strike is given.⁹² Strikers have two avenues of ensuring that their strike is protected. One is to comply with the provisions of section 64(1); the other is to comply with the procedure

⁸⁴ *FGWU v The Minister of Safety & Security* (1999) 4 *BLLR* 332 (LC).

⁸⁵ Thompson and Benjamin AA1-304.

⁸⁶ *Ibid.*

⁸⁷ S 64 (1).

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² S 64(2).

contained in a collective agreement. The choice rests with the would-be strikers. Once they have complied with the provisions of section 64(1), even though they failed to comply with the collective agreement, the strike would be protected.⁹³

Section 64(1) places no limitation on who should give notice, nor does it require the notice to indicate how many employees will take part in the strike and for which union. All the employer has to know is the time of the strike.⁹⁴ It is therefore clear what the purpose of the notice is. A strike action is in itself disruptive, and without a notice the employer will be placed in a predicament in terms of how to be prepared for and be productive during the period of the strike. This purpose is defeated if the employer is not informed on when the proposed strike will commence.

A notice that fails to state when the strike will commence is defective and renders the strike unprotected.⁹⁵ In determining whether there has been compliance with section 64(1)(b) of the Act, an interpretation must be sought which best gives effect to the broader purpose of the Act and the specific purpose of the section itself.⁹⁶ One of the purposes of the Act is to promote orderly collective bargaining. Giving notice to the employer assists in that orderly process. Failure to give proper notice of an impending strike may undermine that order. Upon receipt of the notice, the employer may give in to the demands of the workers or take steps to protect the business before the strike starts.⁹⁷

There has been a lot of debate as to whether our labour laws are too protective towards the employees thereby making it difficult and costly for small employers to comply with them. Pertaining to the part of the Act that specifically deals with the requirements to a strike action, one can imagine how chaotic it would be if the above requirements were not put in place. Being an employer requires one to be equipped in dealing with labour issues in their entirety including industrial action. The other question is whether investor confidence is adversely affected by how our labour laws are structured. This has recently been a burning issue and also one that has prompted this study and will be dealt with in the next chapters.

⁹³ *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* (1997) 10 *BLLR* 1292 (LC) at 1294 par G-H.

⁹⁴ *SATAWU v Equity Aviation Services (Pty) Ltd* (2006) 11 *BLLR* 1115 (LC).

⁹⁵ S 64(1)(b).

⁹⁶ *Ceramic Industries t/a Betta Sanitaryware v NCBWU* (1997) 6 *BLLR* 697 (LAC).

⁹⁷ *Ibid* at 702.

2.2.2 Substantive Limitations

Section 65 of the Act provides for the following substantive limitations on the right to strike:

2.2.2.1 A person is prohibited from embarking on a strike action where they are bound by a collective agreement prohibiting a strike in respect of the issue in dispute.⁹⁸ A question often raised is whether it is constitutional for parties to contract out of the right to strike. In order for the limitation placed by section 65(1)(a) to be constitutional, it must pass the test in terms of section 36 of the Constitution.

2.2.2.2 A person is further prohibited to strike if bound by an agreement that requires the issue in dispute to be referred to arbitration.⁹⁹ It is said that where a prohibition to strike stems out of a collective agreement, the members (and other employees who have been identified in the agreement in situations where a trade union represents the majority of the employees covered by the agreement), are prohibited from striking for the duration of that agreement.¹⁰⁰

2.2.2.3 Where the issue in dispute is one that a party has a right to refer to arbitration or to the Labour Court in terms of the Act, a person is prohibited to strike.¹⁰¹ The Courts look to what is really in dispute when deciding legal consequences and will not lightly be led astray by an expedient characterisation.¹⁰² The Labour Appeal Court held that in order to determine whether a strike is permissible or not, the court needs to establish the true nature of the dispute between the parties. To do so it must look at the substance of the dispute and not only the form in which it is presented.¹⁰³ A person may however take part in a strike action even where the issue in dispute is the one where a person has a right in terms of section

⁹⁸ S 65(1)(a).

⁹⁹ S 65(1)(b).

¹⁰⁰ Thompson and Benjamin AA1-323.

¹⁰¹ S 65(1)(c).

¹⁰² Thompson and Benjamin AA1-324.

¹⁰³ *Coin Security Group (Pty) Ltd v Adams* 2000 4 BLLR 371 (LAC).

65(1)(c) to the refer to arbitration or the Labour Court, if that issue in dispute is about a matter referred to in sections 12 and 15 of the Act.¹⁰⁴

2.2.2.4 A person engaged in an essential service¹⁰⁵ or maintenance service¹⁰⁶ cannot take part in a strike action.¹⁰⁷ The Act makes provision for the appointment of an Essential Services Committee under the auspices of the CCMA which may:¹⁰⁸

- a) conduct investigations to determine whether the whole or a part of any service is an essential service;
- b) determine any disputes surrounding such determinations;
- c) ratify any collective agreement that provides for the maintenance of minimum services in a designated essential service which in effect may allow employees engaged in such a service the right to strike except in those areas designated as minimum services; and
- d) determine on application from an employer whether the whole or a part of an employer's business is an essential service.

Any party to a dispute in an essential service that is precluded from embarking on a strike may refer the dispute to a bargaining or statutory council and in cases where no council has jurisdiction, to the CCMA. The council or CCMA must attempt to resolve the dispute through conciliation. If the dispute remains unresolved, any party may request that the dispute be resolved through arbitration by the council or the CCMA.¹⁰⁹

Although the right to strike is enshrined in section 23(2)(c) of the Constitution, that right is not absolute and may be limited in terms of a law of general application to the

¹⁰⁴ S 12 refers to trade union access to the work place and s 15 refers to leave for trade union activities.

¹⁰⁵ S 213 defines essential service as (a) a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; (b) the Parliamentary service; (c) The South African Police Service.

¹⁰⁶ Finnemore Van Rensburg at 369 defines maintenance service as a service where the interruption of that service has the effect of material physical destruction to any working area, plant or machinery.

¹⁰⁷ S 65(1)(d).

¹⁰⁸ Finnemore Van Rensburg at 369.

¹⁰⁹ *Ibid.* S 74 regulates disputes in essential services.

extent that such limitation may be reasonable and justifiable in an open and democratic society. It is widely recognised, both in this country and abroad, that in certain circumstances, it will be reasonable and justifiable to limit the right to strike, particularly in times of national emergency or in services where a strike is likely to harm the public.¹¹⁰ In some countries like Canada, France and Italy, limitations on strikes in essential services are confined to the public sector, based on the notion that it is only the government which provides services, whose absence will endanger the community's safety.¹¹¹ The differentiation of workers should be made according to the functions they perform and not according to the nature of their employer's legal status. This is so because a service provided by a worker in a private sector may be more harmful to the public compared to a service provided by a public sector worker.¹¹²

The developing nations, in particular, have tended to take a broad view of the concept of essential services. In the Philippines, the definition includes "companies engaged in the generation or distribution of energy, banks, hospitals and export-orientated industries. In 1983, semiconductor electronics was added to the list. South Korea includes stock transaction and banking business. The list in Malaysia is extremely extensive covering maintenance and functioning of the Armed Forces and Royal Malaysian Police Force, and business and industries which are connected with the defence and security of Malaysia.¹¹³ The inclusion of services which affect the economy is not confined to developing countries. In 1976 the New Zealand definition was extended to "export slaughterhouses". Various countries, both industrialised and developing, have recently included in their list of essential services certain financial operations such as those carried out by banks and foreign exchange offices.¹¹⁴

Countries in Asia, Africa, Latin America and the Caribbean have tended to adopt the enumeration method. By contrast, Western countries generally allow special provisions to be invoked if industrial action is deemed by a particular person or body to threaten particular consequences. In France, the Government can requisition

¹¹⁰ *Eskom Holdings Ltd v NUM* 2012 1 ALL SA 278 SCA at 280-281 par 4.

¹¹¹ Cooper at 904.

¹¹² *Ibid.*

¹¹³ S. Morris *Strikes in Essential Services* 1986 at 7-8.

¹¹⁴ *Ibid.*

strikers employed in a service or an enterprise regarded as indispensable to provide for the needs of the nation.¹¹⁵ Countries will differ in what they consider essential services. Morris says the necessity for continuous provision of a service in any given country depends upon a variety of geographical, environmental and technological factors.

2.3 Consequences of Protected Strike

The protected strike is not a breach of contract nor is it a delict. The statement by Thompson and Benjamin¹¹⁶ that strikers who engage in protected strikes cannot be dismissed for striking, neither can they or their union be sued for damages arising from any loss occasioned to the employer or a third party by the strike, has proved to be incorrect. Anglo American Platinum (Amplats) is suing the Association of Mineworkers and Construction Union (AMCU) R600 million for damage to property, increased security costs and production losses caused by non-striking employees being prevented from going to work.¹¹⁷ Members of AMCU have been on strike since 23 January 2014 at Amplats, Impala Platinum (Implats) and Lonmin mines demanding monthly wage increases for the lowest paid underground workers to be R12 500.00. The question that comes to mind is whether AMCU's refusal to accept anything less than the demanded R12 500.00 is a genuine demand in its role to represent the interests of its members or it is done to increase and maintain a majority status in the mining industry. The latter seems likely to be true taking into consideration the lengthy periods of the strikes and the position it has taken of "R12 500.00 wage increase, nothing less, nothing more".

The issue was raised on whether once employees taking part in a protected strike have been dismissed, they cease to be "employees" and the strike, together with any protection they enjoyed, therefore comes to an end. The Labour Court found that in the context of protected strike action, the employment relationship must extend beyond termination because the protected strike suspends the operation of the contract of employment and also because the dismissal of protected strikers is a nullity.¹¹⁸ An employee is not protected from dismissal during a protected strike if the

¹¹⁵ Fn 64.

¹¹⁶ At AA1-304.

¹¹⁷ Sunday Times (2014-02-16).

