TITLE : **THE CHANGING FACE OF COLLECTIVE BARGAINING**

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DATE OF SUBMISSION :

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THE INDUSTRIAL COURT DISCUSSES ITS RECORD ON COLLECTIVE BARGAINING

"Our progress gets so little mention,

Attacked at each intervention.

Seeing that we don't get our due -

Our praises we will sing to you.

To start - we gave the Press the law:

Once you've bargained, you can't withdraw.

Fodens was fine, but a little later,

Good faith: banned as an infiltrator.

Johnson Tiles gave Erasmus' his say,

Damn the world - we'll do it our way.

We're erratic, we've hit and missed,

Marievale broke the mine paternalist.

Unions were keen but lost **Hart**,

A change - we took the bosses' part.

Things then went to the higher court,

Trident Steel - a lesson well taught.

We now know voluntarism's a sham-

Don't bargain and breakfast with **Spekenham.**

The future - what is in store?

We got it right - they changed the law."

PAUL BENJAMIN

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1. INTRODUCTION

The International Labour Office submitted that

> "...[C]ollective bargaining is an evolving social institution, subject to continuing process of change and growth. As practised today in many countries, it is far different from the process of negotiation which trade unions sought to carry on with employers until late in the nineteenth century. At that time it was necessary for trade unions to threaten with a strike or actually to declare a dispute before employers would negotiate with them over their demands".[1]

This quotation is general but it encapsulates the very essence of South African labour relations and is the reason for this thesis - the evolution of collective bargaining.

The current Labour Relations Act 66 of 1995 has a lengthy history with regard to industrial legislation and several milestones document the developments and changing attitudes that have taken place towards the collective bargaining process in South Africa.[2]

To fully appreciate and understand the Labour Relations Act 66 of 1995 (the Act) and its

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[1] International Labour Office *Conciliation and Arbitration Procedures in Labour Disputes* (ILO Geneva 1980) at 24

[2] To name a few -the Cape Servants Registry Act 1906, the Transvaal Industrial Dispute Act 1909, the Native Labour Regulations Act 1911, the Factories Act 1918, the Industrial Conciliation Act 1924(this Act was passed during the last days of the Smuts government as a response to the grievances of white mineworkers which led to the Rand Rebellion of 1922.), the Wage Act 1925, the (second) Industrial Conciliation Act 1937, the Black Labour Relations Regulations Act 48 of 1953, the (third) Industrial Conciliation Act 1956(the 1981 amendment changed the long-serving name to the present "Labour Relations Act" as a reflection of the rationalization of the legislation throughout the whole sphere of labour relations by its long awaited inclusion of blacks as employees), the Labour Relations Amendment Act 1988, the Labour Relations Amendment Act 1991 and the Labour Relations Act of 1995(amended by Act

impact on collective bargaining, it is necessary to examine the evolution of South African labour relations. I will attempt to take the reader through this arduous and often painful journey.

It is hoped that through this examination it will become evident that the evolution of labour relations and collective bargaining has been greatly influenced, if not determined, by the different political policies of South African governments.

This journey begins with a historic and political overview of South African labour relations since 1924. The reader will then be given a detailed definition and explanation of what is meant by collective bargaining. I will examine the theories and the need for collective bargaining with specific reference to South African labour relations. A critical analysis of the evolution of the duty to bargain, the levels of bargaining, with whom to bargain and the bargaining topics follows. Through this analysis I will evaluate the degree of voluntarism compared to compulsion in the South African collective bargaining system and to what extent it has evolved over time.

It should be noted that this thesis covers only the period until the implementation of the Labour Relations Act 66 of 1995. The Act brought about major changes in South Africa's industrial relations system and the centrepiece of industrial relations - collective bargaining – was fundamentally changed through the Act. The far-reaching changes swept through enterprise, industry and macro-economic relations level. Because of the profound impact of the Act on collective bargaining I will explore the evolution of collective bargaining only up to this critical stage. The purpose of the Act is "to advance economic development, social

142 of 1996).

justice, labour peace and the democratisation of the workplace..."[3]. Whether this will be achieved depends on the response from business and labour and this has yet to be assessed. At the end of this journey the reader should be able to determine whether the changes brought about by the Labour Relations Act 66 of 1995 were necessary and whether they are for better or worse.

[3] Section 1 of the Act

2. HISTORICAL AND POLITICAL BACKGROUND TO THE CHANGES

2.1. THE PERIOD 1924 - 1979

The first comprehensive piece of labour legislation, the Industrial Conciliation Act 11 of 1924, was passed by the Smuts government in response to the grievances of white mineworkers which led to the Rand Rebellion of 1922. Although the Act introduced the registration of employers' organisations and trade unions, a system for the settlement of disputes and a framework for collective bargaining, it failed significantly since it excluded pass-bearing African employees.

The political and ideological views of the time were concretised through the Act's definition of "employee"[4] which excluded pass-bearing Africans. Africans were denied membership of registered trade unions, direct representation on industrial councils and access to the processes of conciliation boards. The Act gave the Minister of Labour wide discretion as far as centralised bargaining was concerned. It made provision for the registration of industrial councils *if the Minister considered* the parties sufficiently representative of employers and employees in the area and industry.[5]

The Minister could also extend industrial council agreements to non-members within the jurisdiction of the council if he felt it necessary and if the parties were sufficiently representative.[6] Industrial council agreements could, at the insistence of the parties and at the Minister's discretion, be gazetted and, thereby, become legally binding.[7] If the Minister was satisfied that the parties were sufficiently representative, a conciliation board could be

[4] Section 24 of the Industrial Conciliation Act 11 of 1924
[5] Section 2(3)
[6] Section 9(1)(b)

established where no industrial council existed to mediate disputes in the area or the industry.

The continued exclusion of pass-bearing African employees meant that they could be exploited. The Minister was given authority in terms of section 9(4) of the Industrial Conciliation (Amendment) Act 24 of 1930 to lay down minimum wage rates and maximum working hours for people excluded from the definition of "employee'. Godfrey[8], however, submitted that the purpose of the amendment was to safeguard white workers rather than to benefit pass-bearing African employees. The amendment further provided for the disputes' resolution function of industrial councils to include *all* disputes within the area of jurisdiction.[9] The Act was replaced by the Industrial Conciliation Act 36 of 1937 but the racially determined system remained.

From 1948 onwards the National Party government entrenched its policy of apartheid. In terms of the Native Laws Amendment Act 54 of 1952 African women were classified as pass bearing and, therefore, also excluded from the operation of the Industrial Conciliation Act. The government made clear its intentions to implement and uphold its apartheid policy and, in 1953, the Native Labour (Settlement of Disputes) Act 48 of 1953 was passed. This created separate labour legislation for Africans without the right to form or join registered trade unions, or denied Africans recourse to industrial action.

When the Industrial Conciliation Act 28 of 1956 was passed, the racially exclusive industrial relations system remained. New non-racial trade unions with white, coloured and Asian

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[7] Sections 9(1)(a) and 2(1)
[8] D du Toit et al *The Labour Relations Act of 1995 A Comprehensive Guide* (1998) 5

members were, prohibited from registering, and existing 'mixed' unions with white, coloured and Asian members, were required to establish separate branches for them.[10] The Act openly promoted white 'job reservation'[11] and the question was how long the majority of workers would tolerate these unjust labour laws.

2.2. THE WIEHAHN COMMISSION

After decades of non-recognition of African trade unions in addition to the repressive political system in South Africa, conditions in the country became highly explosive. The increasing vertical mobility and demands of the black labour force, as evidenced by the growing strength of black unions, led to widespread unrest in the 1970s. A watershed in South Africa labour legislation was reached in June 1977 with the establishment of the now well-known "Wiehahn Commission".[12]

The establishment of the commission was vital because South African legislation had last been subject to systematic review thirty years earlier and the demands of the black labour force could

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[9] Section 3(1)(g)
[10] Sections 4(6) and 8(3)(a)
[11] Section 77
[12] *Commission of Inquiry into Labour Legislation* - named after its chairman N.E.Wiehahn. The commission's brief was to inquire into and make recommendations in respect of (i) the adjustment of the existing system for the regulation of labour relations in South Africa with the object of making it provide more effectively for the needs of changing times (ii) the adjustment, if necessary, of the existing machinery for the prevention and settlement of disputes which the changing needs may require (iii) the elimination of the bottlenecks and other problems which were experienced at the time within the entire sphere of labour and (iv) the methods and means by which a foundation for the creation and expansion of labour relations might be laid for the future of South Africa.

no longer be silenced. The commission's report[13] was published in six parts between February 1979 and November 1980. The commission saw the growth of "informal" collective bargaining as having the potential to undermine the statutory collective bargaining institutions. It also feared that plant-level bargaining would expand at the expense of industry-wide bargaining centred in industrial councils.

The commission's central recommendation, which became law in 1979, was to allow trade unions with African members to register and to participate in the statutory conciliation system.[14] Another important recommendation was the creation of an industrial court with an unfair labour practice jurisdiction, which replaced the industrial tribunal.[15]. The unfair labour practice concept was introduced by the Industrial Conciliation Amendment Act 94 of 1979. It was deemed to be "any labour practice, which in the opinion of the industrial court is an unfair labour practice." This meant that individual and collective rights would now enjoy the protection of the court through its unfair labour practice jurisdiction. The commission envisaged that the court would, through its judgements, develop a body of case law that would serve as guidelines for fair employment practices.

The commission further recommended the establishment of a statutory advisory body, the National Manpower Commission, which would survey and analyse the labour market, evaluate the effectiveness of labour laws and make recommendations to the Minister.[16]

The government eventually accepted most of the commission's recommendations. These came into operation over a period of four years as amendments embodied in the Industrial

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[13] *Report of the Commission of Inquiry into Labour Legislation* (RP 47/1979)
[14] Ibid paras 3.38, 3.72 and 3.153.2.

Conciliation Amendment Act 94 of 1979 and 95 of 1980, and the Labour Relations Amendment Act 57 of 1981, 51 of 1982 and 2 of 1983. During this time the Act underwent a name change and became the Labour Relations Act (LRA).

The catch-all, open-textured unfair labour practice definition as stated above and the court's very wide discretion to interpret this definition, led to it being applied unevenly and contradictorily. The Industrial Court was simply left with the task of bringing a dispute about an alleged unfair labour practice to an end. Section 46(9)(c) merely provided that the court should issue an appropriate order without indicating the type of orders the court was empowered to make. It thus came as no surprise when in 1980 the definition was modified through the Industrial Conciliation Amendment Act 95 of 1980, which required the court to *interpret* and not *define* what the concept meant. This definition required:

(a) an act that amounted to a practice;

(b) it had to be a *labour* practice other than a strike or lockout;

(c) it had to be unfair and;

(d) it had to result or have the potential to result in the employee(s) or the business of any employer(s) being unfairly affected, labour unrest or the relationship between the employer and employee being detrimentally affected.

An issue, which had to be addressed, was whether a refusal to bargain could be construed as an unfair labour practice. Initially the Industrial Court was reluctant to intervene in the bargaining process[17] but as the court grew more confident, it ruled that a refusal to bargain could constitute

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[15] Ibid paras 4.28.1 and 4.28.5.
[16] Ibid paras 2.45.1, 2.45.2 and 2.45.7.
[17] MAWU v Hart (1985) 6 ILJ 478 (IC)

an unfair labour practice under certain circumstances.[18]

In terms of the LRA, registered trade unions were subject to a range of controls which amongst others required the unions to maintain proper records of membership, office-bearers and subscription payments, keep accounts, prepare financial statements and hold regular meetings. Through the Labour Relations Amendment Act 57 of 1981 these controls were extended to unregistered unions. The Wiehahn Commission had hoped that independent trade unions would join industrial councils and become part of the industrial councils' labour activities. Government, on the other hand, hoped that these measures would give it control over militant trade unions[19]. The new non-racial unions initially avoided registration out of protest against the controls and also against the initial exclusion of 'homeland workers'[20]. However, with the removal of the exclusions[21], these unions began to register. Such unions were most effective when bargaining at enterprise or plant level as "[t]his allowed them to maximise their power when bargaining and facilitated control of unions by their members. Hard struggle at this level enabled them to improve on the low wage rates set for less skilled job categories in industrial council agreements"[22]. However, this state policy of formal control

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[18] FAWU v Spekenham Supreme (1988) 9 ILJ 628 (IC) and was later endorsed by the Labour Appeal Court in Sentraal-Wes (Ko-op) Bpk v FAWU (1990) 11 ILJ 977 (LAC).This will be dealt with in more depth in Chapter 3 of this thesis.

[19] D. du Toit et al *The Labour Relations Act of 1995 A Comprehensive Guide* (1998) 10

[20] D. Davis ' From Contract to Administrative Law: The changing Face of South African Labour Law' in DP Visser (Ed) *Essays on the History of Law* (1989) 96 *Referring to workers residing on land as contemplated in the Development Trust and Land Act 18 of 1936 or on land which was part of a self-governing territory in terms of the Black States Constitution Act 21 of 1971, or workers who were required by law to leave the country at the conclusion of their contracts of employment.*

[21] Sections 98 and 99 of the Labour Relations Amendment Act 57 of 1981

[22] D. du Toit et al *The Labour Relations Act of 1995 A*

had little impact on the pattern of collective bargaining:

(i) The growth of bargaining at plant-level continued unabated and

(ii) The non-racial unions kept their participation in the statutory framework to a minimum as it had very little confidence in it to reverse unilateral managerial decisions.

In 1982 the Labour Relations Act was amended to give the Industrial Court 'status quo' powers in terms of section 43 which enabled it to undo unilateral actions in industrial disputes. The Industrial Court could also temporarily reinstate dismissed employees whilst a dispute over their dismissal was being processed through the statutory machinery. After the 1982 amendment the court took on a pivotal role in the labour relations system and the number of referrals to the court increased. The new non-racial trade unions began to make use of the industrial councils and conciliation boards to resolve disputes. Unregistered trade unions now gained access to conciliation boards and thus to the courts. The fact that the industrial court could overturn managerial actions made it an attractive alternative to bargaining at plant level for the trade unions. However, participation in the statutory system and the use of legal remedies did not increase trust or diminish adversarialism between employers and trade unions.

Employers who were members of industrial councils and had previously refused to bargain at plant level now pressed for decentralised bargaining. The employers' support for decentralised bargaining might have been a direct consequence of trade unions' increased membership at the industrial councils. Employers resisted even more when some trade unions demanded bargaining at both levels. The Industrial Court adopted a voluntarist policy and was reluctant

to intervene. Although the court established that the employer had a duty to bargain in good faith it did not prescribe the level of bargaining[23]. It was accepted that this was a dispute of interest and thus should be left to the exercise of powers between the parties[24].

2.3. THE 1988 UPROAR

With the states of emergency declared in 1985 and 1986, the trade unions took on a new leading role in the political arena. The Congress of South African Trade Unions (COSATU) emerged as an essential component of the democratic struggle and COSATU became a major target for government repression.

Against this background, the 1988 amendments to the Labour Relations Act were enacted. In September 1987 a Labour Relations Bill[25] was published which proposed wide-ranging changes to the Act. Representations by interested parties which included COSATU, other trade unions, employers, academics and trade union support organisations were made to the Parliamentary Standing Committee on Labour Relations. The Bill was severely criticised by the labour movement as well as labour law specialists representing both management and labour. If passed, the Bill would represent a major change of direction in state policy on labour relations. It proposed to codify the unfair labour practice concept and included unprocedural strikes and lockouts in the definition. It also proposed that powers be given to the Industrial Court to grant urgent interdicts prohibiting unfair labour practices. It further proposed to place the delictual liability on unions for unprocedural strike action by their members, to bolster the registration

[23] The levels of bargaining are discussed in more detail in Chapter six
[24] See FAWU v Spekenham Supreme (1988) 9 ILJ 628 (IC).
[25] Labour Relations Amendment Bill [B118-87(GA)]

rights of minority white unions[26] and to establish a Labour Appeal Court.

Benjamin and Cheadle[27] stated

> "The underlying strategy behind the Bill is to impose a number of controls on the trade unions and restrictions on conciliation procedures and by so doing to alter patterns of collective bargaining. The more likely consequence of this approach will be to drive trade unions out of the statutory conciliation system and to ensure a vast increased in the level of unlawful strikes. The Bill's most crucial provision will make it much easier for employers to sue trade unions for damages caused by unlawful strikes. The state's strategy appears to bank on the spectre of damages actions and contempt of court orders forcing trade unions to restrain their members from engaging in unlawful industrial action."

