# THE RIGHT TO ORGANISE:

# CRITIQUING THE ROLE OF TRADE UNIONS IN SHAPING WORK RELATIONS IN POST-APARTHEID SOUTH AFRICA

A thesis submitted in fulfillment of the requirements of the degree of

**MASTER OF LAWS**

of

**RHODES UNIVERSITY**

by

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DECEMBER 2010

**Abstract**

Organised labour continues to play a prominent role in shaping employment relations in South Africa. The individual worker is powerless and in a weaker bargaining position against his employer. The advent of democracy was accompanied by numerous interventions to level the historically uneven bargaining field.

The trade union movement has made and consolidated significant gains since the advent of democracy. It however faces a plethora of new challenges, such as the negative forces of globalisation, declining membership (often associated with high levels of unemployment and the changing nature of work from standard to atypical employment), the resurfacing of adversarialism in the bargaining process, and numerous shortcomings inherent in forums established to facilitate corporatism. Business is intensifying its calls for investor-friendly policies, which effectively mean a relaxation of labour policies. The trade union movement faces an enormous task of rebuilding confidence and credibility among its members and at the same time showing some commitment to other social actors, government and business, that it is committed to contribute to economic growth and employment creation.

The central focus of this thesis will be to highlight the gains made by the trade union movement, the numerous challenges threatening their existence, and how they have attempted to redefine their role in the face of these challenges. It will attempt to offer advice on how trade unions can continue to play a prominent role in shaping relations of work in South Africa.

The study begins with a historical overview of trade unionism in South Africa. It then attempts to establish how trade unions have made use of the institution of collective bargaining, the importance of organisational rights to the trade union movement, the effectiveness of industrial action, and the emerging challenges threatening the vibrancy of trade unions. The overall aim is to assess whether the trade union movement is still a force to be reckoned with and its future role in influencing employment relations in South Africa.

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**Abbreviations**

| | |
|---|---|
| ACAS | Advisory, Conciliation and Arbitration service |
| AIRC | Australian Industrial Relations Commission |
| AJ | Acting Judge |
| AMEO | Automobile Manufacturers Employers' Organisation |
| ANC | African National Congress |
| ASCJ | Amalgamated Society of Carpenters and Joiners |
| AZACTU | Azanian Confederation of Trade Unions |
| BCEA | Basic Conditions of Employment Act |
| CAC | Central Arbitration Committee |
| CCMA | Commission for Conciliation, Mediation and Arbitration |
| CEACR | Committee of Experts on the Application of Conventions and Recommendations |
| CFA | Committee on Freedom of Association |
| CODESA | Convention for a Democratic South Africa |
| COSATU | Congress of South African Trade Unions |
| CUSA | Council of Unions of South Africa |
| DA | Democratic Alliance |
| DoL | Department of Labour |
| ed | editor |
| ECHR | European Convention on Human Rights |
| FFCC | Fact-Finding and Conciliation Commission |

| | |
|---|---|
| FOSATU | Federation of South African Trade Unions |
| GEAR | Growth, Employment and Redistribution Programme |
| GIWUSA | General Industries Workers Union of South Africa |
| GNU | Government of National Unity |
| IC | Industrial Court |
| ICA | Industrial Conciliation Act |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICFTU | International Confederation of Free Trade Unions |
| ICU | Industrial and Commercial Workers Unions |
| *ILJ* | Industrial Law Journal |
| ILO | International Labour Organisation |
| IMF | International Monetary Fund |
| IWA | Industrial Workers of Africa |
| J | Judge |
| JSE | Johannesburg Stock Exchange |
| LAC | Labour Appeal Court |
| LC | Labour Court |
| LRA | Labour Relations Act |
| MAB | Military Arbitration Board |
| MBA | Master Builders Association |
| MBC | Military Bargaining Council |

| | |
|---|---|
| MERSETA | Manufacturing, Engineering and Related Services SETA |
| MWU | Mineworkers Union |
| NACTU | National Council of Trade Unions |
| NBF | National Bargaining Forum |
| NEF | National Economic Forum |
| NEHAWU | National Education, Health and Allied Workers' Union |
| NMC | National Manpower Commission |
| NTB | National Training Board |
| NUM | National Union of Mineworkers |
| NUMSA | National Union of Metalworkers of South Africa |
| PAC | Pan African Congress |
| para | paragraph |
| paras | paragraphs |
| s | section |
| SACP | South African Communist Party |
| SACTWU | South African Clothing and Textile Workers Union |
| SACWU | South African Chemical Workers Union |
| SACCAWU | South African Commercial, Catering and Allied Workers Union |
| SADC | Southern African Development Community |
| SACOL | South African Confederation of Labour |
| SACCOLA | South African Employers' Consultative Committee on Labour Affairs |

| | |
|---|---|
| SAEWA | South African Equity Workers' Association |
| SAMWU | South African Municipal Workers Union |
| SANDF | South African National Defence Force |
| SANDU | South African National Defence Union |
| SAAWU | South African Association of Water Utilities |
| SCA | Supreme Court of Appeal |
| SDA | Skills Development Act |
| SETA | Sector Education and Training Authority |
| ss | sections |
| subsec | subsection |
| TULRCA | Trade Union and Labour Relations (Consolidated) Act |
| UASA | United Association of South Africa |
| UDF | United Democratic Front |
| UDHR | Universal Declaration of Human Rights |
| UWUSA | United Workers Union of South Africa |
| VAT | Value Added Tax |
| WTO | World Trade Organisation |

# CHAPTER 1

# INTRODUCTION

## 1.1 Contextual Background

Organised labour played a pivotal role in the birth of a new labour relations dispensation in South Africa. The labour movement militantly lobbied for radical changes to the pre-1994 labour market and industrial relations dispensation and played an instrumental role in the determination and formulation of numerous post-1994 labour relations policies. Whilst trade unions militantly lobbied for basic labour rights during the apartheid era,[1] their role has dramatically changed in the new constitutional and labour relations dispensation. The role of trade unions in shaping the labour market and the employment relations system is now fairly entrenched and it now extends beyond traditional labour issues, such as negotiating for better wages and working conditions.