¹¹⁸ *FGWU v The Minister of Safety & Security*.

employee's conduct during the strike warrants dismissal or if the operational requirements of the employer are the reason for the dismissal. Civil legal proceedings may not be instituted against any person for participating in a protected strike.¹¹⁹ The Labour Court has exclusive jurisdiction to determine whether a strike is protected and the CCMA and bargaining councils have no jurisdiction to make a conclusive pronouncement in this regard.¹²⁰

2.4 Consequences of Unprotected Strike

Participation in a strike that does not comply with the procedural provisions, or is limited, for example a strike in an essential service, may constitute a fair reason for the dismissal of an employee. In determining whether or not the dismissal is fair, various factors must be taken into account, namely, the seriousness of the contravention, the attempts made to comply with the Act and whether or not the strike was in response to unjustified conduct of the employer.¹²¹ In addition, the employer should issue an ultimatum in clear and unambiguous terms, state what is required of the employees, state what sanction will be imposed if they do not comply with the ultimatum and give the employees sufficient time to respond.¹²²

In *NUM v Billard Contractors CC*¹²³ the Labour Court had to decide on the procedural fairness of the dismissal where employees participated in four work stoppages over 12 days. The employer notified them that the next work stoppage would result in a dismissal. When the employees downed tools again, the employer gave them a notice informing them that they had until 11h30 of the same day to give reasons why they should not be dismissed. The employees were dismissed for failing to do so. The court had to draw a distinction between a pre-dismissal hearing and an ultimatum to be given in terms of Item 6 of schedule 8 of the Act.¹²⁴ The Court held that the notice given to the employees gave too little time for meaningful engagement; it failed to give the union representatives a proper opportunity to meet with the respondent and to discuss in a calm and reasonable environment, whether there was any reason why the employees should not be dismissed. The Court's

¹¹⁹ Finnemore Van Rensburg at 370.

¹²⁰ *Cape Gate (Pty) Ltd v Numsa* 2007 5 BLLR 446 (LC).

¹²¹ Finnemore Van Rensburg at 371. Item 6 of schedule 8 of the LRA.

¹²² Item 6(2) of schedule 8 of the LRA.

¹²³ (2006) 27 ILJ 1686 (LC).

¹²⁴ Item 6 provides guidelines to be followed prior to dismissing employees participating in an unprotected strike action.

decision clearly illustrates that the *audi alteram partem* rule forms the cornerstone of our jurisprudence. The opportunity to be heard is derived from the right to justice and equity. To have an employee dismissed without being afforded this opportunity will go against the object of the LRA and the Constitution.

In *Modise v Steve's Spar Blackheath*¹²⁵ the court held that the only situation where non-compliance with the *audi alteram partem* rule will be justified is where workers had indicated that they were not interested in making representations on why they should not be dismissed. The court further held that the general principle is that people are entitled to hearings before action is taken against them affecting their rights. That it was generally agreed that workers were entitled to hearings before being dismissed for misconduct, that there was no reason why strikers should be denied such a right.

2.5 Secondary Strikes

The definition of a secondary strike is clearly set out in section 66¹²⁶ of the Act. The procedural requirements of a secondary strike are as follows:

- 2.5.1 the strike that is to be supported by a secondary strike must comply with the requirements of section 64 and 65 of the Act;¹²⁷
- 2.5.2 at least seven days' notice prior to a secondary strike must be given to the employer or employer's organization of the employees who are to take part in a secondary strike¹²⁸;
- 2.5.3 the nature and extent of a secondary strike must be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.¹²⁹ Section 66(1)(c) requires a relation between a primary strike and a secondary strike. There must be some relationship or nexus between the primary employer and the secondary employer(s) for the proposed strike at the businesses of the secondary

¹²⁵ 2000 5 *BLLR* 496 (LAC).

¹²⁶ A secondary strike means a strike or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.

¹²⁷ S 66(1)(a).

¹²⁸ S 66(1)(b).

¹²⁹ S 66(1)(c).

employer(s) to have a possible direct or indirect effect on the business of the primary employer in such a way as to make the nature and extent of the secondary strike “reasonable”.¹³⁰ A secondary strike must cause some adverse effect or have some negative impact on the business of the primary employer.¹³¹ If there is no link between the two businesses, then the secondary strike will not affect the business of the primary employer.

Mischke says that the nexus required as stated by the Labour Court in *Sealy of South Africa (Pty) Ltd v PPWAWU* does not put an end to the investigation whether a secondary strike is reasonable. He argues that it must still be determined whether the secondary strike will have an impact on the collective bargaining process. The form of the impact on the collective bargaining, he argues, is achieved by placing pressure on the primary employer to accede to the demands of the employees. When one analyses the argument by Mischke, the question that comes to mind is whether a strike can be isolated from collective bargaining? The right to strike is an essential tool to collective bargaining. If the secondary strike can adversely affect the business of the primary employer, then in the same breath, the same strike will influence collective bargaining. The primary employer would due to the additional pressure of the secondary strike want to go back to the bargaining table. The need to take the investigation further as argued by Mischke is in my view unnecessary. In *SAMWU v SALGA* the court held that the requirement of reasonableness in section 66(2)(c) is what lends secondary strikes their legitimacy. Without it, secondary strikes would become “mindless exercises of worker solidarity for the sake of nothing but worker solidarity”.¹³² The court further held that underlying the requirement in section 66(2), is the notion that the secondary action must have some impact on the bargaining process underway between the employer and the trade unions engaged in the primary strike. The court held that since the bargaining process turns on the exercise of power, there ought to be some sense, at least, in which the secondary strike will affect the economic power or position of the primary employer.¹³³

¹³⁰ *Sealy of South Africa (Pty) Ltd v PPWAWU* 1997 4 BLLR 421 (LC).

¹³¹ Mischke “The Secondary Strike: Proportionality and the Interpretation and Application of S 66 of the LRA” (1999) Vol 8 (4) CLL 31.

¹³² (2008) 1 BKKR 66 (LC) at 69.

¹³³ *Ibid* 70-71.

2.6 Protest Action

Protest action¹³⁴ assumes the form of a strike, but it is called for a different purpose. The reference to the promotion and defence of the socio-economic interests of workers is drawn from the decisions of the ILO's supervisory bodies, who have considered that the right to strike is a legitimate means of defending workers' economic and social interests.¹³⁵ The following conditions must be met in terms of the Act before a protest action will be protected¹³⁶:

- 2.6.1 the protest action must be called out by a registered trade union or federation of trade unions;
- 2.6.2 the parties who called out the protest action must serve a notice on NEDLAC and this notice must state the reasons for the protest action as well as the nature that the protest action will assume;
- 2.6.3 the matter that gave rise to the protest action (as described in the notice to NEDLAC) must be considered by NEDLAC or another appropriate forum; and
- 2.6.4 the registered union or federation of unions must give at least 14 days notice of their intention to proceed with the protest action to NEDLAC.

2.7 Picketing

Picketing is a form of labour action in a range of tactics that may be used by unions in labour dispute situations. Picketing has several purposes, namely to:¹³⁷

- 2.7.1 persuade other employees, who may be continuing production, to join or support a strike;
- 2.7.2 deter delivery of supplies necessary to maintain production;
- 2.7.3 deter customers from entering a shop or business;

¹³⁴ S 213 of the Act defines protest action as the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike.

¹³⁵ Van Niekerk 386-387.

¹³⁶ *Ibid.* S 77.

¹³⁷ Finnemore Van Rensburg at 372.S 69.

2.7.4 inhibit the delivery of goods from the organisation where the strike is occurring;

2.7.5 communicate information to the wider public about the cause of the strike.

A Code of Good Conduct on picketing provides practical guidelines. The purpose of picketing in item 3 of the Code is to encourage non-striking employees and members of the public to oppose a lockout or to support strikers involved in a protected strike. The strike must be a protected strike. A picket in support of a secondary strike must satisfy the requirements of a lawfully secondary strike in terms of section 66 of the Act. If a picket is in support of an unprotected strike, the picket is not protected. Pickets may be held in opposition to a lockout

Section 69 of the Act governs picketing and gives the registered trade unions the right to authorise a picket by its members and supporters. The picket can take place in a public place and on the employer's premises with the employer's permission, which permission may not be unreasonably withheld. The parties are given the latitude to conclude an agreement on the rules regulating the picket. The CCMA may on request by either party assist in having the agreement concluded. The CCMA will make the picketing rules if the parties fail to conclude an agreement after the CCMA's intervention. Section 17 of the Constitution protects the right to picket.

2.8 Lockouts

2.8.1 As stated in this study, the recourse to lockout and the right to strike do not mirror each other and are therefore not always equivalent.¹³⁸ Strikes and lockouts are not equivalent phenomena, whether viewed in jurisprudential or economic terms.¹³⁹ A lockout by an employer is an exclusion by the employer of employees from the workplace. This action is taken in order to compel the affected employees to accept a particular demand or proposal concerning conditions of employment or other matters of mutual interest.¹⁴⁰ The employer may implement an offensive lockout which can be used when a deadlock in negotiations arises. Management may impose a lockout so

¹³⁸ *Certification of the Constitution of the Republic of South Africa, 1996, In Re (1996) 17 ILJ 821 (CC).*

¹³⁹ Thompson and Benjamin AA1-303.

¹⁴⁰ Finnemore Van Rensburg at 384.

that the employer controls the timing of the industrial action rather than allowing the union the advantage of choosing when to embark on a strike.¹⁴¹ Offensive lockouts may be used to force an agreement which would otherwise be difficult to obtain. The Act prohibits employers to hire replacement labour to do the work of employees who have been excluded from the workplace during an offensive lockout.¹⁴²

2.8.2 Defensive lockouts may occur after a strike has already commenced. Management may wish to enforce the seriousness of its final offer or remove striking workers from the premises.¹⁴³ In *Ntimane v Agrinet t/a Vetsak*¹⁴⁴ a deadlock on wage negotiations resulted in employees engaging in a protected strike, the employer in response to the strike locked out the employees. The employees withdrew from the strike action. The employer informed the union that it will continue to lockout the employees until the offer was accepted. The employees argued that the lockout was no longer in response to a strike as the strike was withdrawn and that the general rule that an employer may not employ replacement labour to perform duties of an employee who is participating in a strike applied. The Court held that section 76 interfered with the employer's common law and constitutional right to level the playing field in an economic battle, thus employing replacement labour while workers were on strike. As much as workers were entitled to withdraw labour, employers were entitled to take on replacement labour during a lockout in response to a strike. The abandonment of a strike action does not bring to a stop a lockout.