The Bill aimed to curb the economic power as well as the political assertiveness of the trade union movement. COSATU's ability to maintain its members' level of real wages, while the wages of the other groups fell, was a sure indication that the black trade unions were a force to be reckoned with. The power of the unions, their ability to demand wage increases and their capacity to bring production to a halt were of great concern to both business and government.

At least two employer federations, ASSOCOM and SEIFSA, welcomed the publication of the Bill but, as was to be expected, both COSATU and NACTU condemned it. It was seen as a fundamental attack on many of the gains won over the previous ten years and workers started

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[26] Under the 1988 amendment trade unions with racially exclusive constitutions were measured for their representivity by taking into account only those employees in the racial groups admitted to membership of that trade union.

[27] *Proposed Amendments to the Labour Relations Act A Critical*

to express a growing resentment toward the Bill and the restrictions it placed on COSATU and the broader democratic movement. COSATU and NACTU launched mass action against the proposed amendments but alas, on 1 September 1988 the Bill was brought into force as Act 83 of 1988 even while discussions between management and trade unions, aimed at reaching agreement on some of the amendments, were continuing.

The most significant improvement contained in the new Act was the simplification of the procedure for the establishment of a conciliation board.[28] The Minister of Manpower no longer exercised discretion but was required to establish a board, provided that a proper application had been lodged and that a genuine dispute existed.[29] The Act also introduced a procedure for the resolution of disputes by the industrial council where such a dispute resolution procedure was non-existent in the constitution or in the agreements of the council.[30] However, it was required that an application for a conciliation board and a referral of the dispute to the industrial council should be lodged within twenty-one days of the dispute[31]. This placed an unnecessary limitation on the use of the conciliation procedures. In the case of an unregistered trade union, it had to obtain a certificate from the Industrial Registrar certifying that it had complied with certain provisions of the Act[32] before the procedures could commence. These requirements placed a great deal of pressure on the unions because of the time periods involved in referrals.

View South African Labour Bulletin 13 1 Nov 1987 76 79

[28] Section 35

[29] This amendment required the objective existence, not just the mere allegation, of a dispute as a prerequisite for the appointment of a conciliation board.

[30] Section 27A(1)(a)

[31] Section 27A(1)(d)(i)

[32] Section 27A(1)(c)(ii)(bb)

2.4. THE 1991 AMENDMENTS TO THE LRA

Large-scale industrial unrest and protest action led to the promulgation of Labour Relations Amendment Act 9 of 1991 that came into effect on 1 May 1991. The most important amendment was the reinstatement of an unfair labour practice definition, almost identical to the pre-1988 definition, thereby restoring the Industrial Court's pre-1988 discretion. Section 1 read as follows:

> **"unfair labour practice"** means any act or omission, other than a strike or lock-out, which has or may have the effect that-
>
> (i) any employee or class of employees is or may be unfairly affected or that his of their employment opportunities or work security is or may be prejudiced or jeopardized thereby;
>
> (ii) the business of any employer or class of employees is or may be affected or disrupted thereby;
>
> (iii) labour unrest is or may be created or promoted thereby;
>
> the labour relationship between employer and employee is or may be detrimentally affected thereby."

This amendment once again removed strikes and lockouts from the definition. It meant that the court could not interdict either form of industrial action on the basis of unfairness. Thus unprocedural strikes could no longer be the subject of urgent, interim or final industrial court proceedings under sections 17(11)(a), 43 and 46(9). However, section 17(11)(aA) empowered the court to interdict strikes and lockouts on the basis of unlawfulness. This meant that the

court merely had to determine whether the provisions of the Act had been complied with.

An application to interdict prohibited industrial action had to comply with section 17D, which required that the respondent should receive 48 hours' notice of such application. There were two exceptions to the rule, namely:

i) That the court could make an order on less than 48 hours' notice if

   (a) the applicant gave notice of his intention to apply for an interdict,

   (b) the respondent was given a reasonable opportunity to state his case before a decision regarding that application was reached and,

   (c) the applicant had shown good cause why a shorter period should be granted and

ii) That a party who wanted to embark on industrial action had to give at least ten days notice of such action.[33]

The following is a brief summary of other amendments pertaining to collective bargaining:

(i) Reference to race in the registration of trade unions was abolished.

(ii) The presumption in section 79(2) that members, office-bearers and officials of trade unions, who interfere with the contractual relationship between employer and employee were, presumed to have authority, was repealed. This meant that trade unions could no longer automatically be held liable for losses caused to employers by illegal strikes.

(iii) The procedures for the establishment of a conciliation board and referral of disputes to it and to an industrial council were simplified.[34]

(iv) The 1988 requirement of formal deadlock before statutory conciliation was scrapped, thereby removing an unnecessary and over-technical provision from the conciliation

[33] Section 17D(1)(a),(b) and (c)

procedures.

(v) The period of 21 days, for referral of a dispute after the service of notice of a deadlock 90 days from the date on which the dispute first arose, was changed. In terms of the amendment the dispute had to be referred to the industrial council or conciliation board within 90 days of the date on which the dispute was alleged to have arisen. Where it involved an unfair labour practice the referral or application had to be made within 180 days from the dates when unfair labour practices started. The Director-General of Labour could, if good cause existed, condone a late application or referral.[35]

2.5. TRANSFORMATION IN THE NINETIES

2.5.1 THE INTERNATIONAL LABOUR ORGANISATION'S FACT FINDING COMMISSION'S REPORT

COSATU had lodged a compliant with the International Labour Organisation (ILO)[36] on 11 May 1988. It stated that the proposed amendments of the LRA infringed on the ILO's principles of freedom of association by promoting racially constituted trade unions and by infringing the freedom to strike. Since South Africa was not a member of the ILO it requested that the government of South Africa consent to the investigation of the complaint[37]. In

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[34] Sections 27, 35, 36, 46(9)(d)

[35] Section 27A(1)(d)(i)

[36] Benjamin,P & Saley,S "The context of the ILO Fact Finding and Conciliation Commission Report on South Africa" ILJ (1992) 13 4 731

[37] South Africa was a member of the International Labour Organization(ILO) from its inception in 1919 until 1964. It was therefore not a member of the ILO at he time of the Fact Finding and Conciliation Commission's investigations in South Africa during February 1992. The government has however associated itself with the principles of the ILO, in particular, with the Convention of freedom of association."

September 1991 permission was granted and the extended mandate of the ILO allowed the Commission "to deliberate on and consider the present situation in South Africa in so far as it relates to labour matter with particular emphasis on freedom of association"[38].

What follows is a summary of the Fact Finding Commission's report[39]. The ILO held the opinion that the proposed system of registration of trade unions should ensure that unions no longer be registered in respect of interests defined with reference to race and that it should be prohibited by law from excluding persons of a specified race[40]. The ILO disapproved of the restriction in section 8(6) of the LRA on political activities of trade unions as politics may exert a profound effect on the economic and social conditions of employees[41]. The ILO was critical of sections 27(A), 35 and 65 of the LRA and recommended that the Act be amended to simplify the procedures in conformity with the principles on freedom of association. It welcomed section 79 of the LRA that gave an important measure of protection against civil liability to strikers but was extremely critical of the imposition of criminal sanctions on strikers.

One of the most important shortcomings of the LRA 28 of 1956 was that strikers enjoyed no protection against dismissal. The ILO recommended that the unfair labour practice provision be amended to provide appropriate protection against dismissal of strikers involved in legal strikes and strikes, although technically illegal, were legitimate in that they called for the

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Benjamin,P & Sealy,S "The context of the ILO Fact Finding and Conciliation Commission Report on South Africa" ILJ (1992) 13 4 731

[38] Chapter 13 at (a)576 of report mentioned in footnote 39.

[39] 'Prelude to Change: Industrial Relations Reform in South Africa'- Report of the Fact Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa (Geneva International Labour office 1992).

[40] Chapter 13 at c(iii) of mentioned report.

[41] Chapter 13 at d(iii) of mentioned report.

promotion and defence of employees' economic and social interests[42].

It was also of the opinion that section 48(1) of LRA gave the Minister of Manpower too much power to decide whether or not to promulgate agreements concluded at industrial council level and to exempt certain areas or classes of work from the agreement.

2.5.2 THE CONSTITUTION

Any discussion of South African legislation in the nineties would be incomplete without reference to the country's first bill of rights. The interim Constitution[43] came into effect on 27 April 1994.[44] Section 2 of the Constitution provided that it was the supreme law of the Republic and any law or conduct inconsistent with it will be invalid and any constitutional obligations must be fulfilled.

Chapter 3 of the interim Constitution - the 'Bill of Rights' - included rights that affected labour relations. Section 27 reads as follows:

"1) Every person has the right to fair labour practices;

2) Workers shall have the right to form and join trade unions and employers shall have the right to form and join employers' organisations;

3) Workers and employers shall have the right to organise and bargain collectively;

4) Workers shall have the right to strike for the purpose of collective bargaining;

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[42] Chapter 13 at e(v) of mentioned report.
[43] Constitution of the Republic of South Africa (Act 200 of 1993)
[44] Subsequently the constitution was adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly. Labour relations are dealt with in Section 23 of the adopted constitution and does not differ substantively from the interim constitution.

5) Employers recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1)".

The implication of the Bill of Rights was that legislation and executive action could be scrutinised judicially in order to determine whether they infringed any of the entrenched rights. However section 33(5)(a) of the interim Constitution intended to insulate certain provisions of the Labour Relations Act 28 of 1956 from constitutional challenge. It reads as follows:

"The provisions of law in force at the commencement of this constitution promoting fair re-employment practices, orderly and equitable collective bargaining and the regulation of industrial action shall remain in full force and effect until repealed or amended by the legislature".

No specific laws were mentioned; the Constitution merely provided that such laws should be "promoting fair employment practices" and "orderly and equitable collective bargaining". The implication hereof was that certain laws should be beyond the reach of constitutional challenge. Brassey[45] questioned whether the intention behind the provision to insulate "existing unfair labour practice and collective bargaining statutory regimes from untoward judicial intervention"[46] was achieved. This doubt stemmed from the fact that the standards of section 33(5)(a) would, in any event, apply in the scrutiny of legislation under chapter 2 and thus its seemed as if the exemptions would be ineffectual.

Landman[47] expressed the same concerns and argued that employers and trade unions could "challenge existing laws which may otherwise appear to be insulated on the basis that they do

[45] "Who is bound by the Constitution?" Employment Law (1994) July 10 6 122
[46] Ibid 123

not fulfil the objective of promoting fairness, orderliness and equity".[48]

It should, however, be noted that no right can ever be absolute. In terms of the general limitation clause contained in section 33(1) of the interim Constitution, every right could be legitimately limited provided that the limitations were reasonable and justifiable in a democratic and open society. The limitation, however, should not negate the essential content of the right. When dealing with labour relationships, the fundamental right of an employer to engage in economic activity should be weighed up against measures which promoted the protection of fair labour practices and the right to protect workers' rights to bargain collectively as well as their right to strike.

Section 27(3) of the interim Constitution entrenched the right to bargain collectively and section 27(4) guaranteed the right to strike in support of such bargaining. This would give the industrial court muscle in enforcing a duty to bargain and it enshrined the right of public servants to bargain and strike. The constitutional right to strike meant that employees could not be dismissed for engaging in a protected strike,[49] and, rightly so, as industrial action is an integral part of collective bargaining.

It was notable that employers were guaranteed only the *recourse* to lockout. The judgement of the constitutional court, on the certification of the constitution[50], dealt with various aspects of

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[47] "A time capsule for SA labour law?" Contemporary Labour Law (1994) March 3 8 75

[48] Ibid 76

[49] Act 108 of 1996 deals with it in section 23(2) and the LRA 66 of 1995 in section 67(4) protects against dismissal.

[50] Ex parte Chairperson of the Constitutional Assembly: In Re certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744

collective bargaining. Objection has been submitted by employers to the omission of the right of employers to lockout as it was argued that parties should have the right to flex their economic muscle in order effectively to engage in collective bargaining. The court found that the constitution need not expressly recognise any mechanism to exercise economic power as long as the right to bargain collectively was recognised. The nature and extent of the right need not be determined[51].

A further argument relating to the omission of a right to lockout was that it was necessary to treat workers and employers equally. The court found that employers have greater social and economic power than employees and, therefore, need not be treated the same. The collective employee unit allowed for collective bargaining with employers and the collective power was primarily exercised through the mechanism of the strike action. The employer could, however, exercise power against employees through dismissal, replacement labour, and unilateral implementation of new terms and conditions of employment and the exclusion of workers from the workplace. The right to strike and the right to lockout are not always and not necessarily equivalent[52].

A third objection was lodged with regard to the fact that the constitution did not entrench the right of individual employers to engage in collective bargaining. The court found that section 23 of the new text of the constitution does not protect the individual's right to bargain as collective bargaining requires acting in concert. This does not take away the individual employee's right to bargain. The individual employee started an employment relationship with bargaining and this continues throughout the relationship, but the effectiveness of the

[51] Ibid 72

bargaining depends on the power the individual holds and the needs of the employer. On the other hand individual employers often engage in collective bargaining and therefore the omission to protect such right is a failure to comply with constitutional principle XXVII. Thus the objection succeeded[53].

The final constitution, which was adopted on 8 May 1996,[54] contains a new bill of rights in chapter 2. Section 23 deals with labour relations. More specifically section 23(5) provides that "every trade union, employers organisation and *employer*[55] has the right to engage in collective bargaining". The constitutional rights as contained in Section 23 provide a framework of values within which our labour law must operate. These values of industrial fairness, freedom of association, the right to organise, to collectively bargain and the right to strike, will definitely determine the development, application and future of our labour law.

2.5.3 THE LABOUR RELATIONS BILL AND THE DEBATE

27 April 1994 heralded the birth of a new democratic South Africa and the ANC-led Government of National Unity immediately made its five-year plan for labour relations known. They planned to introduce a new labour dispensation[56], and in July 1994 Cabinet approved the appointment of a ministerial legal task team to overhaul labour relations legislation. The task team's brief was to draft a Labour Relations Bill that would inter alia[57]:

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[52] Ibid 72
[53] Ibid 73
[54] The Constitution of the Republic of South Africa Act 108 of 1996
[55] My own emphasis.
[56] Du Toit et al gives a summary of the 'five year plan ' of the new government on 18

[57] As set out in the Explanatory Memorandum to the Draft Negotiating Document in the form of the Labour Relations

i) give effect to government policy as reflected in the Reconstruction and Development Programme;

ii) comply with the constitution;

iii) be simple;

iv) be certain;

v) contain recognition of fundamental organisational rights of trade unions;

vi) promote and facilitate collective bargaining in the workplace and at industry level, and

vii) entrench the constitutional right to strike and regulate lockouts.

A Draft Negotiating Document in the form of a Bill was produced to begin public debate and negotiation amongst the social partners. Cabinet approved the draft bill with the necessary amendments and it was tabled in Parliament during the 1995 session. An Explanatory Memorandum to the Draft Bill spelt out the problems with the existing labour law system and how it proposed to overhaul the Labour Relations Act.

Reflecting on South African history and the law governing South African labour relations, it was apparent that various problems existed. An added concern was to bring our labour law in line with public international law and the Reconstruction and Development Programme. The first problem was the different statutes governing labour relations. The existing Labour Relations Act applied to parts of the private and public sector. The Public Service Labour Relations Act applied to parts of the public sector. The Education Labour Relations Act

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Bill, Government Gazette Notice 97 of 1995, dated 10 February on 110-111.

governed educators. The Agricultural Labour Act was for the agricultural sector and the police service had its own regulations. A further problem was the discriminatory exclusion of domestic workers and university teaching staff from the protections of labour legislation. As stated in the explanatory memorandum, this led to inconsistency, complexity, duplication, inequality and great confusion. The Bill thus intended to cover all employees, except the National Defence Force, the National Intelligence Agency and the South African Secret Service, under the same legislation. The Bill clearly distinguished between collective and individual labour relations. By using simple language, it intended the Labour Relations Act to be very accessible.