The concept of tripartism and social dialogue[2] embraced by the 1994 democratically elected government strengthened the role of trade unions in the employment relationship. They have a responsibility to complement the efforts of other social actors, government and business, aimed at promoting, *inter alia*, peaceful labour relations and the competitiveness and growth of the South Africa economy. Despite their broad brief, trade unions remain custodians of the rights and interests of their members and their primary role is to service such rights and

[1] For example, the right to organise without interference from the state and employers, a less onerous right to engage in industrial action and the right to engage in collective bargaining.

[2] The International Labour Organisation (ILO) acknowledges that although tripartism cannot be defined with precision, it "could be regarded as a modality inherent to its structure and one of its main recommendations in terms of labour policy to its member States". Available at http://www.ilo.org/public/english/region/ampro/cinterfor/temas/dialogo/dsoc_fp/tripart.htm#definition (accessed 17 October 2010). ILO describes social dialogue as including "all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers' organisations) with or without indirect government". Available at http://www.ilo.org/public/english/dialogue/themes/sd.htm (accessed 17 October 2010).

interests. They should however be dynamic in order to effectively safeguard and promote the interests of their members.

The South African trade union movement has strong English roots. As observed by Grogan, the initial reaction to trade unionism worldwide was generally that of resentment. They were regarded as:

> "[M]utinous interlopers by early capitalists, and a significant part of domestic policies in many capitalist states during the 19th century consisted of attempts by government to discourage, or even crush, incipient labour collectives".[3]

South Africa inherited this system of industrial relations and has developed from an era where trade unions were given scant recognition to the present contemporary labour relations dispensation where they have assumed a prominent role in the employment relations landscape. The statutory framework regulating trade unionism before the coming into effect of the Constitution,[4] which ushered a new labour relations landscape, was generally inadequate. Although recognising trade unions and granting them certain rights, they were attempts by government to use labour legislation to curtail the powers and activities of trade unions.

This chapter will commence with a cursory overview of the significant phases which had an impact in the development of trade unionism in South Africa. As an introductory chapter, it will also outline the general purpose of the study, specific goals of the research, methods of research, literature review, limitations of the research, and the organisation of the rest of the study.

[3] J Grogan *Collective Labour Law* (2007) 2.

[4] The Constitution of the Republic of South Africa, 1996.

### 1.1.1 The development of trade unionism in South Africa

a. The development of trade unionism pre-1867

The period before the industrial revolution did not have any significant developments in the field of employment relations and trade unionism in particular. Although a small number of strikes were recorded, relations between employers and employees were generally peaceful.[5] The economy was agriculture-oriented with domestic servants and agricultural workers constituting the majority of the labour force.[6] Although a number of laws were passed to remedy an inadequate common law system, they "related to the bilateral individual relationship and naturally did not provide for matters such as trade unions, collective bargaining, strike action and the many others pertaining to the collective relationship".[7]

b. Trade unionism between 1867-1920

This period was marked by the discovery of gold and diamonds. This discovery saw the beginning of industrial revolution which resulted in economic growth. As put by the *Wiehahn Report*:

> "The discovery of diamonds and gold, apart from catapulting the country into a dramatic era of industrial and economic development, immediately exposed the virtual non-existence of skilled and expert human resources as well as infrastructural and other essential services to unlock, process and market the new found riches of the subcontinent."[8]

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[5] JA Slabbert and BJ Swanepoel *Introduction to Employment-Relations Management: A Global Perspective* 2 ed (2002) 26.

[6] See N Wiehahn *The Complete Wiehahn Report: Parts 1-6* (1982) 449.

[7] *Ibid.* Legislation regulating the relationship between masters and servants was passed as early as 1841. This piece of legislation which was called the Master and Servant Act was amended in 1856 and was followed by similar laws and ordinances in other pre-Union territories, all with a view of regulating the master-servant relationship. As put by S Bendix *Industrial Relations In South Africa* (1989) 286, "[t]here were no collective labour relations and no concerted attempts at organization by workers."

[8] Wiehahn *The Complete Wiehahn Report* 449.

The period saw an expansion of labour activities and a large influx of immigrants mainly from Europe and in lesser numbers from America and the East. The industrial revolution and a growing economy resulted in the migration of black workers surviving on a subsistence agriculture-oriented economy to the mines to satisfy shortages of unskilled labour as well as an influx of "poor Whites" in search of work.[9] The artisans and other skilled workers who came from Britain "brought the British system of trade unions with them".[10] According to the *Wiehahn Report*, "[f]rom the outset these workers put their experience of trade unionism to work in their endeavours to protect their skills and trades against a lowering of standards and against the admittance of Non-Whites to their closed circle."[11]

The first trade union to be established in South Africa was the Amalgamated Society of Carpenters and Joiners (ASCJ).[12] The increase in labour activities complicated employment relationships. Grogan states that although there was "a succession of labour laws issued from the South Africa parliament … these were mainly paternalistic, and neither recognised nor sought to regulate organised labour".[13] They regulated individual relationships and were inadequate when it came to "more complex and collective relationships which had resulted from the surge of industrial development".[14]

[9] Wiehahn *The Complete Wiehahn Report* 450.

[10] Slabbert and Swanepoel *Employment-Relations Management* 26. See also Bendix *Industrial Relations in South Africa* 287. The author states that these skilled "workers brought with them the European, and especially the British, brand of trade unionism, at that time based on the ideal of a universal worker movement, but balanced by a British sense of individualism".