2.8.3 The substantive and procedural limitations on the right to strike in section 64 of the Act apply similarly to lockouts. An employer engaged in a protected lockout enjoys indemnity against any delictual liability or breach of contract committed by engaging in a protected lockout, and no civil proceedings may be instituted against the employer in that regard. Employees who are locked out are therefore not entitled to remuneration, despite the fact that they may

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ 1999 3 *BLLR* 248 (LC).

tender their services during the course of the lockout.¹⁴⁵ If a lockout is unprotected, the affected employees may claim compensation that is just and equitable for any loss attributable to the lockout.¹⁴⁶

2.8.4 A lockout dismissal entails that the employer wants his existing employees to agree to a change of their terms and conditions of employment. In a lockout dismissal, the employer would take the attitude that, if the employees do not agree to the proposed changes, he would dismiss them not for operational requirements, but to compel them to agree to the change. In such a case the employees thereafter have an opportunity to agree to the change. When they agree to the change, the dismissal ceases because it has served its purpose. If the employees do not agree to the change after they have been dismissed for the purpose of compelling them to agree, the employer dismisses them finally. The last mentioned dismissal is not a lockout dismissal. It is an ordinary dismissal for operational requirements.¹⁴⁷ The question that arises is when can it be said that, in dismissing an employee or a group of employees, the employer is exercising his right to dismiss for operational requirements as opposed to an employer dismissing employees in order to compel them to agree to a demand on a matter of mutual interest, which is contrary to the provisions of section 187(1)(c).¹⁴⁸ The Supreme Court of Appeal in *NUMSA v Fry's Metal (Pty) Ltd*¹⁴⁹ held that there is a thin line between dismissal where an employer was compelling employees to accept a demand which is a case of dispute of interest and where the dismissal is due to operational requirements. The SCA held that the Labour Appeal Court was correct when it held that the purpose to compel an employee to accept a demand is lost when the dismissal is final. The SCA held further that the question to be asked is a factual one, thus what was the employer's reason for dismissing the employees? Once it is established that the purpose was not to compel the employees to accept a demand and that the employer is not prepared to "reverse" the dismissal if the employees accept the demand, no further inquiry is required. It is clear

¹⁴⁵ Van Niekerk 394-395.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Fry's Metals (Pty) Ltd v NUMSA (2003) 24 ILJ 133 (LAC) 146-147.*

¹⁴⁸ *Idem* 144.

¹⁴⁹ (2005) 5 BLLR 430 (SCA).

from the above decisions that the merits of each case will determine the nature of the dismissal.

2.8.5 Sjaak van der Velden¹⁵⁰ states that strikes and lockouts are two different sides of the medal of labour relations. Strikes are a weapon of workers, whereas lockouts can be a means by which employers force their workers into a certain direction. However many countries do not distinguish between strikes and lockouts. He says since 1894, British statistics have not distinguished between strikes and lockouts. They use the term “disputes” and that this practice has become common in a growing number of countries. He further states that this practice is based primarily on a misunderstanding of the class nature of the capitalist society. He says that the main reason for regarding strikes and lockouts as separate phenomena is that they are weapons in the struggle between labour and capital over the division of income and power. Van der Velden says workers have several weapons at their disposal, they can go on strike, sabotage riots, change jobs or try to change the political constellation. These weapons stem from an uneven relationship in which labour is the weakest party. Employers on the other hand, he says, are the stronger party, and they are even in a position to deny their workers “the possibility of living”. Van der Velden says ultimately, capital prevails in society and it only needs to resort to weapons when labour challenges its power. The disparity between labour and capital is recognised in the legislation of many countries, and therefore laws rarely mention lockouts while the right to strike is enshrined in law.

He says in the Netherlands and other core countries of Europe, lockouts almost completely vanished from the scene. He says the reasons for this are that capitalists realised that unions, the main target of lockouts were not enemies, but an integral part of labour relations and that there was more to be gained by involving them. These countries have also recognised that there were better ways to fight workers than by locking them out.

¹⁵⁰ Historical Social Research, Vol.31 - 2006 - No. 4 Lockouts in the Netherlands: Why Statistics on labour disputes must discriminate between strikes and lockouts, and why new statistics need to be compiled 341-346.

The above illustrates the undeniable imbalance between labour and capital and that the engagement of employees in the affairs of the employer deflates friction and divisions in the workplace. The value that labour brings to the workplace is undermined if the employer perceives himself as the dictator and the one with authority. This creates division which ultimately result in lockouts and strike action.

3 The Principle of *Laissez-Faire*

3.1 This is a system of collective labour law where industrial relations, employer and unions largely regulate themselves. Law does not play a pivotal role. This system was developed by Otto Kahn-Freund in the 1950s and 1960s where employers would terminate employment or rather dismiss an employee by simply giving notice of termination in terms of a common law contract. This did not entail an investigation into the reason of the dismissal.¹⁵¹ The *laissez-faire* approach is based on the following principles:

3.1.1 Union involvement and the process of collective bargaining ensure that workers are protected, and for this reason, there is no need for the law to intervene.

3.1.2 Workers are granted more protection by acquiring rights through collective bargaining compared to rights acquired by the Constitution or legislation.

3.1.3 Trade unions and workers are allowed to determine pressing issues affecting their circumstances.¹⁵²

This theory is focused on the parties in an employment relationship to be in a position to achieve some kind of equilibrium where the employee is not being hard pressed due to the powers held by the employer as a party with more economic power. Otto Kahn-Freund based this system of *laissez-faire* on the collective British labour which came under pressure. By the end of the 1970s, Kahn-Freund expressed a view that the *laissez-faire* approach was in need of adjustment.¹⁵³

¹⁵¹ Davies & Kahn-Freund's *Labour and the Law* (1983) at 3.

¹⁵² *Idem* at 4.

¹⁵³ Van Niekerk 9.

3.2 Appropriateness of *Laissez-Faire* Approach in South Africa

South African labour law is highly regulated. It is through legislation that we see the intervention of the law on employment relationships. Legislation was promulgated to reduce the economic power that the employer had in employment contracts. The *laissez-faire* theory will not find its place in South Africa as there is high level of regulation with employment relationships. In England, there is minimum wage guarantee regulating an hourly rate of employees. The UK has work councils mainly responsible to enhance communications between employers and employees. Employers are required to consult with employees on decisions that would largely affect their business.¹⁵⁴ The system of *laissez-faire* will not find application in these countries due to the regulations in place.

The importance of collective bargaining can be explained by the fact that it has value for employers as well as workers – for employers, as a means of maintaining “industrial peace”, for workers, primarily as a means of maintaining “certain standards of distribution of work, of rewards and of stability of employment”.¹⁵⁵ According to Kahn-Freund’s system of *laissez-faire*, the “central purpose of labour law is that of maintaining an equilibrium between employers and workers by ensuring the effective operation of a voluntary system of collective bargaining”. The law in other words should protect the institutions of collective bargaining whilst maintaining a hands-off attitude towards the bargaining process itself.¹⁵⁶

Du Toit says that the picture has become more complicated since then. In its classical sense, perhaps, “collective *laissez-faire*” could only ever have existed under the conditions of relative stability and sustained economic growth experienced in the industrialised countries during the 1950s and 1960s. As economic growth faltered, the picture began to change. In one sense, the impact of collective agreements on labour markets and increasingly fragile economies was simply too great to be left entirely to the self-interest of trade unions and employers. Starting with the battle to contain inflation and government spending amidst growing international competition, the autonomy of collective bargaining became increasingly circumscribed by income

¹⁵⁴ Davies & Kahn-Freund’s 16-17.

¹⁵⁵ Du Toit “What is the Future of Collective Bargaining (and Labour Law) in South Africa?” (2007) *ILJ* 1405.

¹⁵⁶ *Idem* at 1407.

policies, social pacts, tripartite institutions and other devices aimed at bringing bargaining outcomes into line with broader policy objectives.¹⁵⁷ Du Toit sees the future of collective bargaining and of labour law as facing common challenges. Labour law in South Africa, as in many other countries has been premised on the principle that its “central purpose”, alongside individual employee protection, is the regulation of collective bargaining. Any erosion of collective bargaining must call into question that purpose.

4. The Trends in Collective Bargaining and Comparisons with Other Countries

Collective bargaining systems differ in various countries. The manner through which employees’ representatives are chosen in the bargaining process is influenced by a number of factors from one country to another. Bamber and Sheldon¹⁵⁸ identified the following ways of recognising a union to a collective bargaining:

- a) Exclusive representation for majority union;
- b) Non-exclusive bargaining rights for the most representative unions;
- c) Multiple representative unions on the basis of a joint committee; and
- d) Multiple representation of various unions with no requirement for concurrent bargaining.

4. (a) Exclusive representation for majority unions in the US

This system means that a majority trade union is legally empowered to bargain for and bind its members, members of minority union and non-union members with its collective agreement. The employer is precluded from bargaining with minority trade unions through this system.¹⁵⁹ The contract of the representative trade union governs all workers regardless of whether they consent or not. The employer can refuse to bargain until the union has proven its majority support. The status of individual employment contracts is determined by collective agreements. Collective agreements are the source

¹⁵⁷ Fn 106 at 1407-1408.

¹⁵⁸ Collective Bargaining: Towards Decentralisation Comparative Labour Law and Industrial Relations in Industrialized Market Economies (2004) 520.

¹⁵⁹ Summers (eds Engels & Weiss) Labour Law and Industrial Relations at the turn of the Century (1998) “Exclusive representation: A Comparative enquiry into a “unique” American principle”.

of individual contracts of employment.¹⁶⁰ Summers says that there is a general failure in the US to accept collective bargaining as a preferred way to structure employment relations. The US system is not different from other countries in allowing a majority union to represent members of minority and non-union members. The uniqueness of this system is that the representative is chosen by the majority and also the impact that the system has on an individual worker by collective action.¹⁶¹

4. (b) Non-exclusive bargaining rights for the most representative unions in Belgium

The three most dominant unions will be recognised by the Government and those unions will be granted bargaining rights. The recognised unions will bargain with the employer. Statutory work councils are the bargaining units at workplace level. Unions that are majority representatives nominate their candidate to the council.¹⁶²

4 (c) Multiple representative unions on the basis of a joint committee in the UK

This system requires that the union must be recognised by the employer. Each union that is recognised by the employer will represent its members regardless of whether such a union is a majority or minority union.¹⁶³

4 (d) Multiple representation of various unions with no requirement for concurrent bargaining in France

In France the employer has the upper hand to choose which union it wishes to bargain with. There may be different conditions of employment for employees due to different collective agreements signed with different unions. This is the system of multiple representation of various unions with no requirement for concurrent bargaining.¹⁶⁴

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Idem.*

¹⁶⁴ Fn 110.

Clyde Summers applies centralised and enterprise bargaining to the US and the four European countries mentioned above as follows:

The US according to Clyde Summers is inclined to use enterprise collective bargaining. This is so because there may be multi plant employers with different majority unions at different plants. Collective bargaining will in these instances be reduced to enterprise level.