The amendments to the Labour Relations Act 28 of 1956 over the years were perfect ammunition for a minefield of cross-referencing and confusion. The Minister of Manpower, the industrial registrar and the Industrial Court enjoyed a wide discretion, which meant that policies were developed which were in conflict. A case in point was the issue of bargaining agents. Section 19(3)(d) required sufficient representation at industrial council level, but was not prescriptive about who the employer should bargain with at other levels. The consequence was that no orderly relationship between the different levels of bargaining existed as industry level bargaining regulated by statute and workplace bargaining was left to the parties and courts to sort out. The developing jurisprudence reflected the personal views of the members of the Industrial Court. The court moved between pluralism[58] and majoritarianism[59] and sometimes even minority trade unions[60] found favour.

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[58] Stocks & Stocks (Natal) (Pty) Ltd v Bawu (1990)11 ILJ 369 (IC)

[59] SA Polymer Holdings (Pty) Ltd v Llale (1994) 15 ILJ 277 (LAC)

[60] BIFAWU v Mutual & Federal (1994) 15 IlJ 1031 (LAC)

The broad discretion of the Industrial Court to determine unfair labour practices led to uncertainty as to the extent of the parties' obligations. This also meant that the Industrial Court intervened in bargaining disputes.

Further problems with collective bargaining as cited by the Ministerial Legal Task Team[61] were:

i) Criteria for the representivity of industrial councils;

ii) The bureaucratic structure of the councils;

iii) Regulations of the Minister's discretion to extend the industrial council agreements to non-parties;

iv) The procedures for gaining exemptions from industrial council agreements, and

v) The enforcement thereof by criminal prosecution.

The unnecessary and unprocedural strikes could be ascribed, amongst others, to the ineffective dispute resolution mechanism of the old industrial relations dispensation[62]. The strikers also did not enjoy any protection from dismissal and this obviously impacted directly on collective bargaining as industrial action is an integral part of the process. Collective bargaining without industrial action would be like having a toothless watchdog. The labour legislation also did not comply with the provisions of the interim constitution.

John Grogan[63] stated that the Bill "has been hailed as the third revolution" in South Africa's labour dispensation. The basic idea running through the Bill was that industrial peace should

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[61] Explanatory Memorandum to the Draft Bill 121
[62] Explanatory Memorandum to the Draft Bill 128
[63] "The labour relations bill - an overview" Employment law

be ensured. The traditional adversarial approach would give way to consultation and joint decision-making and the dispute resolution mechanism would be proactive, effective, cheaper and user-friendly.

The workplace forum[64] was an innovation at plant level to encourage joint problem solving and participation on certain subjects. This concept represents "a shift from the tradition of collective bargaining between employers and trade unions over all matters of mutual interest towards division of labour between trade unions and workplace forums in representing employee interests"[65]. The underlying idea was to create a more co-operative management-labour relationship, "not to undermine collective bargaining but to supplement it...by relieving collective bargaining of functions that collective bargaining cannot easily achieve"[66]. The forums would be established on application to the CCMA by a majority union in respect of employers with more than 100 workers. The trade union would initiate the establishment of the forum and therefore "only those trade unions which feel ready for such a second channel will initiate it, others will retain a purely collective bargaining-based relationship with the employer"[67]. The forum would be entitled to adequate information regarding specified matters and the employer was prohibited from supplementing any proposal, in respect of such matters, until consultations had been held to attempt to reach consensus. NEDLAC would decide on the list of matters that would be subject to compulsory consultation. The bill drew a distinction between collective bargaining (adversarial) and workplace forum issues (employee

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[64] As enacted in Chapter 5 of the Labour Relations Act 66 of 1995

[65] Du Toit et al *The Labour Relations Act of 1995 A Comprehensive Guide* (1998) 251

[66] Explanatory memorandum to the Draft Bill 135.

[67] Ibid 137

participation)[68]. This innovation tied in with a principle of national economic policy[69] which required legislation to "facilitate worker participation and decision-making in the world of work" and which placed "an obligation on employers to negotiate substantial changes concerning production matters or workplace organisation within a nationally negotiated framework"[70].

The bill's most wide-ranging reform proposal dealt with collective bargaining. The most important question to be answered by the Legal Task Team was whether the promotion and facilitation of collective bargaining should include the duty to bargain. Our courts had held that the refusal to bargain constituted an unfair labour practice but in the same breath held that it could not determine the outcome. The courts' decisions were inconsistent and uncertainty prevailed over questions as to whether employers are obliged to bargain at plant or industry level and whether minority unions have a bargaining entitlement. In *BAWU v Edward Hotel*[71] the court required a majority union whilst in *Natal Baking & Allied Workers Union v BB Cereals*[72] the court imposed the duty to bargain on the employer in respect of every employee. In *Besaans du Plessis (Pretoria) Foundaries v NUSAW*[73] the court left the choice of bargaining forum with the parties whereas in *SA Woodworkers Union v Rutherford Joineries*[74] the court ordered plant level bargaining.

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[68] See Du Toit "*Corporatism and Collective Bargaining in a Democratic South Africa*" (1995) 16 ILJ 785 at 789-790
[69] African National Congress *The Reconstruction and Development Programme: A policy framework* (1994) (referred to as the RDP)
[70] RDP para 4.8.9.
[71] BAWU v Edward Hotel (1989) 10 ILJ 357 (IC)
[72] Natal Baking & Allied Workers Union v BB Cereals (1989) 10 ILJ 870 (IC)
[73] Besaans du Plessis (Pretoria) Foundaries v NUSAW (1990) 11 ILJ 690 (LAC)

The bill proposed that the legally enforceable "duty to bargain" should be removed but "...It unashamedly promotes collective bargaining".[75] It did so by incorporating a series of basic organisational rights for unions and thereby also providing a mechanism for resolving recognition disputes without industrial action or court interventions. It also supplemented the union's power and thereby tried to "coax reluctant employers to the negotiating table".[76] The basic organisational rights as contained in Part A of Chapter III of the LRA are:

a) Access to an employer's premises for union purposes;

b) The right to hold meetings;

c) The right to conduct ballots;

d) The right to stop-order facilities;

e) The right to time off for union activities;

f) The right to elect union representatives and

(g) The right to information for collective bargaining purposes.

The only legal dispute would be whether a trade union satisfies the necessary thresholds of support, which still had to be determined by NEDLAC. A union with sufficient members would be able to obtain these organisational rights, giving statutory force to union entitlements[77]. The Bill thus gave any registered union the right to notify the employer that it was representative and would compel the employer to meet with the union within 30 days to endeavour to conclude a collective agreement which would be binding on the employer, the union and its members. If the parties could not conclude an agreement either party could refer

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[74] SA Woodworkers Union v Rutherford Joineries (1990) 11 ILJ 695 (IC)
[75] Explanatory Memorandum to the Bill 122
[76] Du Toit et al 101
[77] As enacted in Chapter 3 Part A of the Labour Relations Act 66 of 1995

the matter to the Commission for Conciliation, Mediation and Arbitration which could then be resolved through conciliation and if this failed, through arbitration.

Collective bargaining could also be promoted through:

(i) the extensive protection of freedom of association;

(ii) the enforceability and legal nature of collective agreements;

(iii) the provision of a process of advisory arbitration to deal with disputes concerning a "refusal to bargain", and

(iv) fully protecting the right to strike"[78].

The new approach ended the notion of a legally enforceable 'duty to bargain' which had created uncertainty for everyone in the domain of labour law.

The Bill introduced the term 'bargaining councils' as it intended to serve both public and private sectors. The draft Bill introduced a number of important reforms to establish bargaining councils[79]. The Bill, and eventually the Act, accommodated small and medium business by providing specifically that small and medium enterprises be represented at this level[80]. If requested, the Minister is *obligated* to extend a bargaining council agreement to non-parties if its terms did not discriminate against non-parties and if the failure to do so would undermine bargaining at industry level. In the old dispensation the Minister had a *discretion* to extend the agreement if two-thirds at the council voted in favour thereof. The constitution of the bargaining council had to provide for the resolution of disputes that could arise within its registered scope and if appropriately accredited, could execute dispute resolution functions

[78] Explanatory Memorandum to the Draft Bill 122
[79] Explanatory Memorandum to the Bill 124
[80] See section 30(b) of the LRA 65 of 1995

itself. Demarcation disputes were left to the Commission for Conciliation, Mediation and Arbitration. The Bill proposed a mechanism for the establishment and registration of statutory councils in sectors where no bargaining council existed. A union with 30% support could apply for the establishment of such a council and could, by agreement, become a bargaining council.

The Bill furthermore provided that a collective agreement would be binding on the parties concerned 30 days after signature, unless otherwise stated[81]. Failure to comply with the provision of an agreement is not a criminal offence. Collective agreements provide for the determination by conciliation and arbitration of disputes concerning their application and interpretation.

The Bill thus proposed fundamentally to affect collective bargaining from the small enterprise through industry to macro-economic relations. What was proposed was a marriage of the best elements of the old dispensation, with substantial innovation. New bodies, such as statutory councils and workplace forums, were introduced, new rights and obligations established and new tribunals set up to interpret the law. For many employers, employees (especially in the agriculture and public sector) and arbitrators, a mindshift was necessary as the long-established adversarial way of doing business now became history. A concerted attempt became urgently necessary to democratise ground-level labour-management relations.

A deadline of 30 June 1995 was set for the publication of the bill, but government could not predict that certain crucial differences between management and labour would derail the

[81] This provision of the Bill was omitted from the Act and left

process. With the publication of the bill, enthusiastic reviews were received from management and labour and it was lauded as the most progressive labour legislation. However, reality then set in. Management and labour presented and argued their position through eight NEDLAC sessions, but because of fundamental differences, the parties deadlocked. Davie[82] reported on 28 May that the "negotiations to reform in South Africa's labour market are close to collapse" and organised labour threatened with mass action. Labour argued for substantial amendments: compulsory centralised bargaining, union-based co-determination, the closed shop, the right to strike on unfair dismissals, and a ban on replacement labour. Business, on the other hand, concentrated on weakening or limiting the unions' rights set out in the bill. It expressed reservations over the proposed workplace forums, organisational rights and disclosure of information. Business proposed, inter alia, that:

(a) There should be no protection for unprocedural sympathy or socio-economic strikes;

(b) Dismissal should be allowed if a protected strike threatens the viability of a business;

(c) Pre-strike balloting should be obligatory, and

(d) It should have the right to employ replacement labour.

Labour argued that business was undermining the bill and was merely trying to delay negotiations.

The fundamental, unresolved differences for collective bargaining purposes between management and labour were that:

(i) Labour insisted on a national bargaining council within each sector whereas

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to the parties to decide the terms thereof.

business supported voluntary collective bargaining where the level of bargaining is determined by organisational circumstances in each sector. The bill proposed voluntary bargaining.

(ii) Labour demanded the right to strike on issues of rights and interests and no replacement labour during a procedural strike. The employer should not be able to claim damages from the union and sympathy strikes should be allowed. Management's stance was that a strike ballot should be retained, only those strikes on collective bargaining issues should be allowed, but that no sympathy strikes should be allowed.

(iii) Labour argued for defensive lock-outs only and no replacement labour whereas management was obviously in favour of a right to lock-out compared to recourse to lock-out.

By the end of May 1995 organised labour and small business began nation-wide campaigns urging the Minister of Labour to redraft the Labour Relations Bill. On 6 and 19 June 1995 workers organised street marches in all the major cities and the minister put proposals on the table to break the deadlock. The proposals were:

(a) Setting up statutory councils where no bargaining councils existed. This was the compromise reached to satisfy COSATU's demand for centralised bargaining. Parties that had sufficient representation could initiate a statutory council.

If employers and trade unions were not able to come to an agreement, the minister would establish the statutory council and it would have powers to deal with issues of industrial restructuring and training. These arrangements were

[82] Sunday Times 28 May 1995

designed to encourage agreement, as the alternative would be ministerial intervention.

(b) Agency shops and closed shops within a democratic environment, and

(c) Workplace forums representing all employees.

2.5.4 THE DEAL AND THE LABOUR RELATIONS ACT 66 of 1995

The negotiation for the provisions of the Labour Relations Act led to an agreement between labour and business and was a watershed for the tripartite labour process in South Africa. Certain issues, like replacement labour and sympathy strikes, were referred to the Cabinet for a final decision, since parties were unable to agree on these. Cabinet ratified the revised Bill on 2 August 1995, and the Labour Relations Act 66 of 1995 (hereinafter called the LRA), was implemented on 11 November 1996.

The key features of the agreement between business and labour were:

(i) There would be no compulsory centralised bargaining over wages, but where no bargaining council existed, unions and employers' associations could apply for a statutory council to be established. These councils would administer pension schemes and other benefits for workers and industry-wide education and training. Only through mutual agreement could the council bargain over wages and industrial policy. The Minister of Labour could extend statutory council agreements to non-parties. The LRA provides for this in Chapter III parts B, C, D, E and F.

(ii) The Draft Bill made provision for the agency shop agreement without overtly infringing the constitutional right of freedom of association but trade unions were vehemently opposing the exclusion of closed shop agreements. The unions' demand to allow the establishment of

closed shop agreements was eventually agreed upon and was contained in the revised Bill ratified by Cabinet. These structures are established through Chapter III Part B sections 25 and 26 of the LRA and although it was agreed upon, one cannot help but expect constitutional challenges from disgruntled workers and rival trade unions on these two issues.

(iii) Subject to the union's own rules, as set out in their constitution, strike ballots were compulsory before a strike. The LRA, however, removed the requirement of a ballot, a requirement for a procedural strike or lock-out, and merely requires that parties meet the provisions as set out in section 64(1). Section 67(7) states that even if the trade union did not conduct a ballot, as required by its constitution, it may not give rise to, or constitute, grounds for any litigation that will affect the legality of the strike or lock-out.

(iv) Workers would have the right to take industrial action on socio-economic issues, but it would be subject to certain conditions and procedures. The LRA now recognises and legitimises such protest action in section 77, thereby affording employees similar protection afforded to strikers under sections 5 and 67 of the LRA.

(v) Employers were obliged to disclose, to a majority union, all[83] relevant information allowing the representative union to engage in effective collective bargaining. If a dispute arose about the information to be disclosed, the CCMA would resolve the dispute through conciliation or arbitration. This is dealt with in the LRA in terms of section 16.

The Witwatersrand region of COSATU strongly opposed the bill for what it described as a "lack of compulsory centralised bargaining, the limitation on the right to strike on disputes of

[83] Note that section 16(5) places an obligation on the employer not to disclose information under the circumstances as mentioned.

interest, the absence of a ban on replacement labour and the provision for lock-outs"[84]. The general secretary of NUMSA, E. Godongwana, stated that "This is a miserable compromise. What essentially is centralised bargaining without wages and substantive issues? Centralised bargaining should close the wage gap, alleviate poverty, and reach socialism"[85].

The Constitution does provide for the *right* of every trade union and employer and employer's organisation to engage in collective bargaining[86] but does not compel collective bargaining. As Du Toit[87] rightly stated that

> "The absence of a duty to bargain in the Act effectively means that parties have to resort to power play in order to engage a right which is guaranteed in the Constitution...section 23(5) may be read as introducing a duty on a contemplated bargaining partner to enter into good faith bargaining...while it is not possible to compel collective bargaining over terms and conditions of employment in terms of the Act, it may be possible to seek a High Court order to enforce section 23(5) of the Bill of Rights."

Possibly as some form of consolation, the LRA 66 of 1995 offers the parties (trade unions?) the use of the advisory procedure in disputes about refusal to bargain cases[88]. The object of advisory arbitration is that the arbitrator could investigate and pronounce on the merits of the refusal and make a recommendation to the parties. Such an award is not binding and cannot be

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[84] K. von Holdt *The LRA agreement "Worker victory" or "miserable compromise"?* South African Labour Bulletin 19 4 September 1995 16 at 20
[85] Ibid 21
[86] Section 23(5) of the Constitution
[87] As referred to by Murphy in *The Labour Relations Act A Comprehensive Guide* at 137
[88] See Section 64(2) for definition

made an order of the Labour Court[89]. If it is ignored, employees could immediately resort to industrial action over the issue. Advisory arbitration "aims to ensure that power plays in response to refusals to bargain are well advised about the legitimate ends and means of orderly bargaining in a particular factual situation"[90].

Thompson highlighted another problem regarding collective bargaining and suggested that the "Act sends something of a mixed signal regarding levels of bargaining"[91]. He based his argument on section 1 and the long title of the Act. S1 states that one of the primary objects of the Act is to promote "collective bargaining at sectoral level" and " employee participation in decision-making in the workplace".