[11] *Ibid*. According to the *Wiehahn Report*, "the characteristic pattern of whites performing the skilled work and non-whites performing the unskilled work-and of ploys to perpetuate this division of privilege-found its origin in those early times".

[12] It was established in 1881 and a Natal branch was established in 1882. See Slabbert and Swanepoel *Employment-Relations Management* 26.

[13] Grogan *Collective Labour Law* 3.

[14] Wiehahn *The Complete Wiehahn Report* 450.

The first "big strike" in South Africa occurred in the Transvaal in 1907 by white mineworkers aggrieved by the indifference of mine management to their grievances.[15] Another strike soon followed in Natal by railway workers and these labour unrests saw the intervention of government with the enactment of the Transvaal Disputes Prevention Act.[16] According to Slabbert and Swanepoel,[17] the Transvaal Disputes Prevention Act was modelled on the Canadian system of managing conflict. The Canadian system compelled the parties to accept mediation and prohibited strikes and lockouts pending the investigation of the merits of the disputes by the mediator who was to report to government. The prescribed interval should have elapsed after the publication of the report and the system did not compel acceptance of the finding. If the finding was not accepted, a strike and a lock-out could be declared.[18]

Another significant event during this period was the 1913 strike by white mineworkers in Kleinfontein mine in Benoni. This strike "led to greater solidarity amongst employees".[19] The strike was precipitated by a decision by management to dismiss two employees working as mechanics and forcing "remaining mechanics to work longer shifts".[20] Attempts by trade unions to discuss the dispute with management were futile. In an act of solidarity, workers in other mines also went on a strike and an estimated twenty thousand workers were involved.[21]

This period also saw the formation of the first black trade union,[22] the Industrial Workers of Africa (IWA), in 1917. According to the *Wiehahn Report*, the union was "moribund virtually

[15] See Slabbert and Swanepoel *Employment-Relations Management* 27.

[16] 20 of 1909.

[17] Slabbert and Swanepoel *Employment-Relations Management* 27.

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] The term "black trade unions" should be generally understood to mean trade unions whose majority membership was black African workers.

from the outset, and by 1920 had all but faded away".[23] Another trade union, the Industrial and Commercial Workers Union (ICU) was formed in 1918 and had a membership of one hundred thousand by 1927 making it "the largest trade union ever to have taken root in the continent of Africa".[24] Its viability was however threatened by "the absence of adequate controls to ensure that its activities remained confined to labour matters …."[25] It involved itself in political and non-labour activities and its collapse in the early thirties was attributed to its "lack of organisation".[26]

c. The period from 1921-1947

The inadequacy of the statutory framework culminated in the revolt of white mineworkers on the Rand in 1922 (popularly known as the Rand Rebellion).[27] The revolt was precipitated by a "confrontation between the White Mineworker's Union and the Chamber of Mines as a result of the latter's intention to open certain semi-skilled jobs to black workers".[28] Although the government successfully used force to manage the rebellion, it realised that organised labour had strength and that serious attention was to be given to the then labour relations system. The rebellion marked a major change in South Africa's industrial relations system and necessitated the intervention of the state in the employment relationship through the enactment of the Industrial Conciliation Act (hereinafter ICA).[29] As put by Slabbert and Swanepoel, the intervention by the State in the form of this piece of legislation signalled the commencement of "triplicity in employment relationships ... when the State entered the conflict arena in the State's industrial area".[30] This piece of labour legislation was a

[23] Wiehahn *The Complete Wiehahn Report* 29.

[24] See "The Decline and fall of the ICU-a case of Self-Destruction?" http://www.sahistory.org.za/pages/library-resources/articles_papers/decline_fall_icu.htm (accessed 18 October 2010).

[25] *Ibid.*

[26] Slabbert and Swanepoel *Employment-Relations Management* 26.

[27] See D du Toit *et al Labour Relations Law: A Comprehensive Guide* 4 ed (2003) 6.

[28] Slabbert and Swanepoel *Employment-Relations Management* 27.

[29] 11 of 1924.

[30] Slabbert and Swanepoel *Employment-Relations Management* 28.

watershed in employment relations. Apart from providing for the registration of trade unions and organisations for employers, it also provided for a framework for collective bargaining as well as a system for settling labour disputes whilst also regulating strikes and lock-outs.[31]

The ICA promoted voluntary centralised bargaining by providing for the establishment of industrial councils by agreement between an employer's organisation and a registered trade union or unions.[32] The agreements reached at industrial councils could, at the discretion of the Minister, be gazetted if the parties so wished with the effect that they became legally binding.[33] In terms of s 9(1) (b) of the Act, the agreements had the potential of being extended to all employers and employees who were within the jurisdiction of the council if the Minister was satisfied that the parties were sufficiently representative and that it was expedient to do so. Section 9(3) provided that non-compliance with agreements which were binding constituted a criminal offence and s 7 provided for the creation of an *ad hoc* conciliation board for bargaining and dispute resolution between parties when there was no industrial council. Agreements reached at conciliation boards had the same effect as those of industrial councils: they could be gazetted and extended to other employers and employees within the jurisdiction of the board.[34] They were also legally binding and non-compliance constituted a criminal offence.[35] In terms of s 12(1) a strike was illegal during the currency of any agreement between employers and employees or their organisations, if the agreement prohibited such action and the issues in dispute had been submitted to the Industrial Council for settlement or to a conciliation board.

In terms of s 2(1), the dispute settlement system of councils was restricted to the parties and-s 4(1) provided that the boards could not be appointed for disputes involving a number of actions taken against individual employees. As put by Du Toit *et al*, "[t]he emphasis of the

[31] D du Toit *et al Labour Relations Law* 6.