In the UK, central bargaining can pose problems as the employer can choose to bargain with more than one union or with a minority union. This may result in ignoring the views of the majority employees and also having various collective agreements within the same industry. At enterprise level Summers says that the shop stewards represent employees and the unions are not involved in this process.

Centralised bargaining in Belgium has similar problems as the US in that different plants may have various majority unions. At enterprise level, the three recognised unions nominate candidates to represent them at plant level. Summers says that the work council, as a matter of law, is the bargaining unit for employee at plant level.

France has problems with centralised bargaining; the employer can sign a collective agreement with a minority union which will bind the majority union. Unions may also sign different collective agreements creating different conditions of employment for employees. Statutory councils are imposed by law in collective bargaining at enterprise level. Depending on whether the work council is composed of union members of a majority union, the statutory workplace in this regard can be said to be democratic and that collective bargaining at plant level will work for the majority of the employees in the workplace.

In South Africa, the Constitution grants the right to engage in collective bargaining.¹⁶⁵ The LRA encourages collective bargaining by creation of bargaining forums such as workplace forums, bargaining councils and statutory councils. Collective bargaining is also encouraged by the acquisition of organisational rights.¹⁶⁶ Majoritarian system is encouraged and this is evident in the LRA where only majority trade unions are given more organisational rights, these trade unions can enter into close shop and

¹⁶⁵ S 23(5).

¹⁶⁶ Vettori "A Judicially Enforceable Duty to Bargain?"(2005) *De Jure* 382.

agency shop agreements, and they can enter into collective agreements to establish thresholds required to obtain organisational rights.

Preference of majority trade unions by the LRA seems to have been driven by the desire to avoid an employer being overwhelmed with unions representing small percentages of employees in a single workplace. A majoritarian system limits the administration burden on the employer.

5. Importance of Collective Bargaining

Collective bargaining remains an important tool to the parties in the workplace. In South Africa and other countries as already illustrated, this tool is essential in the functioning of a particular workplace, conditions of employment and in the avoidance of a strike action and lockout. Conflict is inevitable in the workplace between capital and labour however, the workplace will be more pleasant when parties engage each other constantly on issues affecting the employment relationship.

Chapter 4—Organisational Rights, Collective Bargaining and No Duty to Bargain

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Chapter 4 – Organisational Rights, Collective Bargaining and No Duty to Bargain

1. The Right to Strike and the Majoritarian System

The right to strike is a collective action. The pressure of a strike action often compels the parties to the employment relationship to bargain collectively. This pressure impacts on the employer immensely when brought forth by majority employees. Our labour law promotes a majoritarian system. This system favours and promotes majority trade unions. This chapter will point out certain indicators in the Act that reflect preference for this system. Majority trade unions are given greater rights in the Act. The reason for this could be attributed to the fact that employers do not want to be overwhelmed by trade unions that are representing small percentages of employees in a single workplace. The burden this will create on the employer administratively and financially could render the workplace impracticable.

2. Organisational Rights

2.1 Organisational rights make it possible for unions to build up, consolidate and maintain power amongst employees. Once the union is strong enough, it is able to compel the employer to bargain on wages and other terms and conditions of employment.¹⁶⁷ These rights do not only allow the union a foot in the door, but also allow the union to lay a foundation for future collective bargaining. Without organisational rights, the union will find it difficult to function and to represent members' interests.¹⁶⁸

2.2 The Act grants organisational rights to representative trade unions only.¹⁶⁹ A distinction is made in the Act between two types of representative trade unions. The first is a representative trade union that is a registered trade union, or two or more registered trade unions acting jointly, which are sufficiently representative of the employees employed by an employer in a workplace.¹⁷⁰ The second type is a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of

¹⁶⁷ Mischke "Getting a Foot in the Door" (2004) CLLVol 13 6 51.

¹⁶⁸ *Ibid.*

¹⁶⁹ S 11 defines a representative trade union as a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace.

¹⁷⁰ *Idem* 3.

the employees employed by the employer in a workplace.¹⁷¹ If a recognition agreement has not been concluded with a trade union, then an employer is only compelled to bargain with or grant organisational rights to a representative union.¹⁷² Van Jaarsveld states that there are three categories of representativity namely:

- a) Majoritarian approach: the employer needs only to negotiate with the trade union which enjoys the support of the majority (50,1 percent or more) of the employees;
- b) Pluralist approach: in terms of the pluralist approach the employer must negotiate with every trade union that enjoys substantial support or which is sufficiently representative of the employees. This will usually be the case if a trade union has support of about 30 percent or more of the employees.
- c) The allcomers approach: this approach implies that the employer is compelled to negotiate with every trade union represented in the undertaking, however small its support may be.

Van Jaarsveld says the Act recognises the majoritarian and pluralist approaches.¹⁷³ A majority trade union is granted organisational rights in terms of sections 12, 13, 14 15 and 16 of the Act¹⁷⁴, while a sufficiently represented trade union is entitled to organisational rights in terms of sections 12, 13 and 15.

¹⁷¹ This trade union defined in s 14 is termed a majority trade union.

¹⁷² Van Jaarsveld *et al* Principles and Practice at 8-13.

¹⁷³ *Ibid* at 8-14. In *NUMSA v Feltex Foam* (1997) 6 *BLLR* 798 (CCMA), the commissioner observed that certain organisational rights require majority representation. The rights referred to by the commissioner are those in s 14 and s 16 of the Act in regard to trade union representatives and disclosure of information respectively. In *SACTWU v Sheraton textiles (Pty) Ltd* 1997 5 *BLLR* 662 (CCMA), a trade union with 30% representation in the workplace was deemed to be sufficiently representative. It was held that sufficiency of representation, should not be determined by numbers alone, a union should be considered sufficiently representative "if it can influence negotiations, the financial interest of those engaged in the industry or peace and stability within the industry or any section of the industry".

¹⁷⁴ S 12 - trade union access to the workplace, s 13 – deduction of trade union subscriptions or levies, S 14 – trade union representatives, s 15 – leave for trade union activities, s 16 – disclosure of information.

2.3 Freedom of association gives every employee the right to join a trade union, subject to its constitution.¹⁷⁵ As stated in the previous chapter of this research, freedom of association grants employees and their trade unions a platform to bargain collectively with the employer and to ultimately engage in industrial action should negotiations fail. The question is whether the granting of organisational rights to representative trade unions infringes on the freedom of association?

In *OCGAWU v Total SA (Pty) Ltd*¹⁷⁶ the applicant argued that the granting of organisational rights should be justified by freedom of association. The commissioner accepted that the right to freedom of association will be meaningless in the absence of organisational rights, however, neither the LRA nor the Constitution envisages that the mere joining of a trade union should trigger the granting of organisational rights. The commissioner held that the requirements in chapter III part A of the Act may be seen as a limitation to freedom of association in terms of section 36 of the Constitution.¹⁷⁷ The commissioner was correct in saying that the granting of organisational rights to certain trade unions only, limits the right granted by the Constitution. No right in the Bill of Rights is absolute, however, any law that limits a right in the Bill of Rights must pass the test in terms of section 36 of the Constitution.

2.4 Another indicator that the Act favours a majoritarian system is section 18. The employer and a majority trade union, or the parties to a bargaining council may conclude a collective agreement establishing a threshold of representativeness required of one or more of the organisational rights referred to in sections 12, 13 and 15. The agreement will be binding if the threshold applies equally to all registered trade unions involved. Other ways of acquiring organisational rights are where registered trade unions that are parties to a bargaining council automatically obtain the rights in section 12

¹⁷⁵ S 4(1)(b).

¹⁷⁶ (1999) 6 *BALR* 678 (CCMA) at 682.

¹⁷⁷ Convention 87 of the ILO on Freedom of Association provides *inter alia* that workers without distinction whatsoever, shall have the right to establish and subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. The convention further provides that workers' organisations shall have the right to draw up their constitution, elect their representatives freely, organise their administration and activities and formulate their programmes. This convention will not be properly effected if organisational rights are denied to certain trade unions.

and 13 in respect of all workplaces within the registered scope of the council, regardless of their representativeness in any particular workplace¹⁷⁸. Parties can further acquire organisational rights by entering into a collective agreement regulating these rights.¹⁷⁹

2.5 Organisational rights are exercised in terms of section 21 of the Act. The trade union will notify the employer that it seeks to exercise one or more of the rights in a workplace. Proof of registration of a trade union must accompany the notice. The notice must detail the workplace in respect of which the trade union seeks to exercise the rights, the representatives of the trade union and the rights that the union is seeking to exercise and how they will be exercised. The employer must within 30 days of receipt of the notice meet with the trade union with the aim of concluding a collective agreement in regard to the rights sought by the trade union. If a collective agreement could not be concluded, the dispute will be referred to the Commission by one of the parties. If the dispute remains unresolved, it will be referred to arbitration.

It has been said in a number of cases referred to the Commission that the defects in the notice given to the employer in terms of section 21(1) and (2) will not deprive the Commission of jurisdiction to arbitrate a dispute. In considering a dispute referred to the Commission, the commissioner said that the legislature could not have intended a conciliated dispute to be referred back purely for technical reasons. “Formalisation of this kind”, the commissioner held, would hinder, rather than expedite an effective substantive outcome.¹⁸⁰

The requirements in section 21(8)¹⁸¹ were applied in *SACTWU v Marley (SA) (Pty) Ltd*¹⁸². The Commission had to determine if SACTWU was

¹⁷⁸ S19.

¹⁷⁹ S 20.

¹⁸⁰ *SACTWU v Sheraton Textiles (Pty) Ltd*. In *SACTWU v Technical Systems* (1997) 7 *BLLR* 948 (CCMA) the employer refused to meet with the union due to non-compliance with section 21. The commissioner found that the union’s non-compliance did not deprive the Commission of jurisdiction.

¹⁸¹ In terms of S 21(8)(a) if the unresolved dispute before the Commission is about whether a trade union is a representative trade union, the commissioner must seek to 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, and to minimise the

sufficiently representative. The commissioner in applying section 21(8)(a) found that majority of employees were represented by NUMSA. NUMSA had an agency shop agreement with the employer, which agreement in a way compels employees to join NUMSA. This was seen to be desirable as employees would be able to speak with one voice. NUMSA was guaranteed subscription fees from the employees due to the agency shop agreement and that this would lessen the employer's burden as there was a uniform and blanket administration in regard to deductions.