The long title of the Act refers to the need to "promote and facilitate collective bargaining at the workplace and sectoral level". Tensions are bound to arise between the employer and trade unions as they attempt to reconcile the two conflicting notions.

The trade unions could not get the ANC's support for the issue of replacement labour. Labour argued that replacement labour would effectively take away their industrial weapon whilst the employer argued that it is self-evident that they should be able to replace striking workers. The Draft Bill discouraged the use of replacement labour as it protected strikers from dismissals and thus the temporary services of replacement employees must be terminated if the strike is over. The Labour Relations Act 66 of 1995, however, provides that in the event of offensive lockout

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[89] Section 143(1) of LRA
[90] Murphy at 137 in *the Labour Relations Act of 1995 A Comprehensive Guide*
[91] Thompson,C: "Collective bargaining" Current Labour Law 1995 2 30 at 31

and maintenance services, the employer could not use replacement labour to continue or maintain production[92].

The LRA embraces all employees except members of the South African Defence Force, South African Secret Service and the National Intelligence Agency[93], thereby placing South African labour relations on a path agreed upon by all stakeholders. For employees and employers in the public and agricultural sectors the changes are far-reaching, as they will venture onto virgin territory, where they have not yet developed a bargaining culture. Those in the private sector who enjoyed existing bargaining structures were required to make amendments as the new model of collective bargaining took some old principles and combined it with profound changes to advance collective bargaining. The idea is to "refine the framework and process of bargaining to bring greater coherence and less adversarialism"[94]. This will become more evident as this thesis proceeds.

The LRA ushered in a new era in labour relations, but its success will depend on the ability of the role-players to adapt and change from adversarialism to co-operation and the ability to face the new challenges presented by the LRA.

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[92] Sections 76(1) and 76(2)
[93] Section 2 of LRA
[94] Du Toit et al 115

3. COLLECTIVE BARGAINING - WHAT, WHY AND HOW[95]

3.1. DEFINITION and THEORIES of INDUSTRIAL RELATIONS

No study of South African collective bargaining will be complete unless the various theories of industrial relations are considered. A theory of industrial relations is important because "the theories which we develop about industrial relations were attempts to construct logically consistent ways of understanding and explaining social reality and real-life practices in this complex field of human behaviour"[96]. In the South African context the theory of industrial relations will give insight into the development of our collective bargaining from an adversarial system towards one which reduced adversarialism by promoting co-operation through the introduction of statutory forums for consultative and joint decision-making at workplace level.

Collective bargaining lies at the heart of South Africa's industrial relations system. It operates from the premise that parties representing employees and employers in a particular industry and area should be brought together in a setting, which facilitates the forging of binding collective agreements. Lewis defines collective bargaining "as a voluntary process for reconciling the conflicting interests and aspirations of management and labour through the joint regulation of terms and conditions of employment"[97]. Jordaan[98] observes that this definition accepts that economic conflict is an integral part of the relationship between labour and management but that it can be resolved if the opposing parties (management and labour) can, together,

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[95] I will primarily refer to Jordaan's chapter on collective bargaining "A guide to South African labour law - Allan Rycroft and Barney Jordaan 114 - 155

[96] Farnharm & Pimlott Understanding industrial relations 51

[97] Labour law in Britain: 1986, 110

[98] A. Rycroft & B. Jordaan *a Guide to South African Labour Law* 1992 (2nd) 116

determine what their relationship should be. Collective bargaining is thus the means of achieving co-operation. Jordaan[99] maintains that the conflict is about control of the enterprise, decision-making within it and distribution of the fruits of production. This conflict of interest may be dealt with in different ways, i.e. through governmental regulation, unilateral control by management, unilateral control by labour, bilateral control by both management and labour, or a combination of these. "Collective bargaining, however, remains the primary instrument through which most democratic societies establish bilateral control"[100] of the enterprise.

In South Africa, however, management style was often characterised by managerial prerogative especially on the issues of redundancy, discipline, the form or nature of production, trade union access, introduction of new technology and plant closure. Jordaan states that

> "Managerial prerogative, or *'the right to manage'*, has two components: the one concerns the power to manage industrial capital and is founded on the employer's position as owner or controller of *'industrial capital'*; the other concerns the power to command labour or human resources, which derives from contract"[101].

The unfair labour practice concept, however encroaches on the managerial prerogative and, today, this concept is foreign as it hampers the underlying notion of the LRA, namely, that of a more participative system of collective bargaining.

According to Jordaan[102] collective bargaining fulfils three functions, namely a social, an economic and a political function. The economic function is fulfilled in that through collective

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[99] Ibid 114

[100] Ibid 114

[101] B. Jordaan *Managerial Prerogative and Industrial Democracy* IRJSA 11 3 1991 1

[102] Ibid 116

bargaining, management's interest in industrial peace is maintained and labour's interest in the creation and maintenance of certain standards, terms and conditions of employment is upheld. Collective bargaining is, however, more than a mechanism that assists workers in staking their monetary claim. It also serves a social function "in that it establishes a system of industrial justice which protects employees from arbitrary action by management and which recognises their right to human dignity"[103]. The political function is served in that employees have a say in issues affecting their employment i.e. democratisation of the workplace.

Charles Nupen[104] is of the opinion that collective bargaining from a trade union's point of view allows opposing parties to engage on issues within the framework of agreed procedures whereas management views collective bargaining as a reaction to the trade union's demands. Although the post-Wiehahn era introduced a time for building bridges between management and labour and an opportunity to improve relationships, Nupen observes that the collective bargaining experience can be painful for all parties. However, the question should not be whether to bargain, but how to develop it in a mutually beneficial way in order to enable the adversarial nature of the labour relationship to develop into a more co-operative relationship that ensures enhanced productivity.

Employers are in a stronger bargaining position than the employee because employers have at their disposal stronger economic and social power, which derives from their property rights. Labour representation flows from the fact that workers find themselves in a markedly subordinate position in the employment relationship. The employee only has the capacity to

[103] Ibid 117

[104] Employment Law (1990) Sept 7 5

work and this results in unequal bargaining power. The employees become a collective entity with power in their numbers, counterbalancing the bargaining power of the employer. Through this collective bargaining, the employee acquires "the most effective means of giving workers the right to representation in decisions affecting their working lives, a right which is or ought to be the prerogative of every worker in a democratic society"[105].

Generally, industrial relations theorists identify three approaches, namely the unitary perspective, the class conflict perspective and the pluralist perspective. The unitarist approach teaches that management and labour share a common goal in the success of the enterprise and thus does not allow for a conflict of interest. The employer has unquestionable prerogative and authority and consequently there is no need for oppositional trade unions since a challenge to the employer's prerogative is regarded as illegitimate[106]. This approach is clearly based on the common law master-servant relationship and is totally inappropriate in a democratic society as it ignores the democratic principles of equality. The class conflict approach teaches that trade unionism is a "symptom of the class conflict inherent of the capitalist society: because workers individually are vulnerable to exploitation they are compelled to establish collectives to protect their own class interests."[107] Collective bargaining is seen as incapable of solving industrial conflict as "it can merely accommodate them temporarily"[108] because in capitalist society the class division is inevitable and permanent.

Although significant recognition was given to the class conflict theory, South African labour

[105] The Royal Commission on Trade Unions and Employers' Associations (1965-8) (the Donovan Commission) quoted by Lewis 109
[106] Jordaan 118
[107] Ibid 119

law has been premised mainly on the pluralist approach and should therefore, be considered in greater detail. The pluralist approach[109] acknowledges that the conflict of interest is inherent in the labour relationship, but that both employer and employee accept that these conflicts must be regulated by procedures - statutory or/and non-statutory. This approach postulates that the workplace should operate as a mini-democracy wherein management and labour exercise joint sovereignty through joint regulation of work rules by means of collective bargaining. It postulates that opposing interest groups exist but because of the equilibrium between the groups, the one should not be able to overpower the other[110].

Jordaan warns that this equilibrium is not constant as it is influenced by factors beyond the control of the parties and therefore managerial prerogative will still have a role to play in this 'equilibrium'. The equilibrium would even be absent "if the exercise of its economic power by one party is subject to legal constraints which do not restrict the economic power of the other party in any comparable way".[111] He submits that "the limitations placed on employee industrial action; the reasons why management and labour participate in the bargaining process; the limitations on the scope of the bargaining agenda and the scope for joint regulation in the bargaining phase",[112] challenge the assumption of power balance. Pluralists[113] accept that employees should act in concert and have a *right* to strike in order to make any substantive impact on the employer's power of ownership. Thus an integral part of collective bargaining is

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[108] Ibid 119
[109] Ibid 120

Wedderburn, Lewis and Clark *Labour Law and Industrial Relations: Building on Kahn-Freund* (1983) 113 at 114
[111] B. Jordaan *Industrial pluralism and the approach of the industrial court* (1989) 5 ILJ 791 at 798
[112] Ibid 798
[113] Davies & Freedland *Kahn-Freund's Labour and the Law* 292 and in *Labour Law* 697

the fundamental human right of the employee to withhold labour in appropriate circumstances. There is no equilibrium between the positions of labour and management regarding their economic bargaining positions and, therefore, employees should be able to act in concert and use their economic weapon to back up their industrial demands. The flip side of the coin is that management has the power to shut down the plant, which is derived from its ownership and control of industrial capital. It must also be remembered that a single employer can lockout, but a single employee cannot strike.

The only way to restore the equilibrium is to recognise a *right* to strike. At common law a strike can constitute a breach of contract and the union calling the strike can be delictually liable to the employer and employees can be summarily dismissed. The LRA 28 of 1956 sought to protect strikes the purpose of which was to pressurise employers in respect of labour relations matters. If strikes conformed to the requirements of the Act, the employer could not bring any civil legal proceedings. However, no specific protection was afforded to strikers against dismissals. Within the ambit of the unfair labour practice jurisdiction the court sought to develop factors to determine whether or not to protect strikers[114], but there was a lack of coherence. The right to strike is now firmly entrenched by our Constitution[115] and the LRA was changed accordingly[116]. Sections 5(2) and 5(1) provide that no person may be prejudiced for participating in the lawful activities of a trade union and no person shall be discriminated against for exercising any right in terms of the Act.

[114] *NUM v Marievale Consolidated Mines* (1986) 7 ILJ 123 (IC)
[115] Section 23(2) of the Constitution.
[116] See Chapter IV of Act

Pluralist theory requires that employment terms and work place disputes are determined through collective bargaining. This begs the question whether the parties come to the table willingly or are driven through compulsion. One of the assumptions pluralism makes is, that the equilibrium of the power of the parties to bargain collectively, lies in the power of employees to withhold labour, and the power of employers to order production, which is based on ownership. This equilibrium is only possible if, in the process of collective bargaining, both parties play by the same rules. Thus, one party should not approach a court of law to determine that the other's bargaining demands are unreasonable or to obtain an interdict to prevent industrial action. Should market forces then be the only factor to determine the outcome of collective bargaining or does the law have some role to play?

Jordaan maintains that collective bargaining can only function properly if parties participate in the process or are forced to participate if they refuse.[117] He submits that

> "As long as the institution of collective bargaining is tied to pluralist orthodoxy it cannot...adequately fulfil its primary aim of ensuring a greater measure of justice, democracy and participation in industry. For it to be effective, it needs to be wrested from the philosophical premises of orthodox pluralism. In particular, the reality of the imbalance of power between management and labour needs to be confined to its proper place, i.e. voluntarism or abstention of the law *in the substantive outcome* of collective bargaining."[118]

Brassey notes that "There is nothing so subversive of collective bargaining ...as to refuse to bargain entirely or to pretend to bargain without doing so, going through the motions with no

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[117] B. Jordaan *Industrial pluralism and the approach of the industrial court* 800

[118] Jordaan *Industrial pluralism and the approach of the industrial court* 804

intention of reaching agreement"[119]. The question is thus not whether legal intervention is necessary or whether it would undermine the pluralist notion of voluntarism but "what degree of legal abstention is necessary for the proper functioning of collective bargaining"[120].

Collins explains that juridification in industrial relations is necessary because

> "The pluralist pattern of collective bargaining is inherently unstable... The bargaining agreement will always be struck on the basis of the transitory balance of forces and any shift in power will undermine the stability of the obligations (derived from the collective agreement). In order to unionise the disruption to the national economy caused by the explosive tendencies within pluralist systems, the state succumbs to the temptation to regulate the employment relationship through law, thus bypassing structures of joint regulation by management and unions[121]".

Jordaan argues that for the proper functioning of the process of collective bargaining, legal structures must be in place to facilitate and encourage it. However, the rough parity in power that should exist between organised labour and management allows them to mediate differences and this will be the product of collective bargaining that reflects the changing fortunes of the participants. The law should, therefore, abstain from interference with the *outcome* of collective bargaining.

Pluralism thus accepts (i) the legitimacy of trade unions (ii) separation of powers between the state on the one hand and management and labour on the other, and (iii) the inherent conflict

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[119] Brassey, Cameron, Cheadle and Olivier *The New Labour Law* (1987) 1 151

[120] Jordaan at 801 paraphrasing Wederburn, Lewis and Clarke at 117

[121] H. Collins *Capitalis doctrine and corporatist law* (1983) ILJ (UK) 78

between management and labour. It concludes that collective bargaining is the only way to contain the conflict. The pluralist theory accepts that to reach a compromise the demands from either side must be reasonable so as to keep the relationship working. Pluralism alone cannot address the reality of the inequality in the collective bargaining relationship. What is required is legislative regulation as was done through the Constitution and the LRA but

> "The dilemma is that the very regulations that place workers in a position of to bargain collectively, and in this way to co-determine their terms and conditions of employment, force them to become part of an organizational and bargaining system created (dictated) by the legislature and the judiciary. This means that trade unions are not in a position to reverse the process of juridification, and to adapt the system according to their own ideals"[122].

3.2 . COLLECTIVE BARGAINING AND FREEDOM OF ASSOCIATION

Collective bargaining goes hand in hand with the principle of freedom of association. Davies and Freedland[123] were of the opinion that

> "Workers' organisations cannot exist if workers are not free to join them, to work for them, and to remain in them. This is a fundamental human right, a civil liberty ...and as such it ranks with freedom of speech, freedom of religion and it is, however also complementary to collective bargaining; that is, it is a conditio sine qua non of industrial relations..."

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[122] C. Miscke *Conflict Colonization - the Juridification of Industrial Action* SA Mercantile Law Journal (1992) 4 157 citing Simitis at 162

[123] Davies and Friedland, *Kahn-Freund's Labour and the Law* 200 -201

The employee must thus be guaranteed the freedom to form, belong to and participate in a trade union and its activities. What then follows is the recognition of representative trade unions, the right to the deduction of union fees, appropriate time off or facilities for industrial relations duties and union access to the employer's premises.

Before 1988 the only statutory protection for freedom of association was found in sections 66(1) and 78 of the Labour Relations Act. Section 66(1)(c) contained an absolute prohibition on the dismissal of employees for belonging to a trade union. Section 78(1) provided that employees could not be prevented from belonging to a trade union. Until 1979 this protection was, however, only afforded to employees who were classified white, coloured and Asian after which all racial groups enjoyed the protection. Workers in the public, agricultural, domestic and certain other sectors were excluded. However, through the introduction of the open textured unfair labour practice definition[124] the court could decide on both individual and collective labour law. It had been successful in areas of individual dismissals and retrenchments and fairly bold on issues of collective bargaining. The court found, amongst others, that victimisation of employees because of their trade union membership constituted an unfair labour practice[125].

In *United African Motor and Allied Workers Union v Fodens (Pty) Ltd*[126] the court also dealt with the unfair labour practice definition and referred to freedom of association. The case involved the dismissal of two shop stewards and a migrant worker. The respondent contended that the shop stewards were retrenched for economic reasons while the migrant worker was

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[124] Industrial Conciliation Amendment Act 95 of 1980
[125] Mbatha v Vleissentraal Co-operative Ltd (1985) 6 ILJ 333 IC
[126] (1983) 4 ILJ 212 IC

summarily dismissed for disobedience. The court held that the employer failed to show that the migrant worker's dismissal was fair and held that an unfair labour practice was committed.