[32] S 2(1).

[33] S 9(1) (a).

[34] S 9(1) (a) and (b).

[35] See s 9(3).

dispute resolution system was … on the settlement of collective disputes rather than those involving individual employees."[36] This was the first comprehensive piece of labour legislation and its "support for voluntary centralised collective bargaining as the primary means to regulate relations between employers and organised (mainly white) labour, and to limit the potential causes of disputes, proved to be one of its most enduring features".[37] One of its glaring shortcomings was, however, its exclusion of black workers from the definition of 'employee'.[38]

The Act created a dual labour relations system which was racially determined by barring African workers from being members of registered trade unions. Section 24 of the ICA defined the term "employee" as excluding "pass-bearing African workers" which effectively meant that this category of workers was excluded from the mainstream industrial relations system with no representatives in industrial councils and also barred from using conciliation boards.[39] The disenfranchisement of the African worker from the machinery of the ICA:

> "[S]ignified 'a convergence of employer interests … and the interests of white workers', which 'served to establish a 'joint monopoly' of employers and registered trade unions at the expense of African workers".[40]

The dual labour relations system established by the ICA was one of its enduring legacies, characterising labour market policies for many years.[41] The Act was however a successful intervention as it saw a decline of industrial actions as "trade unions became reliant on institutional supports rather than on their members' organised power".[42] As put by Van

[36] Du Toit *et al Labour Relations Law* 6.

[37] Du Toit *et al Labour Relations Law* 7.

[38] See s 24.

[39] Du Toit *et al Labour Relations Law* 7.

[40] *Ibid*. The authors quote E Webster (ed) *Essays in South African Labour History* (1978) 68.

[41] *Ibid.*

[42] *Ibid.*

Jaarsveld and Van Eck, "the system of industrial councils and conciliation boards was accepted with alacrity".[43] The period saw an increase in trade union membership, especially during the years of depression in the 1930s.[44]

The ICA was amended in 1930. A Commission[45] was established in 1934 with a mandate to investigate the influence of the old ICA and the Wage Act[46] on labour. The recommendations of the Commission led to the promulgation of a consolidated ICA 36 of 1937. Among the numerous recommendations of the Commission was "the formation of industrial unions representing all classes of employee" and a proposal that the interests of black employees should be represented by two government officials.[47] The Commission also recommended that the dual labour relations system be retained by arguing that the inclusion of African workers into the mainstream industrial relations system was not a "viable option".[48] The Act provided for an inspector of Department of Labour without voting rights to represent pass-bearing African workers at industrial council meetings.[49] Apart from this aspect, there were no significant changes brought by the Act impacting on trade unionism.

d. The period from 1948-1976

This period saw the entrenchment of the apartheid policy and as put by Slabbert and Swanepoel, "it became clear that the country's political system was inextricably linked to its employment-relations system".[50] The significant event during this period was the appointment of the Botha commission in 1948 "to investigate the entire spectrum of measures

[43] F van Jaarsveld and S van Eck 3 ed (2005) *Principles of Labour Law* 206.

[44] *Ibid.*

[45] The Van Reenen Comission.

[46] 25 of 1927.

[47] Du Toit *et al Labour Relations Law* 8.

[48] *Ibid.*

[49] See s 27(9).

[50] Slabbert and Swanepoel *Employment Relations-Management* 28.

pertaining to industrial law".[51] The recommendations led to the promulgation of such pieces of legislation as the ICA 28 of 1956, the Wage Act 5 of 1957 and the Settlement of Disputes Act 48 of 1953.[52] An important recommendation in the field of trade unionism, which was rejected by government, was that black trade unions be regulated in separate legislation and that there should be measures for the effective control and guidance over such unions.[53]

As outlined in the *Wiehahn Report*, the submissions made to the Commission against the registration of black trade unions included the following:

i. Black employees were unsophisticated to make use of "the trade union system properly and to appreciate its value". They needed training and education before being granted full trade union rights.

ii. Black employees outnumbered "the workers of other population groups and would swamp existing unions, dictate union structure, distort wage patterns and endanger the position of non-Black workers in the economy".

iii. Allowing Black trade unions to the mainstream industrial relations system will precipitate "infiltration by political agitators and thus pave the way for the introduction of foreign ideologies" which would most likely lead to "[t]he disruption of industrial peace …" and that such a disruption was likely to have a far-reaching negative impact on "the economy and, in the long run, the country as a whole".

iv. The urge for unionism could not be explained as "spontaneous" but was a calculated move "by non-black instigators with ulterior motives". Unionism was unknown or "foreign to the labour tradition and culture of the Black workers and should therefore not be artificially encouraged by permitting Black trade unions to register".

[51] *Ibid.*

[52] *Ibid.*

[53] Slabbert and Swanepoel *Employment-Relations Management* 29.

v. The registration of black trade unions was going to result in the agricultural sector being unionised, which had the potential of disrupting an important sector in the South African economy.

vi. The whites were "trustees of the Black people" and this meant that they had a responsibility to negotiate their employment conditions and wages. Legislating the "recognition of Black trade unions would be tantamount to an admission of failure in discharging the duties of this stewardship".[54]

The reasons advanced for the registration and recognition of Black trade unions were that the system of discrimination which existed then was untenable and that a dual labour relations system was going to generate conflict as it fuelled a perception that the conditions of employment for Blacks were inferior compared to those of other employees who were enjoying the benefits of the mainstream industrial relations system.[55] The recommendation of the Commission that black trade unions be recognised subject to effective measures and guidance was rejected by the government which opted for the establishment of workers committees for Black employees implemented by the Bantu Labour Act.[56] This system not only strengthened the dualistic employment relations system which was already in existence in South Africa, "but also integrated the system of segregation in the labour situation".[57]

The system however failed to achieve its intended objective and this was partly due to the fact that it sought to represent workers in a "paternalistic way in matters which affected their employment conditions and their wages".[58] The ICA 28 of 1956 made numerous amendments to the old Act which included, amongst other things, categorically excluding black workers

[54] Wiehahn *The Complete Wiehahn Report* 30-31.