With regard to section 21(8)(b)¹⁸³ the commissioner said that in determining whether or not an employer is engaged in a particular trade, regard must be had to the nature of the enterprise and not the specific nature of the work done. The commissioner found that NUMSA was already protecting the interest of the workers. The agency shop agreement was in place whereby subscription fees were deducted. NUMSA and the employer were found to have a long association. They were both members of the same bargaining council. It was said that SACTWU was not and could not be a member of the same council as it did not fall within the same sector. The commissioner found that granting organisational rights to SACTWU would result in conflict and unnecessary administration burden and that it will not be in the interest of the employees.

- 2.6 Collective bargaining is promoted in the Act by *inter alia* freedom of association and organisational rights. As already stated, freedom of association will be meaningless if a trade union is not granted organisational rights. The Act protects the right to freedom of association and the right to organise by extending specific rights and protection to workers and to employees, and by extending organisational rights to registered trade unions that meet representativity thresholds.¹⁸⁴ Organisational rights are

financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union.

¹⁸² (2000) 21 *ILJ* 425 (CCMA).

¹⁸³ In terms of s 21(8)(b) the commissioner must consider the nature of the workplace, the nature of one or more organisational rights that the registered trade union seeks to exercise, the nature of the sector in which the workplace is situated and the organisational history at the workplace or any other workplace of the employer.

¹⁸⁴ Van Niekerk Law @ work at 321.

said to strengthen and support trade unions. They also promote the institution of collective bargaining. They make it possible for trade unions to recruit members, interact and engage with them and to be financially stable.¹⁸⁵

2.7 A trade union that is not representative can still acquire organisational rights, through collective bargaining and strike action. *In NUMSA & others v Bader Bop (Pty) Ltd & another*,¹⁸⁶ the Constitutional Court had to determine whether the Act must necessarily be interpreted to preclude non-representative unions from obtaining organisational rights, either through agreement with the employer or through industrial action.

The Court looked at the following:

- a) The purpose of the Act in section 1. It was found that the first purpose of the Act is to give effect to constitutional rights. The second purpose is to give legislative effect to international treaty obligations arising from the ratification of the ILO's conventions. The third purpose is to provide a framework whereby both employers and employees and their organisations can participate in collective bargaining and formulate industrial policy. Finally the Act seeks to promote orderly collective bargaining with emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.
- b) The interpretation of the Act in section 3, which provides that any person applying the Act must interpret its provisions to give effect to its primary objects, interpret its provisions in compliance with the Constitution and interpret its provisions in compliance with public international law obligations of the Republic.
- c) Section 39(1) of the Constitution. In applying the provisions of this section the Court looked at the ILO's Conventions 87 and 98, in particular, Article 2 of convention 87. The Court held that this Article

¹⁸⁵ *Idem*.

¹⁸⁶ 2003 2 BLLR 103 (CC).

contains an important principle that workers without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisations concerned, to join organisations of their own choosing without previous authorisation.

The Court held that the ILO's Committee of Experts and Freedom of Association Committee considered Article 2 as important in that it gives workers and employers the option to choose organisations of their choice. The ILO's Committees accepted that this does not mean that trade union pluralism is mandatory, they said that the majoritarian system will not be incompatible with Freedom of Association as long as minority trade unions are allowed to exist, organise, and represent its members and to seek to challenge majority unions from time to time. The Court further held that what is important from the Conventions and relevant to the current case was that:

- i Freedom of Association is ordinarily interpreted to afford unions to recruit members and to represent them; and
- ii Unions should have the right to strike to enforce collective bargaining demands.

Taking the above two principles into consideration, it could be suggested that a reading of the Act which permits minority unions the right to strike over organisational rights, would be more in line with the principle of Freedom of Association in the ILO Convention and that it would avoid the limitation of Freedom of Association and of the right to strike. The Court held that if the Act is capable of being interpreted broadly so as to avoid limitation of fundamental rights, then such interpretation should be preferred.

- d) The Court also looked at section 20 of the Act and said that there is nothing in the section that suggests that only representative unions should conclude a collective agreement that regulates organisational rights. However the conclusion of a collective agreement by an unrepresentative union should not have the effect of depriving representative unions the right conferred to them by the Act.

The Court concluded that an unrepresentative trade union can seek organisational rights outside the ambit of the Act and can also embark on a strike action in pursuit of such rights.

- 2.8. The concerted action to embark on industrial action is strengthened by organisational rights. Where a trade union is unrepresentative, it will lack the ability to have an effective and powerful voice to negotiate with the employer. The promotion of the majoritarian system in the Act makes sense in that it avoids chaos that could be a consequence of a workplace being overwhelmed by numerous minority trade unions. Bargaining with a representative trade union means that the terms and conditions regulating that workplace and a significantly large number of employees will be contained in one collective agreement. Although minority trade unions can obtain organisational rights by a collective agreement or by embarking on a strike action, the impact of their efforts will be minimal as compared to actions taken by a representative trade union.

3. Collective Agreements

- 3.1 These agreements play a pivotal role in enhancing collective bargaining. They are agreements entered into by qualifying parties across the labour-management divide. This rules out deals struck between unions. Parties not encompassed by the definition¹⁸⁷, thus unregistered trade unions, unregistered employer associations, groups of employees and individual employees, may enter into valid agreements on employment matters. Such agreements do not amount to collective agreements and are not enforceable under the Act.¹⁸⁸ A collective agreement binds:

3.1.1 Parties to the collective agreement;

¹⁸⁷ S 213 of the Act defines a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and on the other hand one or more employers, one or more registered employers' organisations; or one or more employers and one or more registered employers' organisations.

¹⁸⁸ Thompson and Benjamin South African Labour Law Vol 1 AA1-135.

- 3.1.2 Each party to the collective agreement and members of every other party to the collective agreement, insofar as the provisions of the agreement are applicable between them; and
- 3.1.3 The members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement, if the collective agreement regulates the terms and conditions of employment, or the conduct of the employers in relation to their employees, or the conduct of the employees in relation to their employees;
- 3.1.4 Employers who are not members of the registered trade union or unions that are party to the collective agreement if:
- i the employees are identified in the agreement;
 - ii the agreement expressly binds the employees; and
 - iii the trade union or unions that are party to the collective agreement have, as their members the majority of employees employed by the employer in the workplace.¹⁸⁹
- 3.2 It has been argued in some case law that a collective agreement is no longer binding on employees who have terminated their membership with a union that is a party to such an agreement.¹⁹⁰ In *Mzeku & others v Volkswagen SA (Pty) Ltd & others*¹⁹¹ the Labour Appeal Court explained that:

It seems to us that until an employee has resigned as a member of a trade union ... the employer is generally speaking, entitled, and obliged, to regard the union as the representative of the employee ... We say generally speaking because there are situations where, even if an employee ... has resigned ..., such union remains entitled to in effect represent such an employee ... The latter situation will occur, for example, where the union is a representative union that enjoys majority status ...

¹⁸⁹ Van Niekerk at 357. S 23 of the Act.

¹⁹⁰ In *Vista University v Botha* (1997) 5 BLLR 614 (LC) it was held that collective agreements entered into between the employer and two trade unions remained binding on the respondent employees notwithstanding the alleged termination of their trade union membership.

¹⁹¹ 2001 8 BLLR 857 (LAC) at 55.

because in such a case such union may conclude a collective agreement with the employer ... which binds even those employees who are not its members and those who may have been its members but have since resigned as well as those employees who will be employed by the employer or employers during the currency of such collective agreement.

The above decision makes it clear that a collective agreement remains binding for its duration.¹⁹² Van Niekerk¹⁹³ says that a collective agreement binds all parties to it and everyone who becomes a member of the union or employer organisation even after the agreement came into force. These agreements vary the contract of employment between an employer and employee who are both bound by it. Provisions in the employment contract that are in breach of a collective agreement are invalid.¹⁹⁴

3.3 Collective bargaining is promoted as these agreements are concluded through that process. Majoritarian system is also promoted as the bargaining parties are the employer and a representative trade union. The question is whether these agreements promote freedom of association? The effect of collective agreements on freedom of association is illustrated in agency shop agreements and closed shop agreements. These agreements are commonly termed exceptions to the freedom of association.

3.3.1 Agency Shop Agreements

These agreements are said to have been designed to eliminate free riders. Free riders are those employees who are not union members, however who derive benefit from union activities. A union's recognised function is to engage in collective bargaining and to assist in maintaining the employment relationship. Activities of a union have costs attached to them and these costs are borne by union members. There are benefits as well flowing from union activities and these benefits flow from collective bargaining. Non-union employees enjoy such benefits.¹⁹⁵ The agency shop agreement is defined in section 25 of the Act.¹⁹⁶ The agreement is binding only if it

¹⁹² S 23(2).

¹⁹³ At 358.

¹⁹⁴ *Ibid* and S 23(3).

¹⁹⁵ Landman "No free ride: the Agency Shop in South Africa" (1996) Vol 6(1) Contemporary Labour Law 1.

¹⁹⁶ A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to

provides that the employees who are not members of the representative trade union are not compelled to become members of the trade union.¹⁹⁷ The agency fee must be equivalent to, or less than the amount of the subscription payable by union members, if the subscription fee is calculated at a percentage of an employees' salary, the agency fee must be equivalent to, or less than that percentage, and if there are two or more trade unions who are parties to the agency shop agreement, the agency fee must be the highest amount of the subscription fee that would apply to the employee.¹⁹⁸ The agency fee can be deducted by an employer from the employee's wages without the employee's authorisation.¹⁹⁹ The agency fee deducted by the employer must be used for an expenditure that advances and protects the socio-economic interests of the employees.²⁰⁰ An employee who is a conscientious objector may in terms of section 25(4)(b) request that the agency fee deducted from his wages be paid into a fund to be administered by the Department of Labour.

Landman²⁰¹ differentiates between statutory and non-statutory agency shop agreements. Statutory agency shop agreements are those agreements that meet the requirements of section 25 of the Act. Non-statutory agency shop agreements are not entered into by a representative trade union. The latter agreements cannot be enforced by the Act and will not be binding on non-union employees. A non-statutory agency shop agreement can also not override the provisions of the Basic Conditions of Employment Act, which prohibits deduction from an employee's remuneration without consent of the employee. There seem to be no logic in entering into the latter agreement as the main purpose of an agency shop agreement is to get rid of free riders. An agency shop agreement that is not binding on non-union employees fails to achieve its purpose.

It could happen that the employee from whose wages the agency fee is deducted is a member of a minority union and that employee is paying a subscription fee to the minority union. That employee will be faced with two deductions from his wages. Van

deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.

¹⁹⁷ S 25(3).

¹⁹⁸ S 25(3)(b).