The court classified seven broad categories of unfair labour practices committed by Fodens. They were:

(i) Refusal by the company to negotiate with a representative trade union;

(ii) Interference by the company with its employees' freedom of association protected by section 78 of Labour Relations Act 28 of 1956;

(iii) The use of derogatory terms by members of management when referring to company employees;

(iv) The company's failure to furnish within a reasonable time an unconditional and permanent undertaking that employees would not be victimised;

(v) The non-existence of a disciplinary code and procedure and grievance procedure for company employees against the background of a representative union having approached the company with a request to discuss, negotiate and introduce the relevant code and procedures;

(vi)The company's failure, despite an undertaking to refund unemployment insurance fund contributions to employees who, as non-South Africans were not covered by the fund, and

(vii) Derogatory references made by managerial staff about the union in relation to the question of pensions.[127]

The court emphasised that it was not laying down general guidelines for the determination of unfair labour practices but that the findings had to be seen in the light of the circumstances of

[127] Ibid 212

the case.[128] Far from being a weapon of perceived union militancy, the position had merely established a basic level of civilised working conditions and given momentum to the ideal of freedom of association.

The 1988 amended definition of an unfair labour practice, paragraph (j),[129] extended to employees the right to associate. This definition afforded protection only to individual employees and not their organisations[130] and the job applicant was left unprotected.

In 1994 the interim Constitution[131] granted the right of freedom of association, thus protecting the freedom of employees, trade unions, employers and employers' organisations. The constitutional sentiments are echoed in the Act and the right of freedom of association is protected from state, employers' and trade union interference. Chapter II of the Act protects explicitly these rights; employees, as well as prospective employees, may freely form, join and take part in the activities of a trade union. A range of specific actions that could infringe on these rights is prohibited; for example, no person may victimise an employee or prospective employee for her trade union association or disassociation[132]. Disputes as to the interpretation

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[128] Ibid 225 E - F

[129] It provided: "subject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate, by any other employee, any trade union, employer, employer's organisation, federation or members, office-bearers or officials of that trade union, employer employer's organisation or federation, including but not limited to, the prevention of an employer by a trade union a trade union federation, office-bearers or members of those bodies to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation."

[130] See para (iv) of section 1 of Act.

[131] The final Constitution was adopted on 8 May 1996 and the 'labour relations' rights are contained in S23.

[132] Section 5

or application of provisions concerning the right of freedom of association may be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation and if not resolved, the matter may be referred to the Labour Court for adjudication[133]. Godfrey[134] argues that certain provisions of the Act make inroads on the right of freedom of association. These provisions include:

- authorising closed and agency shop agreements [sections 25 and 26];
- providing for compulsory winding up of trade unions and employer's organisations under certain conditions [section 103];
- limiting union access to the workplace for the purpose of recruiting to unions that are 'sufficiently representative' [section 12 read with section 11];
- providing for the compulsory cancellation of the registration of trade unions and employers' organisations under certain circumstances[section 106];
- imposing certain duties upon trade unions and employers organisations relating to the keeping of records and furnishing of information [sections 98 and 99] and
- stipulating certain matters for which the constitutions of all registered trade unions and employers' organisations must provide [section 95(5)].

The controversial issue of closed shop agreements must be mentioned in relation to freedom of association. The original draft bill did not make provision for closed shop agreements as it was argued that it would violate the right to freedom of association. Instead it made provision for agency shop agreements whereby employees are not required to belong to a trade union in order to retain their jobs. In terms of an agency shop agreement, as contained in section 25 of the LRA, the non-union members who may benefit from collective bargaining by a union may

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[133] Section 9

be requested to contribute an agency fee. This money will be paid into a separate account to be administered by the representative union that is acting as their bargaining agent. The amount deducted cannot be more than the trade union subscription fee and it may not be used for purposes such as a political affiliation fee, contribution to a political party or person standing for political election or for any expenditure which does not promote or protect socio-economic interests of employees. The agreement terminates on the initiative of the employer who merely has to allege that the union is no longer representative. Section 25(9) provides that if within a 90-day period, the trade union fails to prove it is representative, the agreement is terminated on 30 days' notice.

The closed shop provision in the Act was inserted at the insistence of the unions but certain conditions had to be met for closed shop agreements to be binding. In terms of section 26(3) the agreement is binding only if:

(i) A ballot has been held of the employees to be covered by the agreement;

(ii) Two thirds of the employees who voted have voted in favour of the agreement;

(iii) There is no provision in the agreement requiring membership of the representative trade union before employment commences, and

(iv) Membership deductions may not be used for purposes of a political affiliation fee, contribution to a political party or person standing for political election or for any expenditure, which does not promote or protect socio-economic interests of employees.

[134] Ibid 69

The Act spells out clearly in section 26(6) that a dismissal will not be unfair if:

(a) An employee affected by the closed shop refuses to join a union which is party to the agreement or,

(b) An employee is refused membership of the union or is expelled from the union in terms of section 26(5).

Section 26(7), however, provides that employees who are already employed when the agreement is entered into, as well as conscientious objectors, may not be dismissed but may be required to enter an agency shop agreement if such an agreement co-exists with the closed shop agreement. The closed shop agreement will be terminated if one third of the employees covered by the agreement sign a petition calling for its termination and three years have passed since the agreement was concluded or the last ballot was conducted in terms of section 26(15). The agreement is terminated if the majority of those who voted have voted in favour thereof.

The question whether closed shop agreements could pass constitutional muster was extremely controversial at the time when the Bill was publicly discussed. However, the Constitution makes provision for the limitation of a right if the limitation is reasonable and can be justified in a free and open society. As Bosch and Du Toit[135] correctly point out, section 26 must pass the proportionality test as contained in section 36(1)(a) to (e) of the Constitution. The question regarding the limitation as reasonable and justifiable, is whether there is a 'less restrictive means' of achieving the purpose of sections 25 and 26. Bosch and Du Toit argued that section 25 "offers a less restrictive means to achieve the purpose of the Act in this regard"[136]. Section 39(1)(c) of the Constitution provides that foreign law may be considered in interpreting the Bill

[135] Du Toit et al *The labour relations act of 1995* 1996 at 78

of rights and it is likely that the Canadian, United States and the German courts will be of particular relevance to the Constitutional Court in deciding the issues. Section 39(1)(b) international law must be considered but the jurisprudence is inconclusive[137]. The closed shop agreement might pass constitutional muster with more difficulty but, due to the extensive controls in section 26, it might pass the proportionality test.

3.3. BARGAINING AND LEGAL INTERVENTION

The Labour Relations Act 28 of 1956 and the Labour Relations Act 66 of 1995 were both premised on legal abstention in the determination of the *outcome* of collective bargaining as will be reflected in this thesis. I submit that legal policy should facilitate and encourage collective bargaining and should have a "hands-off" approach regarding the results of the process which should be left to the parties to determine for themselves.

Thompson was of the opinion that the "law can and should impose an obligation to negotiate, but that a failure to distinguish process from product has produced a limping jurisprudence" [138]. He further postulated that legal intervention is appropriate

> "to remedy two species of mischief. Firstly, granted that collective bargaining constitutes the legislative cornerstone for the promotion of labour peace, conduct which is subversive of that process should invite judicial reproach. The unfair labour practice definition, makes specific reference to practices which may create labour unrest...The second mischief requiring redress relates to activities that undermine the employment

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[136] Ibid 78
[137] See *Young, James & Webster v United Kingdom* [1981] IRLR 408 (ECHR)as summarised in (1995) 4 LCD 208.
[138] 'On bargaining and legal intervention' (1987) 8 1 ILJ 1

justice that employees may demand in their individual capacities"[139].

With the introduction of section 43[140] of Act 28 of 1956, interim relief could be obtained against parties who offended against the collective bargaining process or who threatened to defeat the ends of labour peace. The court could thus oblige the respondent to engage with the applicant to settle differences.

The two cases of *NUM v Marievale Consolidated Mines*[141] and *MAWU & others v Natal Die Casting Co (Pty) Ltd*[142] illustrate that the courts indirectly acknowledged that there was a duty to bargain in good faith. In the *Marievale* case the court held that "there appears to be an obligation on parties to a dispute to adopt a bona fide, objective and flexible attitude during dispute-settling negotiations in order to achieve the ultimate aim. Dictates of sound industrial policy urge the imposition of such an obligation"[143]. In *Trident Steel (Pty) LTD v John NO & others*[144] the court found that it is because of the inadequacies of the voluntarist approach that disputes reach the industrial courts and therefore parties must be compelled to bargain in good faith. The voluntarist approach teaches that the law should abstain from the outcome of collective bargaining [145]

The Industrial Court, however, had over the years not clearly distinguished between abstention and intervention. Cameron[146] blamed this on the confusion between disputes of rights and disputes of interest. Disputes of rights are those which arise from the application or

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139 Ibid 8-9
140 Introduced by Act 51 of 1982
141 (1986) 7 ILJ 123 (IC)
142 (1986) 7 ILJ 520 (IC)
143 at 149C
144 (1987) 8 ILJ 27 (W)
145 See in *Macsteel(Pty) Ltd v NUMSA* (1990) 11 ILJ 995 LAC
146 Cameron et al *The new labour relations act* (1989) 96

interpretation of an existing law or collective agreement whereas disputes of interest are those which arise because collective bargaining had failed, i.e. where parties' negotiations for the conclusion, renewal, revision or extension of a collective agreement ended in deadlock.

> "When confronted with a rights dispute, the employer's obligation is to attempt to conciliate the matter through domestic or statutory procedures; if an impasse is reached, it is then for the court to bring finality through adjudication. With respect to interest disputes, the employer's obligation is to bargain in good faith in an endeavour to reach a settlement; if this type of dispute remains unresolved, economic power, not judicial decree, should dictate the outcome"[147].

The issue was further clouded by the unfair labour practice jurisdiction which was amended a few times over a short period and because of its open textured definition it came as no surprise to find the courts struggling to apply the concept consistently. The function of the unfair labour practice jurisdiction was twofold in that "it is aimed both at protecting and promoting the collective bargaining process and at preventing or, at least, remedying some of the major causes of industrial conflict."[148] The 1988 unfair labour practice concept was defined in the Labour Relations Act[149] and thus an unfair labour practice determination should be a rights dispute. Cameron[150] however pointed out that the 1988 definition was extremely broad and appeared as if a limitless range of disputes could be brought before it. He submitted that

> "the scheme of the Act, then, allows the industrial court to intervene in arbitral mode in core economic matters, but then only by consent, to the extent that, an area of dispute

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[147] C. Thompson *Collective Bargaining* Current Labour Law 1991-92 26 at 28

[148] A. Rycroft & B. Jordaan *A guide to South African labour law* (1992) 172

[149] Since 1980 (Act 95 of 1980) and had undergone numerous amendments since then and finally discarded in 1995.

has been carved out of the unfair labour practice jurisdiction of the industrial court."[151]

The unfair labour practice jurisdiction of the industrial court proved to be extremely inconsistent, as is reflected in the following cases:

(a) In *NUM v Marievale Consolidated Mines*[152] the court rejected the contention that the court should be careful about coming to the assistance of those dismissed strikers who opted for industrial action in their wage claim instead of going the unfair labour practice route.

(b) In *NUM v Henry Gould*[153] the court opted for the voluntarist approach. The court found that it could not intervene in the collective bargaining process but that the outcome needed to be determined at the bargaining table.

(c) In *Ntuli v Hazelmore Group*[154] the court had to decide among other things whether the employees were entitled to severance pay on retrenchment. This involved an interest dispute but the court found that it constitutes an unfair labour practice.

(d) In *OK Bazaars Ltd v SA Commercial Catering and Allied Workers Union*[155] the employer refused to pay striking workers their annual bonuses. The Industrial Court held that the employer's conduct constituted an unfair labour practice. On appeal the court confirmed that it had to tread with great circumspection on the terrain of collective bargaining and in regard to monetary matters it should adopt a "hands-off" policy. It held that there was nothing unfair in refusing bonuses to workers whose demands threatened their employer's survival, and could cause considerable and substantial loss.

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150 Cameron et al *The New Labour Relations Act* (1989)97
151 Ibid 99
152 (1986) 7 ILJ 7 123 (IC) at 145A, 149E and 151B
153 (1988) 9 ILJ 1149 (IC) at 1156I
154 (1988) 9 ILJ 709 (IC) at 718-719
155 (1993) 2 LCD 197 (LAC)

The result of the court's inconsistency was that parties were uncertain of their rights and economic outcomes were imposed on them with little bearing on their needs or the power they were capable of exercising. The inconsistent intervention by the Industrial Court did not go unnoticed and the legislature has in the LRA, left no doubt as to what is meant by an unfair labour practice.[156] A general unfair labour practice definition is absent and the LRA replaced it "with specific rules designed in part to codify the existing unfair labour practice jurisprudence, and in doing so reduce something of the subjectivity...of the courts' decision as to which labour practices are fair, and which not"[157]. Through conferring organisational rights and setting out the circumstances and procedures to be followed to dismiss employees, the legislature has to some extent taken away the courts' discretion. However, the new 'residual unfair labour practices' found in Schedule 7 of the Act will give South African courts sufficient scope to use its discretion.

[156] Schedule 7 Part B
[157] John Grogan *Yours residually The new unfair labour practice definition* Employment Law April 1996 12 4 66 at 66

4. MAJORITARIANISM V MULTI-UNION BARGAINING UNITS

In the post-Wiehahn period the Industrial Court was inevitably called upon to consider a range of ancillary claims to the collective bargaining process such as, in the event of a dispute, with which, of several competing unions an employer should negotiate? On which subjects? How?

The Labour Relations Act 28 of 1956 was not prescriptive as to whom the employer should bargain with[158]. The court was thus faced with the question as to whether the employer could be compelled to bargain with any union. The courts found it particularly difficult to decide who the legitimate parties were to the bargaining process. In some instances the court supported majoritarianism and in others there was a rejection of the principle. What it boils down to is "whether the issue of bargaining agents is a matter which belongs to the process of collective bargaining, or whether it is a matter which appropriately belongs on the bargaining agenda and which should therefore be left to the parties to determine for themselves[159]". As Jordaan correctly observed, if there was a bargaining arrangement (whether majoritarian or pluralist[160]) between the employer and a trade union then the court could not intervene and impose its views on the parties. A further problem for the courts was to exactly determine when a trade union enjoyed sufficient representation and in respect of whom there should be a sufficiency. This question could only be dealt with by looking at the merits of each case.

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[158]Except section 19(3)(d) which required that a trade union or employer or employer's organization must be 'sufficiently representative' to qualify for representation at industrial council level.

[159]B. Jordaan Ibid 136

[160] The pluralist approach here means that the employer is required to bargain with any union which is sufficiently representative of employees in a particular bargaining unit

In *NUTW v Rotex Fabrics*[161] the employer was accused of helping a rival union achieve majority status at the expense of the applicant. The company accepted majoritarianism whereas the arguments of both trade unions and the court decision, were based on what the most appropriate system for collective bargaining was in the company. However, the court remarked that

> "The industrial court has strong reservations with regard to the universal acceptance of such a model. Although this model may be acceptable in countries with a more homogenous workforce than South Africa, the experience of this court has been that it often bedevils labour relations in this country. This is not only because of racial or ethnic diversity of our workforce, but also because of employers sometimes using the opportunity to refuse to recognise which although substantially representative of its workforce, has not acquired the majority of the workforce in accordance with this model. As convenient as it may be for management to negotiate with only one collective bargaining unit, it very often has the effect of depriving employees of the right to associate with a union of their choice or which is able effectively to represent their particular interests."

In *Luthuli v Flortime*[162] the Industrial Court held the opposite opinion about the majoritarianism system. The court referred to the *Mynwerkersunie v African Products*[163] case that suggested that circumstances might exist where it may reasonably be expected of an employer to negotiate with a minority union that has substantial support. The court, however, argued that if the

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[161] (1987) 8 ILJ 841 (IC)
[162] (1988) 9 ILJ 287 (IC)
[163] (1987) 8 ILJ 401 (IC)

majority union had concluded a recognition agreement with the employer whereby retrenchment procedures were included, it would be beyond the court's jurisdiction to impose a duty on the employer to consult separately with a minority union. The judgement accepted the majoritarian system and also illustrated the inconvenience that the employer would be put to if it were required to negotiate with every trade union present.

The Industrial Court had indicated its unwillingness to enforce the principle of majoritarianism for various reasons, namely, that:

(i) Individuals have a right to bargain as individuals with the employer[164];

(ii) The principle can be disruptive as it will encourage union rivalry[165], and

(iii) It infringes on freedom of association[166].