[55] Wiehahn *The Complete Wiehahn Report* 30.

[56] 48 of 1953.

[57] Slabbert and Swanepoel *Employment-Relations Management* 29.

[58] *Ibid.*

from the statutory trade union system, statutory work reservation[59] and prohibiting the registration of mixed unions unless there was ministerial permission. Section 36 provided that existing trade unions with white and 'coloured'[60] members were required to establish separate branches for the members, to hold separate meetings and that only white members could hold executive office.

According to Du Toit *et al*, the ICA of 1956 marked the completion of a racially determined employment relations system.[61] The calm which followed the promulgation of the Act did not last long. Political activism was suppressed with the banning of the African National Congress (ANC) and other organisations in 1961.[62] Trade unions with black membership ceased to operate mainly because of their leaders fleeing into exile or being imprisoned.[63] The 1970s saw the re-awakening of the black working class. There were mass strikes which spread from Durban to other areas of the country and workers began to acknowledge the importance of organising rather than solely relying on militant actions to make their demands.[64] The countrywide labour unrests necessitated the renaming of the Bantu Labour Act to the Regulation of Black Labour Relations Act which provided for, amongst other things, the establishment of liaison committees and co-ordinating work committees as well as for the right of black workers to strike under certain circumstances.[65]

Despite numerous changes brought by the amendment of the Bantu Labour Act, the government's position on excluding black trade unions from the mainstream industrial

[59] See s 77.

[60] See s 1 of the ICA which defined a 'coloured person" as a non-white or African person.

[61] Du Toit *et al Labour Relations Law* 9.

[62] Du Toit *et al Labour Relations Law* 9-10.

[63] *Ibid.*

[64] See "Overview of South African labour History" http://www.lrs.org.za/salhap/history.htm (accessed 20 August 2009).

[65] Slabbert and Swanepoel *Employment-Relations Management* 30. The introduction of liaison and works committees was an attempt "to restrict union organisation by African workers". See Du Toit *et al Labour Relations Law* 10.

relations system remained unchanged. This, however, did not put a damper on the determination of black workers to organise themselves. Apart from rejecting the committee system established by the amended and renamed Bantu Labour Relations Act, African workers also rebelled against the system by joining the unregistered trade unions.[66] This period was generally characterised by increasing organisation and militancy of black trade unions. Some employers succumbed to the resilience of the factory based organisation and recognised unregistered trade unions.[67] As observed by Du Toit *et al*, the repressiveness of the system was ultimately going to culminate in its destruction as its success was largely attributed to the political system which existed then.[68]

e. Trade unionism between 1977-1989

A significant event during this period which had an impact on the development of trade unionism in South Africa was the appointment of the Wiehahn Commission in 1977. The brief of the Commission was to investigate the employment relations system in South Africa and to make recommendations to ensure that there was industrial peace in the future. The appointment of the Commission was motivated by a dual industrial relations system which was increasingly becoming complex and unworkable.[69] As put by Slabbert and Swanepoel, the Commission, apart from attempting to find solutions on the unworkable dualistic system of industrial councils and work committees, was also necessitated by, *inter alia*, the growth of the economy which saw the increasing use of black labour to satisfy shortages of skilled labour, the fact that black or African workers outnumbered workers from other population groups and the emergence of unregistered trade unions some of which were receiving help

[66] *Ibid.* The authors state that these non-official trade unions, being barred from making use of the institutions provided for by the mainstream industrial relations system, shifted their attention to the workplace where they pressured employers to recognise them for the purpose of negotiating plant-level agreements and also built strong structures of shop stewards.

[67] Slabbert and Swanepoel *Employment- Relations Management* 30.

[68] Du Toit *et al Labour Relations Law* 10. The authors further state that "[i]t became evident that the system had created a high long-term cost in the shape of deeply-rooted adversarialism and an overlapping of workplace and political struggle that characterised industrial relations during and after the 1970s."

[69] Wiehahn *The Complete Wiehahn Report* 2. As outlined in the Report, "[t]he dualistic structure in which the industrial council system for non-Black workers and the committee system for Black workers co-exist in the same industries [was] becoming complex and problematic in its operation."

from outside and were not only seeking to advance labour interests but were also increasingly taking part in activities aimed at bringing political change.[70]

The Commission submitted its findings in 1979 and made numerous far-reaching recommendations on the South African industrial relations system and trade unionism in particular. It dealt with diverse issues such as black workers and trade unionism, freedom of association, the trade union structure and trade union management. The most significant recommendation in the field of trade unionism was that African workers be allowed to join registered trade unions and thus to make use of the institutions of the mainstream industrial relations system.[71]

A comprehensive report was submitted by the Commission on the South African industrial relations system and black trade unionism in particular.[72] The numerous recommendations submitted by the Commission included, amongst other things, an acknowledgement that black workers were "a permanent part of the South African economy",[73] that black trade unions were to be also subjected "to the protective and stabilising elements of the system [and] … its essential discipline and control" to ensure that their activities do not spill over to the political field, that the continued exclusion of black trade unions not only "deprive[d] black trade unions of the protection and impetus for growth … but prejudice[d] existing unions". The Commission also noted that the unregistered black trade unions were recipients of large amounts of money from internal and external funders and that their exclusion from the machinery of the ICA meant that they were not obliged "to account for their income and

[70] Slabbert and Swanepoel *Employmen- Relations Management* 31.