¹⁹⁹ S 25(4)(a).

²⁰⁰ S 25(3)(d).

²⁰¹ Fn 29.

Niekerk²⁰² is correct to say that although an agency shop agreement does not require employees to become members of the trade union party to the agreement, it could also amount to an infringement upon the freedom not to associate as improper pressure is exercised upon the employee with regard to choice of union membership. Non-union employees would choose to join a representative union which is party to the agency shop agreement solely in order to avoid paying fees to two unions.

The constitutionality of the agency shop agreement has been questioned and case law confirms that the agency shop agreements must strictly comply with section 25 of the Act to be constitutional. The Supreme Court of Appeal in considering the validity of an agency shop agreement where the applicant sought an order declaring that the agreement infringed his constitutional rights, found that the agency shop agreement was invalid *ab initio* for want of compliance with section 25(3) of the Act.²⁰³ In *Solidarity & others v Minister of Public Service & Administration*²⁰⁴ the Labour Court struck down a purported agency shop agreement which failed to state that employees who were not members of the signatory trade union did not have to become members of those unions. The court found that since an agency shop agreement entails a limitation of employees' constitutional and statutory rights, parties who conclude them must comply strictly with section 25. General reference to its requirements is not sufficient.

The agency shop agreements are said to have survived constitutional scrutiny in Canada.²⁰⁵ Lavigne, an employee in Canada who was not a member of the union and who was not required to be, opposed the use of the union fee deducted from him. He argued that the Act that gave the union the powers to use fees for activities that were unrelated to the union's core workplace causes violated *inter alia* his freedom of association. The Supreme Court of Appeal found that the violation on his freedom of association could be justified, however different reasons were given by judges in this respect. In particular one judge found that the objectives of the compelled payment of fees were to enable the union to participate in broader political, economic and social debates in society and to contribute to democracy in

²⁰² At 328.

²⁰³ *Greathead v SACCAWU* 2001 (3) SA 464 (SCA).

²⁰⁴ (2004) 6 BLLR 593 (LC).

²⁰⁵ *Lavigne v Ontario Public Service Employee Union* (1991) 2 S.C.R. 211.

the workplace. That these objectives were of sufficient importance to warrant a violation of Lavigne's freedom of association.

The Judge further said that the means through which the union attempted to achieve these objectives passed all three components of the proportionality test, firstly being that the means were rationally connected to the objectives. That the union needed to compel the payment of fees to engage in the broader political, economic and social goals. That the means minimally impaired the protected right to freedom of association. Further alternative schemes, such as an opt-out clause, would seriously undermine the union's ability to achieve its objectives. It was said that as such the means were also appropriate to their effects upon individuals such as Lavigne.

The agency shop agreement terminates upon the employer giving the trade union and the employees covered by the agency shop agreement, 30 days notice of termination, where the trade union has failed to establish that it is a representative trade union after being given a 90 day written notice by the employer or employer's organisation of the allegation that it is not a representative trade union.²⁰⁶

3.3.2 Closed Shop Agreements

A second category of agreements that are said to be exceptions to the freedom of association, are closed shop agreements.²⁰⁷ If a closed shop agreement is applicable in a specific sector or area, then every employee in that sector is obliged to become a member of the trade union which is a party to the closed shop agreement to which his or her employer is also a party.²⁰⁸ Van Jaarsveld says these agreements place restrictions on the right to associate freely, in particular, the opposite of this right, namely the right not to associate or join a trade union. He says the conclusion of a closed shop agreement will be appropriate in the following circumstances:

- i where a competing or minority trade union has insignificant representation;
or
- ii where only a single union operates.

²⁰⁶ S 25(8), (9) and (10).

²⁰⁷ S 26 of the Act defines closed shop agreements as collective agreements concluded by a representative trade union and an employer or employers' organisation, requiring all employees covered by the agreement to be members of the trade union.

²⁰⁸ Van Jaarsveld at 8-8.

He says that where a minority union has substantial support/representation, a closed shop agreement will not be in the interest of fairness and labour peace.

Closed shop agreements are binding only if.²⁰⁹

- 1) a ballot has been held of the employees to be covered by that agreement;
- 2) two thirds of the employees who voted have voted in favour of the agreement;
- 3) there is no provision in the agreement requiring membership of the representative trade union before employment commences; and
- 4) it provides that no membership subscription or levy deducted may be paid to a political party as an affiliation fee, contributed in cash or kind to a political party or a person standing for election to any political office or used for any expenditure that does not advance or protect the socio-economic interests of employees.

A trade union that is a party to a closed shop agreement may not refuse an employee membership or expel an employee from the trade union unless the refusal or expulsion is in accordance with the trade union's constitution and the reason for the refusal or expulsion is fair, including, but not limited to, conduct that undermines the trade union's collective exercise of its rights.²¹⁰ Employees who were already employed at the time that the closed shop agreement came into effect may not be dismissed for refusing to join the trade union party to the agreement and employees could refuse to join the trade union party to the agreement on grounds of conscientious objection.²¹¹ These employees who fall under section 26(7) may still be required to pay an agency fee.

The employer can dismiss an employee who refuses to join a trade union party to a closed shop agreement or an employee who has been refused membership to a trade union party to a closed shop agreement if the refusal is in accordance with the provisions of section 26(5), or an employee who is expelled from a trade union party to a closed shop agreement if the expulsion is in accordance with the provisions of

²⁰⁹ S 26(3).

²¹⁰ S 26(5).

²¹¹ S 26(7)

section 26(5). Disputes on admitting a registered trade union as a party to a closed shop agreement are referred to the Labour Court for adjudication.²¹² A closed shop agreement is terminated in terms of section 26(15) where a representative trade union conducts a ballot of the employees covered by the agreement to determine whether it must be terminated or not. The agreement will be terminated if one third of the employees covered by the agreement sign a petition calling for the termination of the agreement and three years have elapsed since the date on which the agreement commenced or the last ballot was conducted in terms of section 26.

Van Niekerk²¹³ refers to the above as checks and balances to safeguard the arrangements against constitutional attack on section 26 on the basis that it limits freedom of association. The purpose of the limitation on freedom of association by sections 25 and 26 is the promotion of collective bargaining in terms of section 1 (c) and (d) of the Act.²¹⁴ Vetorri²¹⁵ says collective bargaining is promoted in the Act by the creation of bargaining forums such as workplace forums, bargaining councils and statutory councils and encouraging collective bargaining by acquisition of organisational rights. The promotion of a majoritarian system is evident in the Act where only majority trade unions:²¹⁶

- a) Are given more organisational rights;²¹⁷
- b) Can enter into close shop and agency shop agreements;²¹⁸
- c) Can enter into collective agreements to establish thresholds required to obtain organisational rights.²¹⁹

At the end of the day it is the majority trade union that will pressurise the employer to go to the bargaining table. A majoritarian system is about power play. The

²¹² S 11, 12, 13 and 14.

²¹³ At 327.

²¹⁴ Purpose of the Act is *inter alia* to provide a framework within which employees and their trade unions, employers and employers' organisations collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and formulate industrial policy and to promote orderly collective bargaining, collective bargaining at sectoral level, employees participation in decision-making in the workplace and the effective resolution of labour disputes.

²¹⁵ A Judicially Enforceable Duty to Bargain? (2005) *De Jure* 382.

²¹⁶ *Ibid.*

²¹⁷ S12, 13, 14, 15 and 16.

²¹⁸ S 25 and 26.

²¹⁹ S 18.

preference of this system is further indicated by the promotion of central or sectoral collective bargaining.²²⁰

4. No Duty to Bargain in the LRA and the Constitution

4.1 Section 23(5) of the Constitution grants every trade union, employers' organisation and employer the right to engage in collective bargaining. The LRA's point of departure in relation to collective bargaining is that of voluntarism. Although there is no duty to bargain, the Act puts limits such as the regulation of disputes for refusal to bargain in section 64 and acquisition and exercise of organisational rights on the voluntarist system.²²¹ Van Jaarsveld²²² argues that what is voluntarist about the Act is not the fact that it does not impose a duty to bargain, but rather the mechanism that the Act provides for collective bargaining. He says that the mechanisms are no compulsion to establish a bargaining council or workplace forum, nor prevention of parties from entering into a recognition agreement and bargaining at plant level despite the Act's preference to central or sectoral level bargaining. The mechanisms referred to by Van Jaarsveld are provisions that make the Act, and it is provisions like these that give the Act its voluntarist nature. To this effect, the Act is voluntarist as its provisions give it that character.

4.2 In *SANDU v Minister of Defence & others, Minister of Defence & others v SA National Defence Union & others*,²²³ the SCA had to determine if there is a legally enforceable duty to bargain collectively with SANDU. Conradie JA held that section 23(5) is open to more than one interpretation. Reference was made to section 39(1) of the Constitution which requires that when interpreting the Bill of Rights, a court, tribunal or forum-

- i must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- ii must consider international law; and

²²⁰ S 1.

²²¹ Fn 1.

²²² Van Jaarsveld "Reg op Kollektiewe Bedinging- Nog Enkele Kollektiewe Gedagtiges" 204 *De Jure* 353.

²²³ (2006) 27 ILJ 2276 (SCA).

iii may consider foreign law.

The Court held that Conventions 87 and 98 of the ILO give much assistance in interpreting section 23(5). That a distinct preference for voluntarism, for a system that functions without reliance on a legally enforceable right to bargain, emerges from the provisions of Conventions 87 and 98. Conradie JA held that the voluntarist approach that emerges from these international instruments has characterised our labour dispensation since its liberalisation with the amendments to the 1956 Act when, following upon the recommendations of the Wiehahn Commission, all workers were permitted to organise and to strike in 1979. Voluntarism, the court held, does not mean that employers and employees necessarily negotiate voluntarily. Often they negotiate in order to avert the economic pressures brought about by a strike or a lockout. This pressure is one of the principal driving forces behind the voluntarist system.

The Court made further reference to section 1 of the Act and held that the Act emphasises the virtues of collective bargaining but nowhere suggests that the process should be any other way except voluntary. That the furthest the Act is prepared to go is certain prescriptions relating to refusal to bargain found in section 64(2)(a). In terms of this section, there must be an advisory award before a notice to strike can be issued where there is a refusal to bargain. The award is not determinative of the dispute. It binds neither party. It merely helps them find a solution. The Court held that this is the clearest indication that the Act does not recognise a duty to bargain enforceable by the courts. Although the right to strike in the military sector has been removed by the legislature, this did not mean that the only way to get the SANDF to the bargaining table is through judicial compulsion. The alternative to compel the parties to bargain is compulsory arbitration, a device well established in our law for settling disputes in essential and maintenance services.