One must, however, bear it in mind when having to consider who the legitimate parties to the bargaining process are, that collective bargaining precludes giving precedence to the interests of individuals, in favour of a collective interest.

The *Radio Television Electronic & Allied Workers Union V Tedelex (Pty) Ltd & another* and the *NUTW V Rotex Fabrics (Pty) Ltd*[167] were aberrations and any uncertainty was laid to rest in the Appellate Division's decision of *Mutual & Federal v Banking Insurance, Finance and Assurance Workers Union*[168]. The facts were as follows:

The union represented black workers only. The employer recognised three bargaining units' namely clerical, non-clerical and first line supervisory staff. The union felt that there should be

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[164] *Radio Television Electronic & Allied Workers Union v Tedelex (Pty) Ltd & others* (1990) 11 ILJ 1272 (IC)

[165] *Ngiba & others v Van Dyck Carpets (Pty) Ltd & another* (1988) 9 ILJ 453 (IC) at 456A

[166] *NUTW v Rotex Fabrics (Pty) Ltd* supra at 842H and *Natal Baking & Allied Workers Union v BB Cereals(Pty) Ltd* (1989) 10 ILJ 870 (IC) at 873I-J

[167] Supra

two units, namely, managerial and non-managerial. The union represented no one on managerial level and felt it had sufficient representation at non-managerial level and that it should bargain for all its members at this level. Neither party wanted to compromise and the union claimed an unfair labour practice. The Industrial Court found that the union did not have sufficient status in its own proposed division and that the employer's bargaining unit criterion was fair and objective. The Labour Appeal Court, on the other hand, found that the support that the union enjoyed was not a criterion to be taken into account to determine bargaining units. The Appellate Division was faced with the question of the all-comers approach against that of the majoritarian approach. The court rejected the view expressed in the BB Cereals[169] and Tedelex[170] cases that the employee, as an individual, had a common law right to engage an employer in negotiations. The court then accepted that a trade union needs to show sufficient representivity for it to bargain collectively. The employers' criterion for bargaining units was fair. The appeal was upheld.

The Labour Relations Amendment Act 83 of 1988 had protected the freedom of association principle by making direct or indirect interference with an employee's right to associate - or not to associate - an unfair labour practice. The reference in paragraph (j)[171] of the definition to a

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[168] (1996) 17 ILJ 241 A

[169] *Natal Baking & Allied Workers Union v BB Cereals (Pty) Ltd & another* (1989) 10 ILJ 870 IC

[170] *Radio Television Electronic & Allied Workers Union v Tedelex (Pty) Ltd & another* (1990) 11 ILJ 1272 (IC)

[171] Para (j) provided that: "subject to the provisions of this Act, the direct or"the injunction against a union preventing an employer from dealing with employees indirect interference with the right of employees to associate or not associate, by any other employee, any trade union, employer, employer's organisation,federation or members, office-bearers or officials of that trade union, employer, employer's organisation or federation, including, but not limited to, the prevention of an employer by a trade union, a trade union federation, office-bearers or members of those

"right to associate", gave members of the industrial court an opportunity to denounce established collective bargaining systems which operated along majoritarian lines. In *Natal Baking and Allied Workers Union*[172] the court found that paragraph (j) granted a general right to negotiate and the concept of majoritarianism was not applicable.

Thomson[173] critically observed that the court thus declared all existing non-statutory recognition agreements to be unfair labour practices. It made nonsense of the fact that (i) the recognition and bargaining rights were based on majoritarianism or the pluralist system and (ii) the employer could make it a condition of employment that the worker had to accept deals negotiated by the representative union. Thompson warned that

> [i]f the provision is to be harmonized with the 'deep structure' of the rest of the Act, the injunction...against a union preventing an employer from dealing with employees not represented by that trade union should be restrictively interpreted. Thus, for instance, where an employer agrees to afford special status to a majoritarian union or to a group of representative unions, the deal should be sustained if challenged... the prohibition should only arise where a union endeavours to block an employer from dealing with employees not represented by a particular union - and the court has ample powers to adjudicate on this point - there should be no basis for denying the bargaining agent favoured status."[174]

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bodies to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation"

[172]*Natal Baking & Allied Workers Union v BB Cereals & another* (1989) 10 ILJ 870 IC

[173]"A bargaining hydra emerges from the unfair labour practice swamp" ILJ (1990) 10 5 808

It must be borne in mind that through the attack on majoritarian trade unionism, it protected the position of the minority and thus racially exclusive trade unions. The fragmentation of the power of organised labour seriously undermined the strength of labour and was bound to lead to industrial tension.

In *Mtembu v Claude Neon Lights*[175] the court rejected the notion of the minority union which stated that there had been an unfair unilateral change to terms and conditions of employment but found that it was "an act negotiated with the representative union and had been agreed to"[176].

However, it must also be borne in mind that sufficient representivity was not the only criterion for determining with whom the employer should negotiate. In *Stocks & Stocks (Pty) Ltd v Bawu & others*[177] it was pointed out that if a union represented a particular interest arising from factors such as special skills, nature of work, politics or religion, it could be a criterion requiring an employer to negotiate with that particular union. Where both sides of the bargaining table were credible potential bargaining partners, then peaceful negotiation was preferred over industrial strife. The court would then not intervene and, even more so, where the union was strong enough to compel bargaining. However, where the employer played cat and mouse and tried to avoid the inevitable then the court would intervene and put the bargaining process back on track. In *Ramolesane v Andrew Mentis*[178] the Labour Appeal Court accepted the power of unions and stated that because of the principle of majoritarianism a decision of the majority will be enforceable against the minority. In *SA Polymer Holdings (Pty)*

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[174] Ibid 813
[175] (1992) 13 ILJ 422 (IC)
[176] at 423E
[177] (1990) 11 ILJ 369 (IC)
[178] (1991) 12 ILJ 329 (LAC) at 336A

Ltd v Llale[179] the Labour Appeal Court once again recognised the principle of majoritarianism as it found that if a majoritarian bargaining arrangement was in place, the court would not compel an employer to bargain or consult with a minority trade union.

A further issue on representivity was raised in *SASBO v Standard Bank of SA*[180]. Here the union wanted the right to bargain for front-line supervisory staff and middle management. Thus it was a matter of the right to belong to a trade union for collective bargaining purposes versus the employer's right to loyalty from senior employees. The court accepted the right to belong to a union but held that this right was not absolute. If there was a conflict or potential conflict of interest, then employers could not be expected to bargain. The employer must show that this conflict of interest was unavoidable and only then court intervention would become necessary to decide whether the fundamental right of representation should be thwarted. What needed to be established was that the performance of a manager's duties would be impossible or difficult if she formed part of the bargaining unit. This, once again, emphasised that each case must be decided on its merits, as there can be no hard and fast rule that a senior employee cannot be represented.

In the light of the above-mentioned examples it was obvious that on the issue of eligibility for bargaining entitlement our courts were contradictory. The LRA ended the uncertainty by granting bargaining entitlement to unions, which are sufficiently representative while not necessarily enjoying majority support[181]. However, unions which represent a majority of employees, either alone or acting jointly, enjoy added rights and benefits. The incentives for

[179] (1994) 15 ILJ 227 (LAC)
[180] (1994) 15 ILJ 332 (IC)

majoritarianism include the right to:

(i) Elect union representatives [section 14];

(ii) The disclosure of relevant information [section 16];

(iii) Conclude agency shop and closed shop agreements [sections 25 and 26];

(iv) Apply for the establishment of a workplace forum [section 80] and

(v) Conclude collective agreements binding employees identified in the agreement who are not members of the union or unions party to the agreement [section 23(1)(d)(iii)].

In terms of section 18 a majority union can, in conjunction with the employers, set thresholds of representivity and thereby have a powerful weapon against rival minority unions.

The Act deals with representivity where the union:

(i) Demands organisational rights in terms of part A of Chapter III;

(ii) Wants to enter into agency or closed shop agreements[182];

(iii) Applies to establish a workplace forum in terms of Chapter V, and

(iv) Applies to establish a statutory council in terms of part E of Chapter III.

When dealing with organisational rights, the Act affords the sufficiently representative union the right:

(a) Of access to the workplace for the purpose of recruiting members, communicating with them, holding meetings with employees on the premises outside working hours and conducting ballots[183];

(b) To require an employer to deduct trade union subscriptions from members' wages[184], and

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[181] Part A of Chapter III
[182] Sections 25 and 26 of LRA 66 of 1995
[183] Section 12 of LRA

(c) To allow reasonable leave during office hours for its office bearers to perform the functions of their office[185].

Section 11 of the Act provides that these rights do not necessarily accrue to one union only but to any number of unions acting jointly and having sufficient representation in a workplace.

However, the Act does not define "sufficiently representative" but provides that, if the issue is in dispute, the commissioner must in terms of section 21(8)(b) consider representivity with regard to the nature of the workplace; the rights the registered union is seeking; the nature of the sector, and the organisational history of the workplace. Our courts expressed this view in the past and those decisions will assist presiding officers when having to determine representivity[186].

Section 21(8)(a)(1) provides that the commissioner must also attempt to encourage a system of one representative trade union. Unrepresentative unions can be completely ignored, as they do not have bargaining rights of capacity. However, where the employer refuses to bargain, the union will be able to strike over recognition and if the strike is procedural, without the threat of dismissal. Section 64(2) provides that a refusal to bargain includes a refusal to recognise a trade union as a collective bargaining agent, to agree to establish a bargaining council, withdrawal of recognition of a bargaining agent, resignation from a bargaining council or a dispute about appropriate bargaining units, levels and subjects. Before a protected strike can be undertaken an advisory arbitration award must have been made in terms of section 135(3)(c). The Appellate Division's decision in *Mutual & Federal v Banking Insurance, Finance and*

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[184] Section 13 of LRA
[185] Section 15 of LRA
[186] See Mutual & Federal Insurance Co Ltd v BIFAWU [1996] 4

Assurance Workers Union[187] on bargaining unit determination and union representivity, will be of great assistance to the CCMA when it has to make advisory awards under this section.

The Act thus generally promotes the pluralist approach when granting bargaining rights but affords added rights and benefits where the union, either alone or acting jointly, enjoys majority support.

bLLR 403 (A); (1996)17 ILJ 241 (A); MWU v East Rand Gold & Uranium Co Ltd (1990) 11 ILJ 1070 (IC)

[187] (1996) 17 ILJ 421 A

5. A DUTY TO BARGAIN?

What is the freedom of association worth if it is not coupled with the ability to bargain? Questions that come to mind on the topic of bargaining are: Is there a duty to bargain? What is the level of bargaining? Which topics are bargainable?

Until 1979, employers were under no obligation to bargain with trade unions at plant level. Negotiation was facilitated at industry level by the existence of industrial councils, and labour disputes could be addressed at conciliation boards. The law did little to encourage bargaining at plant level.

After 1979 the Industrial Court initially refused to acknowledge a general duty to bargain as it affected the voluntary character of negotiations. In *BCAWU v Johnson Tiles (Pty) Ltd*[188] the trade union was seeking the section 43 remedy as it alleged that the employer's refusal to negotiate in good faith constituted an unfair labour practice. The court found that the concept of good faith bargaining was not found in the Labour Relations Act and thus dismissed the application. In *MAWU v Hart*[189] the dispute arose out of a refusal by an employer to negotiate with a representative trade union on wages and other benefits at plant level. Although the dispute essentially involved the levels of bargaining, the court spent some time on the question whether it should impose a duty to bargain on the employer. The court took a voluntarist stance. It rejected the idea that bargaining should be made compulsory[190], and approved of the Johnson case. The court forced the trade union to bargain at industrial council level, or not bargain at all, thereby compelling the parties into a bargaining situation they both rejected. *In*

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188 (1985) 6 ILJ 210 (IC)
189 (1985) 6 ILJ 487 (IC)
190 Ibid 488-9

Buthelezi and others v Labour for Africa[191] the court found that "the duty of an employer to recognise and commence negotiations with his employees must now be taken to be incontrovertible." In *FAWU v Spekenham Supreme*[192] the court expressed a general duty to bargain as the system of labour relations is intended to combat industrial unrest. *In Vereeniging Refactories Ltd v BCAWU*[193] and *BAWU and others v Asoka Hotel*[194] the Supreme Court, as well as the Industrial Court, found that an employer had to negotiate with a union even though minimum wages were set in the wage determination or had been negotiated at centralised collective bargaining level. Plant level bargaining on actual wages was not incompatible with negotiations for minimum wages at industry level[195].

Where the parties bargained, the court was prepared to ensure that the negotiations took place in good faith. The concept of a duty to bargain in good faith had two principal functions. First, the duty obliged the employer to recognise the bargaining agent. Second, the duty fostered rational, informed discussions, thereby decreasing the potential for industrial conflict. The *Natal Die Casting* case[196] was the subject of an unfair labour practice application. The court re-instated employees who were dismissed after participating in a lawful strike. The employer's refusal to bargain in good faith was a deciding factor in the decision. In *FAWU v Spekenham Supreme*[197] the applicants were workers who had been dismissed after striking in protest at the company's refusal to allow union representatives at wage negotiations. The court said that the complex and changing character of collective bargaining made it difficult to define

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[191] (1989) 10 ILJ 867 (IC) at 869G
[192] (1988) 9 ILJ 628 (IC)
[193] (1989) 10 ILJ 79 (WLD)
[194] (1989) 10 ILJ 167 (IC)
[195] BAWU at 177C
[196] (1986) 7 ILJ 520 (IC)
[197] (1988) 9 ILJ 628 IC

the concept of bargaining in good faith. The focus was generally on what was not good faith bargaining. The court said that, to bargain collectively with labour, management sought to give effect to the legitimate expectation that work would continue as usual without interruptions whilst labour sought to meet the legitimate expectation of wages and conditions of work. These objectives were the conditions upon which bargaining should be compulsory. The court found it to be unfair for an employer not to negotiate with a representative trade union. The basic duty to bargain, and to bargain in good faith, was established but, on the other hand, our courts had also held that it was not their task to determine outcome.

Industrial pluralism requires that employment terms should be jointly regulated by management and labour by means of collective bargaining. This infers a willingness to bargain. However, employees participate in collective bargaining because they are compelled to do so through economic need. In *FAWU v SAMS FOOD* [198] the employer refused to bargain over wages with the union which represented the majority of members because a formal recognition agreement had not been concluded. The employer then unilaterally offered a wage increase to the workers behind the trade union's back. The court found that there cannot be "significant doubt about the fact that the aforesaid conduct constitutes a deliberate and gross unfair labour practice calculated to damage and erode the applicant union's position as the collective bargaining agent of its members"[199]. In *Dalview Nursing Home & NEHAWU* [200] the arbitrator held that the failure of the employer to consult with a representative trade union on retrenchment whilst negotiating a recognition agreement, constituted bad faith.

[198] (1991) 12 ILJ 1327 IC
[199] at 1325J - 1326B of the case

The much-publicised Ergo case[201] must also be considered since it was the first time the Appellate Division was required consider the concept of the duty to bargain in good faith and an employer's rights when impasse is reached. The facts were as follows: In terms of a formal recognition agreement the company recognised NUM as the sole bargaining agent within specified bargaining units. In 1987 during the annual wage negotiations the union demanded that whatever the date of wage settlement, the wage increases should be implemented from 1 June 1987. The employer however maintained that only if settlement were reached by 31 July 1987 would the increases be backdated. The dispute remained unresolved and the employees embarked on a strike. The company then offered employees within the bargaining unit to accept their final offer to NUM backdated to 1 June 1987 on condition that they were no longer in dispute and that the strike should end. The dispute over the employer's direct offer to the employees, and the refusal to backdate the wage increase to strikers, was referred to the Industrial Court for determination.

The Industrial Court found for NUM, the Labour Appeal Court for the employer, and the Appellate Division for NUM. The question was whether the direct negotiations with the employees, in the light of the recognition agreement and the differential treatment of the strikers and non-strikers within the bargaining unit, constituted an unfair labour practice. The Labour Appeal Court held that it was fair for the employer to make the same deal that was offered to the union directly to employees and the differential back-pay was offered because of the union's conduct during negotiations. The Appellate Division ignored the conduct of the parties during negotiation and focused on the obligations of the parties under the recognition

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[200] (1991) 12 ILJ 1163 (ARB)
[201] NUM v East Rand Gold & Uranium Co (1991) 12 ILJ 1221 A

agreement. The court found that the employer was bound by its obligations under the recognition agreement. It was not entitled to, even at the point of impasse, negotiate directly with its employees as the union had the sole collective bargaining rights. The message of the court to the employers was thus that under these circumstances, the employer had to suspend the recognition agreement before dealing with the employees directly as, anything to the contrary, would be subversive to the process of collective bargaining.