[71] Du Toit *et al Labour Relations Law* 10. Other proposals included the replacement of the industrial tribunal by an industrial court with "an extensive unfair labour practice jurisdiction".

[72] For detailed recommendations particularly on black trade unionism see Wiehahn *The Complete Wiehahn Report* 29-36.

[73] *Ibid.*

expenditure, as in the case with registered trade unions, which [was] … an undesirable state of affairs".[74]

The Commission went further to note that apart from the financial support, black trade unions were constantly being exposed "to trade union philosophies and disciplines foreign to South Africa" through visits by international and foreign trade unionists. It opined that although there was nothing wrong with such exposure, what was undesirable was "that this should be the foundation of the training and orientation they obtain". It warned that the "moral and financial support" was "instilling in black trade unionists ideas, approaches and skills which could well give rise to a new form of dualism in South African industrial relations: an alien system existing side by side with a local one". The Commission cautioned that the continued exclusion of black trade unions from "the statutory industrial relations system, could well bring extreme stress to bear on the existing statutory system" and that this posed "a grave danger to industrial peace".[75]

The Commission argued that prohibiting black workers from forming or joining trade unions "would constitute a serious infringement of a worker's freedom of association and thus be in direct conflict with one of the fundamental principles underlying self-governance in a free-enterprise economic system". It went further to warn that such a:

> "[B]an would prepare the ground for confrontation between, on the other hand, employers and their employees-particularly those in multinational enterprises which have already established liaison with the existing unregistered trade unions-and on the other hand the state".[76]

It cautioned that a statutory prohibition would "have the effect of driving black trade unionism underground and uniting black workers not only against the authorities but, more

[74] *Ibid.*

[75] *Ibid.*

[76] *Ibid.*

important, also against the system of free-enterprise in South Africa".[77] The net effect of this was that "it would certainly add fuel to the flames of radicalism on the part of those who wish to overthrow the system".[78]

The Commission also cautioned that such a ban negatively impacted on the image of the country as it drew international criticism. The majority of the recommendations tabled by the Commission, however, leave one with the question whether it was genuinely concerned with the plight of black workers or whether it was merely trying to protect the then government from black trade unions which were increasingly becoming powerful and unmanageable, an unintended consequence of their exclusion from the mainstream legislative framework.

Dissenting from the majority view of the Commission that black trade unions be allowed to join and participate in trade union activities, Commissioner Arthur Niewoudt argued, amongst other things, that such trade unions were likely to involve themselves in activities not related to labour matters, which was generally going to result in "untenable pressures" on the political and social arena, that black trade unionism was inevitably going to result in tightened controls over the entire trade union movement thereby further making "inroads into existing rights and freedoms", that the unreasonable demands most likely to be made by black trade unions were going to jeopardise the economy and rights and interests of persons who were presently members of legally recognised trade unions, and that the militancy of black trade unions could not be entirely attributed to their non-recognition in the mainstream industrial relations system but was precipitated by "instigators and agitators outside the trade union movement".[79]

The recommendations of the Commission were accepted by the government, which, as put by Du Toit *et al*, was "clearly hoping to repeat the success of the 1924 Act by incorporating the

[77] *Ibid.*

[78] *Ibid.*

[79] Wiehahn *The Complete Wiehahn Report* 37.

militant new unions into the industrial relations system and thereby taming them".[80] The recommendations were incorporated as amendments to the ICA over four years and they were contained in the Industrial Conciliation Amendment Act[81] and the Labour Relations Amendment Act.[82] Although black trade unions were now allowed by statute to register, they remained sceptical about their new rights and there was a genuine fear that this was a ploy by the government to co-opt and control them. They refused to register, fearing that this was going to subject them to the onerous legal framework. They were also protesting the framing of the definition of 'employee', which excluded 'non-residents' and contract workers.[83]

Although the 1981 amendments forced the new unions to register,[84] they did not make use of the main institution of the mainstream industrial relations system, the industrial council. Instead, they bargained at plant or enterprise level. According to Du Toit *et al*, bargaining at plant level, which constituted the strongest base for trade union organisation, proved to be advantageous in that it consolidated their strength and trade union members were involved in the negotiation processes.[85] Basson *et al*,[86] argue that the hesitancy by new trade unions to actively participate in the institutions created by the labour legislation could be attributed to the fact that such institutions were once part of the repressive machinery of the government and also had a history of being utilised by employers and trade unions opposed to black trade unionism. The authors also reiterate that the trade unions were still yet to make inroads in industry level organising and were more organised and powerful at individual workplaces.

[80] Du Toit *et al Labour Relations Law* 11.

[81] 94 of 1979 and 95 of 1980.

[82] 57 of 1981, 51 of 1982 and 2 of 1983.

[83] Du Toit *et al Labour Relations Law* 11.

[84] In terms of the Labour Relations Amendment Act 57 of 1981, unregistered trade unions were also subjected to the controls that applied to registered trade unions.

[85] Du Toit *et a Labour Relations Law* 11.

[86] A Basson *et al Essential Labour Law Volume 2: Collective Labour law* 3 ed (2002) 11-12.