The Court concluded that the Constitution, whilst recognising and protecting the central role of collective bargaining in our labour law dispensation, did not impose on employers or employees a judicially enforceable duty to bargain. Moreover, it did not contemplate that, when the right to strike was removed or restricted, but was replaced by another adequate mechanism, a duty to bargain arose.

4.3 The Constitutional Court in *SA National Defence Union v Minister of Defence and others*²²⁴ also had to determine whether there is a legally enforceable duty to engage in collective bargaining. O'Regan J held that a litigant who seeks to assert a right to engage in collective bargaining must base his case on the legislation enacted to regulate that right, and not on the Constitution. If the legislation does not fully protect the right, then its constitutionality can be challenged. The judge did not decide on whether or not there is a legally enforceable duty, however as an aside she said that should section 25(3) impose such a duty outside legislative framework to regulate such duty, this may result in courts drawn in controversial industrial relations issues and that this would be undesirable.

The lack of a judicially enforceable duty to bargain is a reflection of how collective bargaining is left to power play. Parties will bargain voluntarily not necessarily because they want to, as Conradie JA said in the SANDU case, however because they avoid to assail each other economically.

5. Bargaining Forums

5.1 Bargaining Councils

The Act promotes bargaining at sectoral level. Bargaining councils are seen as institutions to best achieve sectoral bargaining. One or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector or area by adopting a constitution that meets the requirements of the Act and by having the council registered.²²⁵

A bargaining council has powers and functions to *inter alia* conclude and enforce collective agreements, prevent and resolve disputes, perform the dispute resolution functions referred to in section 51, and determine by collective agreement matters which may not be an issue in dispute for the purposes of a strike or a lockout at the workplace.²²⁶ A bargaining council is an institution that ensures that as its core function, collective bargaining is effected and that it is done so efficiently. This is

²²⁴ (2007) 9 BLLR 785 (CC).

²²⁵ S 27.

²²⁶ S 28(1).

another indicator of the promotion of bargaining at sectoral level by the Act. Bargaining councils have a regulatory function to maintain labour peace in the sector by negotiations, supervision and enforcement of collective agreements. The dispute settling function of the bargaining council depends on:

- a) whether the dispute is between parties who are subject to the bargaining council's jurisdiction as far as it concerns the area and sector for which the council has been registered;
- b) whether it is a dispute between parties to the council and any member of the trade union or employers' organisation; and
- c) the nature of the dispute, thus whether a dispute concerns a matter of mutual interest or not.²²⁷

The binding nature of a collective agreement concluded in a bargaining council is provided for in section 31.²²⁸ The binding effect in terms of section 31 is subject to section 32 and the constitution of the bargaining council. Section 32 is mostly criticised for extending a collective agreement concluded in the bargaining council to non-parties to the collective agreement that are within its registered scope and are identified in the request done by the bargaining council to the Minister.²²⁹

Godfrey²³⁰ says the outcome of bargaining council agreements can be that it does not take into account the ability of a non-party to pay. He says some non-party may be able to afford the labour costs but others may be forced to reduce the labour force or even to close down. However he says that the criticism against extended

²²⁷ Van Niekerk at 353.

²²⁸ S 31 provides that a collective agreement concluded in a bargaining council binds parties to the bargaining council who are also parties to the collective agreement, 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 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 party, if the collective agreement regulates the terms and conditions of employment or the conduct of the employers in relation to their employees or the conduct of employees in relation to their employers.

²²⁹ The request to extend a collective agreement in terms of s 32 must be done if at a meeting of the bargaining council one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension and one or more registered employers' organisations, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

²³⁰ Godfrey "Regulating the Labour Market: The Role of Bargaining Councils" 27 (2006) 731.

collective agreements is unwarranted as only a small percentage of employees are covered by extended collective agreements.

When one analyses the effect of extending collective agreements to non-parties in terms of section 32, it could be argued that should such an extension not be applicable, there might be a potential element of risk of competition that could emerge between non-parties and parties covered by a bargaining council's collective agreement. This could be due to the fact that parties covered by a collective agreement will have their labour costs regulated by the agreement, whilst non-parties will not have such a cost regulating mechanism. On the other hand it does not sound fair for a non-party to be forced to pay unaffordable labour costs.

Perhaps the bargaining council should have categories of parties and accommodate parties according to their categories when concluding collective agreements and not treat all parties the same. As Godfrey states, the challenge facing small firms are time, resources and industrial relation expertise. This is more the reason why bargaining councils must revisit the positions of these parties and be more flexible when dealing with them. Section 33 gives a designated agent the powers to promote, monitor and enforce compliance with any collective agreement concluded in that bargaining council.

The Public Service has its own bargaining council called the Public Service Co-ordinating Bargaining Council.²³¹ The Public Service Co-ordinating Bargaining Council has powers to perform all the functions of a bargaining council in respect of the matters in section 36(2).²³² The Public Service Co-ordinating Bargaining Council may by its constitution and resolution designate a sector of the public service for the establishment of a bargaining council and may vary the designation of, amalgamate or disestablish bargaining councils so established.²³³ A bargaining council established by the Public Service Co-ordinating Bargaining Council in terms of section 37(2) has exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the State as employer in that sector, has the requisite

²³¹ S 35.

²³² Matters that are regulated by uniform rules, norms and standards that apply across the public service, or matters that apply to terms and conditions of service that apply to two or more sectors, or matters that are assigned to the State as employer in respect of the public service that are not assigned to the State as employer in any sector.

²³³ S 37.

authority to conclude collective agreements and resolve labour disputes.²³⁴ Disputes between bargaining councils in the public service are referred to the Commission. If the dispute remains unresolved, a party may request that the Commission resolve the dispute through arbitration.²³⁵

5.2 Statutory Councils

Statutory councils on the other hand are established in a sector and area where there is no registered council. By application to the registrar²³⁶ a representative trade union or a representative employers' organisation may request the establishment of a statutory council in a sector and area in respect of which no council is registered.²³⁷ Upon the establishment of a statutory council, an agreement on the registered trade unions and registered employers' organisations to be parties to the council and on a constitution of the council will be facilitated at a meeting chaired by a commissioner. A statutory council will be registered in accordance with the agreement concluded.

If no agreement is reached on the parties to the council and on the constitution, the commissioner must facilitate separate meetings of trade unions and employers' organisations to facilitate the conclusion of an agreement.²³⁸ If an agreement is reached on the registered trade unions to be parties to the council, the Minister must admit, as parties, the agreed registered trade unions and if an agreement is reached on the registered employers' organisations to be parties to the council, the Minister must admit, as parties to the council, the agreed registered employers' organisations.²³⁹ If the agreement is still not reached, the Minister must admit the trade union or employer organisation that applied and must appoint any other union

²³⁴ S 37(5).

²³⁵ S 38.

²³⁶ Registrar is defined in section 213 as the registrar of labour relations appointed in terms of section 108 and includes a deputy registrar appointed in terms of that section when acting on the direction or under a general or special delegation of the registrar or any acting registrar appointed in terms of that section.

²³⁷ S 39 (1) defines a representative trade union as a registered trade union, or two or more registered trade unions acting jointly, whose members constitute at least 30 per cent of the employees in a sector and area and a representative employers' organisation is defined as a registered employers' organisation, or two or more employers' organisations acting jointly, whose members employ at least 30 percent of the employees in a sector and area.

²³⁸ S 41(10).

²³⁹ S 41(2).

or employer organisation in the sector or area.²⁴⁰ Where there is no registered employer organisation in the sector and area, or there is one which does not wish to be party to council, Minister may appoint suitable persons taking into consideration the nominations done. The same procedure applies where there is no registered trade union in the sector or area.²⁴¹ A statutory council has the powers to:²⁴²

- i resolve disputes about matters of mutual interest between trade unions, employees, trade unions and employees and between employers' organisations, employers or employers and employers' organisations;
- ii promote and establish training and education schemes;
- iii establish schemes and funds for the benefit of one or more of the parties to the council; and
- iv conclude collective agreements.

Where a collective agreement is concluded by a statutory council in respect of the powers as mentioned above, the agreement will have the binding effect as mentioned in sections 31, 32, 33.²⁴³ Any of the powers of a bargaining council may be included in the constitution of a statutory council by agreement.²⁴⁴ Van Niekerk says statutory councils are creatures of compromise and bear all hallmarks of an awkward settlement. He says these councils were established to address, at least in part, demands by the union federations for compulsory centralised bargaining in all sectors of the economy.²⁴⁵

5.3 Workplace Forums

One of the institutions that I perceive integral to the employment relationship is a workplace forum. As correctly put by Clyde Summers²⁴⁶, the purpose of a workplace forum is to allow workers to have a voice on issues affecting their day-to-day work. Summers says that countries that have prospered domestically and in the world competition, have developed institutions and attitudes which relate to allowing

²⁴⁰ S 41(3).

²⁴¹ S 41(6) and (7).

²⁴² S 43(1).

²⁴³ S 31, 32 and 33 are discussed under Bargaining Councils.

²⁴⁴ S 43(2).

²⁴⁵ At 355.

²⁴⁶ Summers "Workplace Forums from a Comparative Perspective" (1995) 16 *ILJ* 806-813.

workers to be involved in issues relevant to their work. This statement cements what constitutes a healthy working relationship. When employees are informed and involved in matters that affect their work, the working relationship becomes less hostile. Negotiations and bargaining also tend to take place more efficiently.

Van Niekerk says workplace forums establish a system where a worker gets involved in the decision making of the employer. They supplement collective bargaining and relieves collective bargaining of duties not suited for it.²⁴⁷ He says these forums are intended for larger workplaces.²⁴⁸ A workplace forum can be established by a collective agreement, failing the conclusion of a collective agreement, the forum will be established in terms of the Act.²⁴⁹ The provisions of the Act will not apply if a collective agreement is concluded to form a workplace forum.²⁵⁰

The employer must consult the workplace forum on the issues referred to in section 84(1) except where such matters for consultation are regulated by a collective agreement with the representative trade union.²⁵¹ A representative trade union is defined as a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.²⁵² A proposal on a matter in section 84(1) cannot be implemented by an employer without the forum agreeing to it or the arbitrator sanctioning it.²⁵³ Matters in section 84(1) clearly create a conducive working environment.

A workplace forum established in terms of the Act has the following general functions:

²⁴⁷ At 362.