Thompson[202] stated that

> "In entering into a recognition agreement, a union acts not only on behalf of its members... but also as an independent bearer of rights. At least for as long as the member remains in good standing he or she cannot conclude separate deals with an employer in the face of conflicting recognition agreement provisions and constitutional obligations. Such a possibility... would be wholly subversive of orderly collective bargaining".

He furthermore maintained[203] that the Ergo decision had demonstrated that the Appellate Division is alive to the inflections of industrial justice". The court's reasoning showed that it understood that collective bargaining should combat avoidable industrial strife and all stakeholders should be afforded the opportunity to play a role in the development of the enterprise.

Although the South African judiciary had determined that a duty to bargain existed, the debate on this extremely controversial issue raged on. Unions were in favour of such a duty as it could use legal intervention to order employers to bargain whereas employers strongly opposed

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[202] *The Appellate Division's first unfair labour practice appeal* (1991) 12 ILJ 7032 on 1207

it as they claimed that a compulsory system of collective bargaining was too rigid. Business argued that compulsory centralised bargaining would frighten off potential investors and make the growth of small business impossible. Business South Africa's vice-president, Bobby Godsell[204], said that legislating the duty to bargain was not necessary or desirable as bargaining structures through agreement had been established in all sectors of the economy. However, he entertained the notion that smaller unions would become a non-factor because only unions with effective membership in a company, area or industry have compelling power.

The uncertainty led to growing confrontation between labour and management and thus amongst other[205] things begged for labour reform.

A legally enforced duty to bargain, favoured those who were unlikely to secure better conditions of employment through collective bargaining. It should be noted that the duty to bargain could not ensure results, as the employer's response to a demand would depend upon the employer's assessment of the trade union's power.

In the light of the above it was evident that the confused jurisprudence led to uncertainty and economic outcomes that did not necessarily address the needs of parties were forced on them. In the Explanatory Memorandum to the Bill[206] it was noted that

"...the fundamental danger in the imposition of a legally enforceable duty to bargain

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[203] Ibid 1209

[204] SA Labour Business Monitor (1995) Aug 16 1 4 6

[205] See Du Toit et al 1996 "The Labour Relations Act of 1995" 1st Edition Butterworths on 21-26

[206] Draft Negotiating Document in the Form of a Labour Relations Bill Notice 97 of 1995 at 122

and the consequent determination by the judiciary of the levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements. The statutory compulsion model, which does not admit even the limited flexibility of judicial intervention, fails even more dismally for the same reason."

Following the promulgation of the Labour Relations Act 66 of 1995, the courts do not have the power to declare a refusal to bargain or bad faith bargaining an unfair labour practice. Instead it grants organisational rights, revamps the existing industrial council system and creates workplace forums that intend to stimulate collective bargaining. If these legally enforceable rights cannot induce the other party to bargain, then industrial action would become the weapon used to resolve the issue. It is worrying that "the removal of the duty to bargain is that negotiations over the real substantive issues of bargaining may have to be preceded by an exercise of power over essentially procedural issues"[207]. Murphy argued that the absence of a duty to bargain effectively means that parties have to resort to power play to enforce a constitutional right.[208]

[207] Du Toit et al Ibid at 137

It should be noted, however, that although the Act does not oblige parties to bargain, it provided for certain procedures to bring parties to the bargaining table before they can embark on industrial action. Chapter IV of the Act outlines the special procedure to be followed in respect of disputes over a refusal to bargain. Section 64(2) provides that disputes concerning the refusal to recognise a trade union, the withdrawal of recognition, the refusal to establish a bargaining council, the resignation from a bargaining council and a dispute about appropriate bargaining units, levels or subjects should be referred to advisory arbitration before notice of industrial action is given. The advisory award of the CCMA will not be binding as it attempts to bring the parties to discuss their differences before they proceed with industrial action.

The LRA promotes collective bargaining by granting organisational rights, revamping the bargaining structure and creating workplace forums.

Chapter III Part A of the LRA promotes bargaining at plant level through the creation of organisational rights. The union need not necessarily be a majority union to enjoy these rights[209]. The Chapter provides that the representative trade union has a *right* to notify the employer that it is representative and that it seeks to exercise these rights. Section 21(3) then *compels* the employer to meet with the employee to conclude a collective agreement, which will specify how the rights will be exercised. This places a duty on the employer to bargain the terms of the organisational rights. If the employer refuses to meet the trade union or if a deadlock is reached, the trade union may either refer the dispute to arbitration [section 21(7)] or may resort to industrial action [section 65(2)].

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[208] Ibid at 137

The bargaining council reflects the legislature's preference for industry-level bargaining as the establishment thereof requires the applicant to be sufficiently representative[210]. The central objectives of the council would be to conclude collective agreements and the prevention and resolution of labour disputes. On application of a majority union, the Minister is obligated to extend the agreement within 60 days to non-parties [section 32].

A further structure created by the LRA to replace the 'duty to bargain' is the workplace forum. The workplace forum can be established through an application to the CCMA by a majority union in any workplace with a workforce of 100 or more workers [Chapter V]. The employer is obliged to consult section 84 matters with a view of reaching consensus. Brassey and Brand found the following issues of the LRA to be flawed:

- "Entry into the workplace forum system is not purely voluntary. Though the majority union has a choice in the matter, management has no choice: it is compelled to participate in the system once it is initiated.
- Continued participation in the system is obligatory. Neither management nor the union may disband a forum once it has been established...
- The system is one-sided. Management has the duty to disclose all information - even information of a confidential nature - that is in its possession and which may have a bearing on the matters being dealt with in the forum...[211]"

Du Toit submitted that the right of every trade union and every employer and employer's organisation to engage in collective bargaining as contained in section 23(5) of the Constitution,

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[209] Section 11 of LRA
[210] Chapter III Part C of LRA
[211] M. Brassey and J.Brand *Flaws and Fantasies A conceptual analysis of the Bill* Employment law March 1995 11 4 78 at 79

may be interpreted as introducing a duty on a contemplated bargaining parties to bargain in good faith. This flows from the fact that section 23(5) rights fall "within the ambit of section 8(2) of the Constitution, and therefore apply both vertically and horizontally". He argues that although collective bargaining on terms and conditions of employment cannot be forced in terms of the LRA, a High Court order to enforce section 23(5) of the Constitution may be possible[212].

From the above it is clear that although the legislature does not expressly say 'duty to bargain' it means 'duty to bargain'.

[212] 'Labour and the Bill of Rights', *Bill of Rights Compendium,*

6. BARGAINING LEVELS - CENTRALISED OR PLANT LEVEL?

Is it an unfair labour practice to refuse to bargain at a particular level and is it desirable for the court to intervene, by prescribing the level of bargaining to the negotiating parties? In terms of the Labour Relations Act 28 of 1956, employers and trade unions were free to negotiate their own collective bargaining and dispute resolution systems unless they required access to the industrial court or wanted to embark on lawful industrial action. The non-statutory bargaining system as, usually described in the recognition agreement, could operate at plant, company or industry level. The problem arose when the one side of the bargaining table demanded decentralised bargaining, whilst either one of the parties or both parties were already represented at industry level. If the employer, who was already represented at industry level, refused to accede to a demand for plant level bargaining, should the court intervene and compel bargaining at plant level?

The argument against intervention was that it impacted on the substance of collective bargaining as the level determined the outcome of the process. A party that was strong at industry level would go for industry bargaining, and, if strong at plant level, would favour plant level bargaining. The level of collective bargaining was therefore a matter of power play, which was left to the parties to determine. The counter-argument was that bargaining could take place at several levels concurrently and each level had to be accommodated. The subject of dispute would determine the level, and bargaining would take place where the issue could appropriately be resolved.

Butterworths (1997) 4B

In *MAWU v Hart*[213] the Industrial Court held that an employer should not be compelled to negotiate actual wages at plant level if it was already participating in industry level bargaining through an industrial council. This decision was criticised because it failed to appreciate that negotiation in an industrial council could not fix actual wages but only the minimum that an employer should pay. In *BAWU v Palm Beach Hotel*[214] the court had to decide whether to reinstate workers who had gone on strike over the employer's refusal to bargain at plant level. The court found that there was no fault with the desire to negotiate actual wages with individual employers, even where an industrial council agreement made provision for minimum wages. The deal struck at bargaining council level was not intended to reflect what a fair wage was between a particular employer and employees. The labour appeal court in *SAWU v Rutherford Joinery (Pty) Ltd*[215] compelled the employer to negotiate actual wages at plant level where the practice was to regard the wages set at industrial council level as minima. The court thus ruled that it was not the employer's prerogative to set actual wages unilaterally.

The decision of the Industrial Court in the *Besaans Du Plessis* case[216] was against the company, which refused to bargain at plant level over wages, as it refused to pay more than the wages set by the industrial council. The company could not afford more and argued that their unwillingness to compromise did not constitute bad faith bargaining. The court found that as a system at the industrial council was already in place, the company could not ignore it, since it was obvious that the company would not move beyond the minima set by the industrial council. Negotiations with the union at plant level would thus be a futile exercise. For the union to

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[213] (1985) 6 ILJ 478 (IC)
[214] (1988) 9 ILJ 1016 IC

[215] (1990) 11 ILJ 690 (LAC)
[216] 1990 11 ILJ 690 IC

succeed, the court had to find that unfairness in the process was attributable to the company. The court found that disputes regarding levels of bargaining are interest disputes and where there was no unfairness, the resolution thereof should be left to power play between the parties. The court would thus not intervene unless there existed a right to bargain at a certain level or unless it would lead to unfairness.

Brassey[217] criticised the judgement in that:

(i) Negotiation outside the council did not automatically mean bad faith bargaining;

(ii) Concurrent negotiations at two levels were common and both have their place: the negotiations in the council set minimum wages whilst plant level bargaining set actual wages, and

(iii) It was expected of a court that was responsible for maintaining industrial peace to intervene and direct the process of collective bargaining.

For the court to suggest that the level of bargaining be left to industrial action was an abdication of responsibility. Brassey argued that the level of bargaining should be compelled so that demands could be fully debated before industrial action.

However, this was not the last word on the subject. In *SACCAWU v Interfare*[218] the court noted that

"with regard to the appropriate bargaining level I am of the opinion that it is not advisable for the industrial court to interfere with the heart of the collective bargaining process by prescribing to the parties and in the absence of any evidence of mala fides on

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[217] Employment law 1990 Jul 6 6 136

[218] SACCAWU v Interfare (1991)12 ILJ 1313 IC

the part of one of the bargaining parties, I am of the opinion that the industrial court will overstep the mark by infringing on the heart of the bargaining process which should, in essence, be voluntary"[219].

A conflicting decision was arrived at in *SEAWU v BRC Weldmesh*[220]. Here the employer insisted that the industrial council should be the bargaining forum while the union demanded plant bargaining. The court found that as the employer had never, and could not participate in industrial council negotiations, negotiations at industrial level were not an alternative to plant level negotiations and thus the conduct of the employer constituted an unfair labour practice. The court furthermore concluded that to refrain from regulating the structure of collective bargaining, it would be neglecting its primary function. What thus emerged was that the courts would intervene in the bargaining level only when the choice of level indicated bad faith. Bad faith bargaining would be reflected in the refusal to negotiate at plant level where it was an attempt to escape the duty to bargain actual wages. Thus where parties could agree on the bargaining level, the court would not force them in a different direction but would definitely intervene when there was bad faith.

A further question to be asked on levels of bargaining was what effect plant level bargaining had on industry bargaining: should the employer be affected by events at industry level if it negotiated at plant level? In *Barlow Manufacturing Co v MAWU*[221] the company concluded a recognition agreement with the union that provided for collective bargaining over wages and working conditions at plant level. The business of the company,however, fell within the

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[219]at 1322G - H

[220](1991) 12 ILJ 1304 IC

jurisdiction of the bargaining council. When an impasse was reached at bargaining council level and the industry employees opted to strike, the company's employees also embarked on the strike. The strike was interdicted. Thompson noted that "if the law should usually not be available to assist unions in achieving central bargaining, there should not be any legal impediment against strike action on the issue once negotiations on the issue are exhausted"[222]. There seemed to be a place for both industry level and plant level bargaining. The one type of bargaining must not be regarded as an alternative to the other but rather as complementary.

Pennington argued that for centralised bargaining to work, capital and labour must adopt certain principles, namely:

"(i) Agreement on definitions of central and plant issues;

(ii) No second-tier bargaining at plant level;

(iii) A central agreement to be concluded, facilitating and regulating centralised collective bargaining;

(iv) A plant agreement to be negotiated at plant level;

(v) Parties acknowledging and accepting that economic variances exist... and that such factors will be taken into account during centralised collective bargaining;

(vi) Unions accepting and acknowledging that individual companies are managed autonomously and that the central collective bargaining forum will have no jurisdiction to interfere with matters covered by the plant agreement;

(vii) The majority of employees in a bargaining unit of each company must vote in favour of industrial action concerning central issues, and

(viii) No sympathy or secondary strike action by employees in any individual company

[221] (1988) 9 ILJ 995 (IC)

or plant issue"[223].

He stated that without centralised bargaining structures, the trade union movement would be weak and unable to be an independent party in the democratic transformation of South Africa.

However, a note of caution could be drawn from the experiences of different countries. Smith[224] discussed the World Bank's view in its 1995 World Development Report in which it approved of collective bargaining. However it was not that

> "(t)he experience of several countries indicate that bargaining at the enterprise level can be an appropriate framework for achieving positive economic effects... But national-level bargaining requires that most workers be covered by union agreements. If they are not, national agreements will benefit the unionised sector at the expense of the unorganised and poorer groups in society...If collective bargaining takes place at enterprise or plant level, the union's ability to effect monopolistic wage increases is tempered by the strong competitive pressures on the firm from the product market"[225].

The report cited Canada, USA, Japan, Hong Kong and Korea, as examples where decentralised bargaining was successful. The report noted that for decentralised bargaining to work, union rights had to be strongly guaranteed but at the same time legislation should limit their potential monopoly power. Brown[226] in a paper delivered at the 8th Annual Labour Law Conference argued for decentralised bargaining and based his argument on the developments in world economy. He argued that industry-wide agreements attach to an individual country only and,

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[222] Current Labour Law *Collective Bargaining* Vol III 26 at 36
[223] Ibid at 20
[224] C. Smith "Collective yes" Finance Week (1995 Jul 13-19 29
[225] Ibid
[226] B. Brown "Bargaining at industry level and the pressure to decentralised" ILJ (1995) 16 5 979

because of the volatility of currencies and organisational problems, transnational collective bargaining was useless and international trade pressure made such an agreement worthless. He stated that enterprise bargaining offered employers the opportunity to improve labour productivity to suit the employers' own business circumstances as technological change was the driving force behind labour productivity growth. He warned, however, that decentralised bargaining could lead to wage disparities within a plant, trade or industry, neglect of training and skill acquisition, and the character of the wider trade union movement might disintegrate. He concluded by saying that, internationally, collective bargaining was undergoing fundamental challenges but that a collective bargaining system could be successful if it built on the existing institutions and developed a system that was unique to suit a nation's peculiar needs.

Although the jurisprudence was confusing, the legislature was not prescriptive about the levels of bargaining. As was noted above, the Labour Relations Bill did not make centralised bargaining compulsory and as was expected, the trade unions were vehemently opposing the bill on this issue.

Friedman reported that

> "(l)abour wants national bargaining councils set up in each industry, NEDLAC to demarcate the scope of jurisdiction of each council - and the Labour Relations Act to make it all compulsory. In addition, labour has proposed that bargaining should take place once the affected trade unions have attained a membership level of more than 50 percent of employees engaged in any industry and that small business enterprise representation on bargaining councils be provided for separately. Business would prefer centralised bargaining to be undertaken voluntary, through mutual agreement

between the parties"[227].