A shift in policy of black trade unions occurred in 1982 when the Federation of South African Trade Unions (FOSATU), while remaining opposed to the system of industrial councils, decided that its affiliates could join and participate in councils as long as such participation did not prejudice their interests and the unions could continue bargaining at plant level.[87] The "unofficial unions" were increasingly becoming a vibrant force and they challenged the practices of the more established unions and employers in industrial councils.[88]

The formation of the Congress of South African Trade unions (COSATU) in 1985 was another milestone in the development of labour relations and black trade unionism in particular. The federation lobbied for, *inter alia,* the formation of national, industry-wide councils in all sectors and the establishment of one union per industry.[89] As put by Bendix, "COSATU set itself a broad role to influence the economic and political dispensation that existed then".[90] Giving an opening address at the organisation's inaugural congress, Cyril Ramaphosa of the National Mineworkers Union (NUM) stressed the importance of building militant and strong organisations at the workplace as the basis of the political strength of workers. He reiterated that the struggle for liberation could not be separated from the struggle of workers and the political nature of industrial issues. The aims and objectives of the federation as spelled out at the inaugural congress, included *inter alia*, securing economic and social justice for workers, striving to build "a united working class movement regardless of race, colour, sex or creed", encouraging workers to join trade unions and developing "a spirit of solidarity among workers" and the facilitation and co-ordination of education and training of all workers to further the interests of the working class.[91]

[87] Du Toit *et al Labour Relations Law* 12.

[88] *Ibid*. The authors point out that their rapid growth, although with many advantages, strained the unions' organisational and human resources.

[89] *Ibid.*

[90] Bendix *Industrial Relations in South Africa* 335.

[91] Bendix *Industrial Relations in South Africa* 335-336.

Although black trade unions were now recognised and enjoyed numerous rights, the industrial relations continued to be characterised by adversarialism and employees who engaged in illegal industrial action were victimised. The Industrial Court developed a body of laws to settle industrial disputes and this meant that parties could not exclusively rely on their collective strength to make their demands.[92] Employers were strongly opposed to the practice of unions to bargain at both industrial council and plant level and this was followed by attempts to curtail the powers of trade unions in the form of amendments to the LRA published in 1987.[93] Restrictions were also placed on COSATU's political activities as well as the United Democratic Front (UDF) and various civic, youth and student organisations.[94] The proposed amendments were met with protests and COSATU held a conference to decide on a stay-away to attempt to force the government and employers to abandon their plan to go ahead with the proposed far-reaching changes to the LRA.[95] The stay-away, which was hailed as the biggest in the South African labour history, did not derail the government from going ahead with its proposed plans and the amendments were promulgated in the LRA 83 of 1988.[96]

In summary, this period was generally characterised by attempts to liberalise the employment relations landscape, the rise of militant and strong black trade unions, an intensely politicised workplace, high levels of conflict between stakeholders in the tripartite employment relationship and the formation of COSATU, the Council of Unions of South Africa (CUSA), the Azanian Confederation of Trade Unions (AZACTU), the United Workers Union of South Africa (UWUSA) and the National Council of Trade Unions (NACTU), formed as a result of a merger between CUSA and AZACTU.[97]

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[92] Du Toit *et al Labour Relations Law* 12.

[93] See Du Toit *et al Labour Relations Law* 14.

[94] *Ibid.*

[95] *Ibid.* A complaint was also lodged by the trade union federation with ILO that the unilateral amendments violated the principle of freedom of association. COSATU requested the Fact-Finding and Conciliation Commission (FFCC) of the ILO to investigate the alleged violations, which it did in 1991.

[96] *Ibid.*

[97] Slabbert and Swanepoel *Employment Relations-Management* 32-33.

f. Trade unionism in the 1990s and beyond

The early 1990s saw a major shift in the policy of government and marked the beginning of a new political dispensation in South Africa. The shift was basically premised on the idea that all South Africans should enjoy equal opportunities in all aspects of life, be it social, economic or political. A new era was dawning in South Africa and a series of legislation were passed to redress the past imbalances and inequalities in the social, economic and political landscapes. The watershed moment was the undertaking made by the government in 1990 to do away with the apartheid system and to pursue the goal of fair governance. This undertaking was followed by the unbanning of political parties such as the ANC, the Pan African Congress (PAC), the South African Communist Party (SACP) and the lifting of restrictions placed on various trade unions such as COSATU.[98]

There were various attempts to construct a new political dispensation. Apart from the unbanning of political parties and the lifting of restrictions placed on trade union organisations, a number of other events also occurred. An important development in the field of labour, industrial relations and trade unionism in particular, was the formation of a tripartite alliance by the ANC, the SACP and COSATU, the establishment of organisational structures by the ANC and SACP, the abolishment of apartheid laws, the disbanding of the South African Congress of Trade Unions (SACTU), formed in 1955, to merge with COSATU and the establishment of the Convention for a Democratic South Africa (CODESA), and the reaching of an agreement on various issues such as a new Constitution, transitional structures, and an election date.[99]

The predominantly black trade unions, such as COSATU and NACTU, did not waste time in seizing the opportunities presented by the transitional phase to participate in various forums created to facilitate discussions on various reforms essential for the birth of a new democratic and constitutional South Africa.[100] Black trade unions became active participants in the

[98] See generally Du Toit *et al Labour Relations Law* 16.

[99] See Slabbert and Swanepoel *Employment-Relations Management* 34-35.

[100] See Slabbert and Swanepoel *Employment-Relations Management* 35.

formulation of policies aimed at redressing past imbalances in the economic, social and political spheres. They "began to accept responsibility for the reconstruction of a post-apartheid South Africa".[101] The labour movement continued to play an active political role in the early 1990s with COSATU going as far as suggesting that a Reconstruction and Development Programme (RDP) be entered between its alliance partners in exchange for its support of the ANC's election campaign.[102]

The RDP, which was a brainchild of COSATU, committed the alliance partners to, *inter alia*, formulate detailed policies and to give special attention to workers' rights. The partners were obliged under the programme to, amongst other things, produce:

> "A single set of statutes that would provide equal rights for all workers, basic organising rights (including the right to organise and join trade unions, the right to strike and picket on all economic and social matters, and the right to information from companies and the government) … a system of collective bargaining at national, industrial and workplace levels with industrial councils empowered to negotiate industrial policy including the implementation of the RDP at sectoral level … and greater worker participation in decision-making in the workplace".[103]

A momentous event was the 1994 elections which saw the ANC becoming the majority party in a Government of National Unity (GNU). The RDP, which was the basis of the ANC's campaign, did not just remain a vision of the alliance partners but became a national agenda.[104] A discussion document titled "A Strategic Approach for the Ministry of Labour" was produced by the then Minister of Labour, Tito Mboweni, highlighting fundamental changes to be effected in the labour market within a period of five years.[105] The most

[101] *Ibid*.