²⁴⁸ Also see s 80 which states that a workplace forum may be established in any workplace in which an employer employs more than 100 employees. An employee is defined in s 78 as any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to represent the employer in dealings with the workplace forum or determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace.

²⁴⁹ S 80(6).

²⁵⁰ S 80(8).

²⁵¹ Matters which the employer must consult the workplace forum in terms of s 84(1) relate to restructuring the workplace, changes in the organisation of work, partial or total plant closures, mergers and transfers of ownership in so far as they have an impact on the employees, dismissal of employees for reasons based on operational requirements, exemptions from any collective agreement or any law, job grading, criteria for merit increases or the payment of discretionary bonuses, education and training, product development plans and export promotion.

²⁵² 78(b).

²⁵³ S 85(1).

- i to seek to promote the interests of all employees in the workplace, whether or not they are trade union members;
- ii to seek to enhance efficiency in the workplace;
- iii is entitled to be consulted by the employer, with a view to reaching consensus, about matters referred to in section 84; and
- iv is entitled to participate in joint decision-making about matters referred to in section 86.²⁵⁴

Section 86 requires the employer to consult and reach consensus with the workplace forum prior to implementing any proposal in regard to matters referred to in that section, unless the matters for joint decision-making are regulated by a collective agreement.²⁵⁵ Van Niekerk says the first level of involving employees in decision making is where the employer in a workplace where there is a workplace forum discloses certain information relating to its performance and prospects to the workplace forum. The second level is consultation where the workplace forum is consulted on a variety of issues. The last level is joint decision making. He says the first level is the weakest level of participation and the third level is the strongest level of participation.²⁵⁶

Summers²⁵⁷ makes a comparison on how workplace forums work in the following countries:

Sweden

Collective agreements in relation to economic terms are negotiated centrally. The workplace problems are resolved by local management and local trade unions.

²⁵⁴ 79.

²⁵⁵ Such matters concern disciplinary codes and procedures, rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees, measures designed to protect and advance persons disadvantaged by unfair discrimination and changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.

²⁵⁶ At 362.

²⁵⁷ Fn 80.

Germany

Economic terms are bargained at industrial or sectoral level. These are distributive issues relating to how much goes to workers and how much goes to the shareholders or owners. Distributive issues should not be mixed with workplace issues as the former can lead to volatile engaging between workers and employers. Summers says the importance of keeping economic issues and workplace issues separate is to ensure that collective bargaining does not intermix with consultative processes.

The following countries are used to illustrate the separation of economic and workplace issues:²⁵⁸

Sweden

The two functions are performed by the union, but separate parts of the union. Central agreements are negotiated by national unions and local unions deal with plant level matters.

Germany

The trade union and the employer cannot through collective bargaining encroach on the statutorily defined functions of the work council, though they can delegate functions to the council.

Western Europe

The centralised agreements establish basic economic terms and plant structure deal with plant level problems.

Disputes in the consultation process are resolved as follows by the following countries:²⁵⁹

²⁵⁸ *Ibid.*

²⁵⁹ *Idem* at 92.

Sweden

If no agreement is reached after full consultation, the employer may implement a proposal. The union is barred by statutory peace obligation of collective agreement from striking.

Germany

Issues not resolved at consultation are left to management. Some are referred to compulsory arbitration. The work council is barred by law from striking.

Japan

Both functions are performed by the union. All disputes begin by consultation, if it fails, then collective bargaining commences. This system is based on co-operative relations in which management and employees consider themselves as members of the family.

South Africa

When looking at South Africa, Summers says South Africa does not have centralised collective bargaining which leads to the separation of functions. That society cannot be democratic and the economy cannot prosper and workers cannot improve their lives if management and employees see each other as adversaries. That collective bargaining system must be constructed to encourage co-operation at the workplace.²⁶⁰

When parties have addressed issues at a workplace forum, they will be in a better position to negotiate and bargain efficiently. Workplace problems are a trigger to hostility and unrest leading to industrial actions. Economic issues and workplace issues should be kept separate, however, the basis of a proper functioning employment relationship depends on how well the employer and employee interact on matters affecting their relationship on a day-to-day basis.

²⁶⁰ *Idem* at 93.

6. Collective Bargaining, Its Supportive Role, Enhancing Employment Relationships and Its Future

The provisions of the Act discussed relating to organisational rights, collective agreements, the creation of bargaining forums, no duty to bargain, promote collective bargaining and give effect to the purpose of the Act, specifically in section 1(c) and (d). When successful negotiations take place, industrial actions are minimised. These provisions are a foundation for orderly collective bargaining, for employee participation in some decision-making in the workplace and the effective resolution of labour disputes. Collective bargaining should however, in certain instances such as in bargaining councils, be more flexible and accommodative to different categories of employers.

Chapter 5–The Causes of and Solution to Labour Unrest

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Chapter 5– The Causes of and Solution to Labour Unrest

1. The Rise of Labour Unrest

Collective bargaining is aimed at minimising conflict in an employment relationship that could give rise to a strike action. Parties are enabled through collective bargaining to negotiate on matters of mutual interest. However, despite mechanisms such as freedom of association, organisational rights, bargaining forums and the right to strike, which enhance collective bargaining, we have seen a high rate of labour unrest in recent years. This research was influenced by persistent strike actions that erupted in different sectors.

Strike actions emerged in sectors ranging from mining, construction and the motor industry. The strike at Lonmin mine in Marikana near Rustenburg in 2012 shook South Africa and attracted the attention of the world due to its violence and duration. The employer threatened to cut 14 000 jobs as a result of the amount of money lost in revenue. BMW on the other hand took a decision in 2013 to stop production into South Africa as a consequence of the labour unrest that resulted in the company losing 13000 cars in production and missing supply targets. The strikes in the construction industry, from August to September 2012, cost employers an estimated R2.7 billion in lost revenue.

2. Collective Bargaining and the Cause of Strike Actions

It has been shown in the research that the Act promotes collective bargaining at sectoral level by favouring a majoritarian system. The Act has mechanisms such as organisational rights, bargaining forums, freedom of association, no duty to bargain and the right to strike, all of which are intended to promote collective bargaining.²⁶¹ Notwithstanding mechanisms available in the Act, aimed at attaining orderly collective bargaining, strikes occur frequently. Labour unrest is a consequence of

²⁶¹ S 12-16 give organisational rights to representative trade unions. S 27-38 have provisions relating to bargaining councils. s 39-48 have provisions relating to statutory councils. Workplace forums are dealt with in s 78-94. Freedom of Association has been discussed in chapters 2 and 3 of the research and in S 4. In *SANDU v Minister of Defence, Minister of Defence v SA National Defence Union (2006) 27 ILJ 2276 SCA*, it was held that the Act in s1 emphasises the virtues of collective bargaining but nowhere suggests that the process should be any other way except voluntary. The right to strike is provided in s 64.

failed negotiations. When parties reach a deadlock at the bargaining table, industrial action becomes a remedy. Collective bargaining is failing to achieve its purpose and this requires an urgent revisit into the bargaining process in its entirety to identify the flaws.

Could it be that the trade unions are desperate for representation? The rivalry between the National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (AMCU), was one of the allegations at the centre of the miners' strike at Lonmin. Collective bargaining will fail if trade unions approach bargaining in bad faith and present unreasonable demands with the aim of gaining popularity.

Could it be that collective bargaining is too rigid and needs to be more flexible and accommodative? Whichever way one looks at it, it is clear that there are flaws in the process that result in the breakdown in negotiations. The provisions of the Act relating to strikes and collective bargaining are unambiguous and support the purpose of the Act. The Act is not the cause of failed collective bargaining.

3. Impact of Strikes and Collective Bargaining on Unemployment and the Economy

Employment provides stability, dignity and economic freedom to individuals. South Africa has one of the highest rates of unemployment in the world. The unemployment rate has recently been increased by the loss of approximately a million jobs during the recession. Labour unrest is another major contributor. Collective bargaining at sectoral level between large incumbent firms and labour unions where parties make deals that suit each other to the exclusion of those without jobs has been pointed out as a contributor to unemployment.²⁶² Wage increases above inflation, militant labour and an inflexible labour regime have been pointed out as developments that will, over time, result in companies thinking twice about expanding their labour force, rather than opting for mechanisation.²⁶³ The extension of bargaining councils' agreements to non-parties in terms of section 32 of the Act has been criticised as failing to take into account positions of small firms that

²⁶² Sunday Times (2013-11-24) 3.

²⁶³ Business Day (2013-10-28) 8.

might not afford labour costs and could be forced to reduce the labour force or close the business.²⁶⁴

4. Comparison of South Africa's Labour Laws with Other Countries

It is believed that countries that have prospered domestically and in the world competition have developed institutions and attitudes which relate to allowing workers to be involved in issues relevant to their work.²⁶⁵ A number of employers are of the view that our labour laws are difficult to comply with. I am more inclined to the view that South Africa is not over regulated in this regard. Finnemore²⁶⁶ says there will always be one or more countries that have a provision in the labour legislation that is similar to or even more onerous than ours. It is not always the level of regulation that is important, but the change in that level. Finnemore argues that it will take years for the role players to adjust from a system of relatively less regulation to the existing regulatory system. Another factor is that South Africa has a legacy of poor education and training, coupled with discrimination which aggravated skills shortages and this makes it difficult for employers to cope with the same level of labour legislation than countries that operate with a highly skilled workforce.²⁶⁷

5. Is Change Eminently Required

The need to revisit collective bargaining is eminent. The source of the worrying labour unrest should be looked at. Trade union rivalry seems to be on the rise and the desperation for representation could be the centre of the problem. There may be some truth in the view that the desire to attract urgent foreign direct investment and the need to resolve the unemployment crisis in the country, may result in the state moving towards stronger state control over trade unions in the future.²⁶⁸ Education is also needed for trade union leaders and its members to rid the strike actions from their current violent nature. Bargaining forums should be looked at. As already

²⁶⁴ Godfrey "Regulating the Labour Market: The Role of Bargaining Councils" 27 (2006) 731.

²⁶⁵ Summers "Workplace Forums from a Comparative Perspective" (1995) 16 *ILJ* 806-813.

²⁶⁶ Finnemore 131.

²⁶⁷ *Ibid.*

²⁶⁸ Finnemore Van Rensburg *Contemporary Labour Relations* 2002 18.

stated, the Act supports collective bargaining and gives every employee the right to strike.²⁶⁹ The source of the problem does not seem to be the Act.

²⁶⁹ S 65(1) provides for the limitations on the right to right.

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