Employers facing the growth of unions argued that centralised bargaining was undesirable[228] as

(i) National strikes would be promoted;

(ii) Economic growth would be frustrated through the setting of high wage entry levels;

(iii) Management's autonomy at plant level would be undermined;

(iv) Industrial democracy would be compromised because small unions would prevented from participating;

(v) Two-tier bargaining would be promoted;

(vi) Competitive advantage would be lost;

(vii) Progressive employers would end up sailing at the speed of the slowest ship in the convoy, and

(viii) Sympathy strikes would spread.

At the heart of the debate was the relationship between capital, labour and the state as historically and politically business has turned to the state with their economic or collective bargaining problems.

At NEDLAC the parties reached an impasse on the issue of compulsory centralised bargaining and to break the deadlock the Minister of Labour proposed the institution of statutory councils. COSATU demanded that bargaining councils be established for every sector and area and that employers should be obliged to participate. After protracted negotiations, bargaining councils

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[227] *Proposed Labour Act reveals big differences* The Argus Wednesday June 28 1995 14
Pennington, S: *The centralised bargaining debate* People

were retained, but the institution of statutory councils was created.

Bargaining councils are voluntary bodies and all existing industrial councils are deemed to be bargaining councils, in terms of Schedule 7. For the formation of a bargaining council one or more registered trade union and one or more registered employers' organisation can set up the council for a specific sector or area whereby a constitution, complying with the Act's requirements, is adopted and registration is obtained from the registrar [Section 27]. It must be noted that the 1996 statutory amendments introduced a new subsection 27(4) that now reads that, " a bargaining council may be established for more than one sector", as the breadth of the industrial interests contemplated for bargaining councils demanded this. The parties must satisfy the registrar that they are sufficiently representative within its scope of registration. The conclusion and enforcement of collective agreements of the bargaining council may initially only bind parties to it (Section 28). In terms of Section 32 the minister may extend the agreement to non-parties within its registered scope on request from the parties. Section 32(2) gives the minister no choice but to extend the agreement within 60 days of receiving the request unless section 32(3) is applicable. The minister, however, may override this requirement if the parties to the bargaining council are sufficiently representative within its registered scope and if the minister is satisfied that the failure to extend the agreement may undermine collective bargaining at sectoral level [Section 32(5)]. The collective agreement can provide for the establishment of an independent board to grant exemptions from the agreement [Section 32(3)(e)]. The criteria for the board to grant exemptions must promote the Act's primary objects, be fair and not discriminate against non-parties [Section 32(3)(f)&(g)].

Dynamics (1992) Mar 10 6 17 18

Statutory councils may be established in areas and sectors where (a) no other bargaining council is registered in the area or sector (b) the applicant complied with section 29 provisions and (c) where the membership of one or more trade unions acting jointly constitute at least 30% of employees in a sector or area or a registered employers' organisation or employers' organisation acting together employ at least 30% of employees in the area or sector. [Section 39(4)(b)]. The main functions of the statutory council are:

(i) Dispute resolution;

(ii) Promotion of education and training schemes;

(iii)The establishment and administration of pension, provident, medical schemes, sick pay, holiday, unemployment and training schemes or funds for the benefit of parties to the council, and

(v) The conclusion of collective agreements on (i), (ii) and (iii).

Both parties can negotiate at statutory council level but only upon agreement wages and conditions of employment.

A statutory council can be established without an agreement between a union and an employers' organisation [Section 41(3)] and without an employers' organisation in the sector [Section 41(6)]. The commissioner must convene separate meetings of the parties to facilitate the conclusion of an agreement [Section 41(1)]. If the facilitation fails, the minister must appoint suitable persons after calling for nominations from interested parties and must then admit the parties to the council and must determine the other aspects relating to the proper functioning of the council [Section 41(3)-(8)].

The Act attempts to be voluntarist and at the same time it promotes centralised bargaining. The establishment of bargaining councils needs the consent of both parties and participation in councils offers benefits such as

(a) access and stop-order rights [Sections 12 and 13] irrespective of their representativeness,

(b) parties can set thresholds of representivity for organisational rights of access, stop-order rights and union office-bearer leave rights [Section 18], and

(c) apply for accreditation as dispute resolution agencies [Section 52].

The statutory council agreement can be extended to non-parties but where the council is not sufficiently representative, the minister can give the statutory council agreement the same status as a wage determination. Finally, a statutory council can change its status by applying to register as a bargaining council [Section 48(1)].

Although the LRA makes provision for the continuance of plant and enterprise bargaining, it promotes centralised bargaining by giving the parties considerable power over the bargaining agenda at plant and enterprise level. Section 28(i) gives bargaining councils the power to determine the matters which may not be an issue in dispute for purpose of a strike or lock-out at the workplace and Section 28(j) allows the bargaining council to add consultation topics onto the workplace forum agenda.

7. BARGAINING TOPICS

Generally, parties can bargain over any matter of mutual interest that was included in the recognition agreement and if there was a refusal to bargain over lawful issues, economic muscle could be tightened. Should the court intervene where a party demanded negotiation on any matter? Is the employer in duty bound to negotiate on a particular subject? Jordaan observed that

> 'the provisions of S24 of the Labour Relations Act, the definitions of `strike' and `lock-out' and the prohibitions against industrial action contained in S65(1A) and (1B) of the Act, (this) translates into the fact that all matters which concern the relationship between employer and employee are, in principle, negotiable"[229].

In *SA Society of Bank Officials v Standard Bank*[230] the court held that a refusal to bargain on a topic which directly impacted on employment relationship constituted an unfair labour practice.

The court would usually intervene where a party's demands were unlawful, that is to bargain away the employee's right to belong to a trade union or the rights contained in a collective agreement, unreasonable or there is no intention to bargain in good faith[231]. It was, however, interesting that Thompson observed that the question as to

> "whether there is a legal duty to negotiate on any particular issue depends on the courts conception of the collective bargaining process and the ambit of the managerial prerogative" [232].

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[229] A.Rycroft and B.Jordaan *A Guide to South African Labour Law* at 134

[230] (1993) 14 ILJ 706

[231] Photocircuit SA (Pty) Ltd v De Klerk (1991) 12 ILJ 289 (A); Dunlop Tyres (Pty) Ltd v NUMSA (1990) 11 ILJ 149 (IC); Buthelezi v Labour for Africa (Pty) Ltd (1991) 12 ILJ 588 (IC).

[232] "Collective bargaining" Current Labour Law 1991-1992 39

Because of the lack of clear guidance in the statute and the weak system of precedent in labour law, the Industrial Courts' and Labour Appeal Courts' jurisprudence was controversial and inconsistent. In *NUMSA v ISCOR*[233] the court found that a bonus over and above the employees' wages could be awarded without negotiation. The bonus should not be something that occurs frequently and be regarded as part of the remuneration package. The employer could not argue that the bonus was part of the remuneration package but that it was not negotiable. This would fly in the face of collective bargaining, as it would undermine the union's right to bargain collectively on behalf of its members and the right of union members to organise. In *National Union of Metal Workers of South Africa v Samancor Ltd*[234] the court held that, as a basic rule there was no obligation to negotiate a gift between an employer and an employee. However, circumstances might be postulated where the failure to negotiate a gift might be unfair, for example, where the unnegotiated gift might lead to labour unrest. In casu the employer paid the ex gratia gift because it was an exceptionally good financial year for the employer. The court found that there was insufficient evidence to justify a finding that the integrity of the union could or might have been affected detrimentally and that the payment of bonuses could impinge negatively upon the bargaining process. In the *SA Society of Bank Officials*[235] case the court had to decide whether the failure of the employer to discuss the issue of housing loans with the employees constituted an unfair labour practice. The court found that the loan scheme was connected with the employment relationship and the court could find no reason why the employer could make unilateral decisions on this issue. It was inequitable to exclude the employee from the bargaining process and thus it constituted an unfair labour practice.

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[233] (1992) 3(6) SALLR 711 (IC)
[234] (1993) 4(5) SALLR 56 (LAC)
[235] SA Society of Bank Officials v Standard Bank Ltd (1993) 2

With regard to the parties' conduct around the bargaining table, it is recognised that power play was a unilateral part of the collective bargaining process. At the point of impasse, economic pressure may be applied to resolve the dispute. Thompson[236] suggested "that an employer's action or counter-action in the framework of our collective bargaining regime will be legitimate where (1) it occurs only after proper deadlock, (2) is proportional and (3) is aimed at inducing workers to accept employment demands or to abandon their own". In *OK Bazaars v SACCAWU*[237] the Labour Appeal Court had to deal with the industrial court's determination that the withholding of a striker's annual bonuses constituted an unfair labour practice. As all primary negotiation was exhausted, the employer was entitled to take economic counter-action against the strike, and thus the non-payment of bonuses, to induce the workforce to settle. However if it were done after the settlement of the dispute as punishment for striking, then it would be an unfair labour practice. For this reason the court held against the employer. In *SA Clothing & Textile Workers Union v Garlick Stores(1922) (Pty) Ltd*[238] the court found that

> "pension benefits are part of the consideration which an employee receives in return for the rendering of services... Therefore, in the absence of any agreement between the employer and the employees' recognised collective bargaining agent which regulated the process, fairness demanded proper bargaining on all matters over which the employer had direct or indirect control, which affected or could affect the interests of employees"[239].

LCD 251 IC

[236] Current Labour Law 1991-1992 53

[237] (1993) 14 ILJ (3) (LAC)
[238] (1996) 17 ILJ 255 (IC)
[239] Ibid 256D -E

In *Fraser Alexander Bulk Materials Handling (Pty)Ltd v Chemical Workers Industrial Union*[240] the court noted that the court cannot and should not prevent one party from bargaining with another over matters which are clearly matters of mutual interest.

The Labour Relations Act 66 of 1995 does not require the employer to bargain with the employee representatives on any particular subject and in the light of case law it can be accepted that bargaining will take place on any matter of mutual interest which affects the employment relationship. Although the LRA does not oblige the parties to bargain, it makes provision for an advisory award in terms of section 135(3)(c) in the event of a dispute over bargaining subjects. If the parties choose to ignore the recommendation of the arbitrator, they can then embark on industrial action. However, if bargaining occurs, section 16 places a statutory obligation on the employer to disclose all relevant information to the trade union to allow the union to effectively engage in collective bargaining. The employer however is not required to disclose if:

(i) The information is legally privileged;

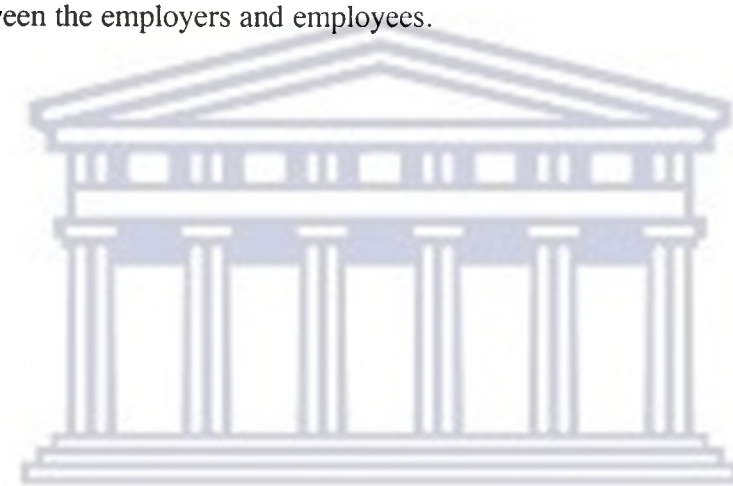
(ii) The disclosure means a contravention of the union has a majority support at the workplace;

(iii) Information is confidential and can cause substantial harm to the employer\employee, and

(iv) The information is private and personal relating to the employee unless she consents to the disclosure.

[240] (1996) 17 ILJ 713 (IC) at 717

In the context of workplace forums, section 86(1) provides that certain specific matters must be negotiated whilst subsections 86(2) and (3) make for provision for additional topics to be put on the bargaining agenda of the workplace forum. If parties cannot reach consensus on section 86 issues then the dispute can be referred to the CCMA for conciliation and if unresolved, for arbitration. Although the Act is not prescriptive as to the bargaining topics, it affords employees and trade unions a fully-protected right to strike in furtherance of all matters of mutual interest between the employers and employees.



8. CONCLUSION

In 1987 Justice Kriek[241] commented that

> "I have on numerous occasions, in relation to a variety of problems arising from the interpretation of various provisions of the Act, expressed dismay at the fact that the legislature, in 1979, saw fit to cut, trim, stretch, adapt and generally doctor the old Act in order to accommodate and give effect to the recommendations of the Wiehahn Commission instead of scrapping the old Act and producing an intelligible piece of legislation which clearly and unequivocally expressed its intentions."

These words uttered as long ago as 1987 by a member of the South African judiciary, could not have been encouraging for anyone, whether expert or layperson. Justice Kriek expressed the inadequacies and frustrations of the existing labour system but, more importantly, expressed the great need for substantial labour reform. He also emphasised the confusion experienced by our judiciary, which confusion is well documented through the decisions of our courts. This confusion and the numerous amendments to the Labour Relations Act led to institutions of collective bargaining that were "haphazard and unintegrated"[242]. Why has it taken almost ten years for South Africa to overhaul its labour relations law? I submit that this is further evidence that political policy and not economic needs drive our labour relations.

As shown above, our labour relations have undergone drastic changes and I submit a summary of changes and the reasons for these changes.

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[241] Natal Die Casting Company (Pty) Ltd V President, Industrial Court and Others (1987) 8 ILJ 245 at 253 - 254A as was quoted in the Explanatory Memorandum of the Draft Negotiating Document in the form of a Labour Relations Bill of 1995 at 112.

[242] Ibid 115

The first change in our labour relations and more specifically in collective bargaining came about with the implementation of the Constitution. Our Constitution guarantees certain labour relations rights and because it is the supreme law of the country, the LRA had to be overhauled to be brought in line with the Constitution. The constitutional rights contained in section 23 was one of the reasons for the move from a system of compulsion to one where the parties in the labour relationship can decide what their relationship should be. This also means that there is minimal intervention by the courts and the statute and thus the bargaining levels, topics and recognition of bargaining agents should be left to the parties to determine, based on their respective bargaining strengths. This voluntary system of collective bargaining will hopefully lead to a less adversarial relationship and a more coherent collective bargaining system. Through the institution of the workplace forum, the legislature encourages co-operation. The effectiveness of the workplace forum can only become a reality if trade unions regard it as complementary to collective bargaining and not as being in competition with the power base of the union.

The voluntary nature of the new regime of collective bargaining is further emphasised by the statutory absence of long-standing 'duty to bargain'. With the removal of the 'duty to bargain', the Act introduced organisational rights and bolstered the position of the employees further with the right to strike.

In the past our labour relations was based on a majoritarian system of industrial level bargaining but the exercise of the Minister of Manpower's broad discretion and the Industrial Court's jurisprudence led to this policy being undermined. The LRA of 1995 does not require majoritarian approach in that unions need to be only 'sufficiently representative' to enjoy

bargaining rights. However, the Act gives added rights where the union or unions jointly enjoy majority support.

However, the long established practices of management and organised labour, will have a strong influence on how the Act will be interpreted and applied and the unfair labour practice jurisprudence has also left deep prints in our labour relations. As was indicated, the Labour Relations Act changed the face of collective bargaining drastically but it also managed to retain much of the old system. Du Toit and others observed that the "changes are aimed at refining the framework and process of bargaining to bring greater coherence and less adversarialism" and thus "to advance collective bargaining as the preferred way of securing labour peace, social justice, economic development and employee equity remains essentially unaltered". The end product "is a hybrid model of voluntarism, inducement and compulsion" and whether the effort of business, labour and the state to make section 2 of the LRA a reality is an open question.

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ANC –	African National Congress
CCMA -	Commission for Conciliation, Mediation and Arbitration
COSATU-	Congress of South African Trade Unions
ERGO -	East Rand Gold & Uranium Company
ILJ -	Industrial Law Journal
ILO -	International Labour Organisation
IRJSA -	Industrial Relations Journal of South Africa
LAC -	Labour Appeal Court
LRA -	Labour Relations Act
NACTU -	National Council of Trade Unions
NEDLAC -	National Economic Development and Labour Council
NUM -	National Union of Mineworkers
RDP -	Reconstruction and Development Programme
SACCOLA -	South African employers' Consultative Committee on Labour Affairs
SACOB –	South African Council of Business
SALLR -	South African Labour Law Report
SEIFSA –	Steel and Engineering Industries Federation of South Africa