[102] Du Toit *et al Labour Relations Law* 17.

[103] See Du Toit *et al Labour Relations Law* 17.

[104] Slabbert and Swanepoel *Employment-Relations Management* 36.

[105] Du Toit *et al Labour Relations Law* 17.

important issues prioritised by the document were the drafting of a new labour relations statute to bring labour laws into conformity with the interim Constitution and the recommendations of the FFCC,[106] "the creation of a single system of labour law for the whole country" and "a framework for collective bargaining at industry and workplace level" as well as the incorporation of the RDP.[107] The document also emphasised the importance of tripartism and the involvement of labour in policy formulation and implementation processes.[108]

As envisaged in the discussion document, the National Manpower Commission (NMC) and the National Economic Forum (NEF) were merged,[109] which led to the formation of the National Economic Development and Labour Council (Nedlac) in 1995. The formation of Nedlac signified the embracement of the concepts of corporatism, social dialogue and tripartism, which generally mean co-operation, co-responsibility, participation and co-decision making between the role players or stakeholders in the tripartite employment relationship.[110] The labour market chamber of Nedlac consists of representatives of the state, organised business and organised labour. As put by Van Niekerk *et al*, although the mandate of the council is broad, its main function is to consider all proposed labour legislation and significant changes to social and economic policy before introduction and implementation in parliament.[111]

[106] The Constitution of the Republic of South Africa,1993.

[107] See Du Toit *et al Labour Relations Law* 17.

[108] *Ibid.*

[109] The NMC was established as a result of the recommendations of the Wiehahn Commission. It comprised of representatives of state, business and labour, appointed by the Minister of Labour. Its mandate was "to continually survey and analyse the labour market, evaluate the effectiveness of labour legislation and make recommendations to the Minister on these and any other matters affecting labour policy". Du Toit *et al Labour Relations Law* 10. The NEF was established by COSATU and some sectors in business largely in response to the "anti-VAT campaign" and was launched in 1992 (Du Toit *et al Labour Relations Law* 16).

[110] Slabbert and Swanepoel *Employment-Relations Management* 19 and 36. More information about the institution is available at http://www.nedlac.org.za/home.aspx (accessed 03 August 2009).

[111] A Van Nierkerk *et al Law @ Work* (2008) 14. See also s 5(1)(c) of the NEDLAC Act 34 of 1994.

Another important event in the development of trade unionism, and employment relations in general, was the coming into effect of the interim and the 1996 Constitutions. The interim Constitution precipitated the promulgation of the LRA,[112] which ushered in a new labour relations dispensation in South Africa. The interim Constitution guaranteed numerous rights with a bearing on employment relations and trade unionism in particular. Section 27 has various 'labour relations rights', which include the right to fair labour practices, to form and join trade unions and employers organisations, to organise and bargain collectively and to strike. The final Constitution guarantees these rights in s 23. It provides that workers have a right to form and join trade unions.[113] It further provides that trade unions have the right to determine their own administration, programmes and activities,[114] to organise,[115] and to form and join a federation.[116]

The Constitution remains an important source and a "frame of reference" for labour law.[117] Olivier argues that, "labour law is an area which will be the subject of continued constitutional challenge".[118] Constitutional provisions are important in the field of labour law for many reasons. The Constitution has numerous provisions on how courts should interpret fundamental rights and legislation. Section 2 of the Constitution provides that the Constitution is the supreme law of the country. The Bill of Rights applies to all law and binds all organs of the state,[119] and every court, tribunal or forum is enjoined to promote its spirit, purport and object when interpreting any legislation and when developing common law.[120] According to Slabbert and Swanepoel, the labour rights guaranteed by the Constitution

[112] 66 of 1995.

[113] See s 23(2) (a).

[114] Section 23(4) (a).

[115] See s 23(4) (b).

[116] See s 23(4) (c).

[117]See Slabbert and Swanepoel *Employmen- Relations Management* 47.

[118] M Olivier "Fundamental Rights and Labour Law: Some Recent Developments" (1996) *De Rebus* 436.

[119] S 8(1).

[120] S 39(2).

constitute the basis for the interpretation of any labour legislation by the appropriate institutions.[121]

In terms of s 233 of the Constitution, "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". Section 39(1)(b) further provides, *inter alia*, that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum-must consider international law". South African courts often rely on the ILO standards to interpret various labour rights. In *SA National Defence Union v Minister of Defence* case,[122] the Constitutional Court made use of the ILO conventions in its attempt to test the constitutionality of a provision in the Defence Act[123] which barred members of the South African National Defence Force from forming and joining trade unions and participating in public protest.[124]

On the basis of Article 2 and Article 9 of the Freedom of Association and Protection of the Right to Organise Convention,[125] and the Right to Organise and Collective Bargaining Convention,[126] the court made a finding to the effect that the jurisprudence of the ILO recognises members of the defence forces and the police to be workers "but consider[s] their position … special, to the extent that it leaves it open to member states to determine the extent to which the provision of the conventions should apply to members of the armed forces and the police".[127] In *Minister of Defence v SA National Defence Force Union*,[128] the

[121] Slabbert and Swanepoel *Employment-Relations Management* 46.

[122] (1999) 20 *ILJ* 2265 (CC). See chapter 3 for a detailed discussion of the case.

[123] S 126B of Act 44 of 1957.

[124] See paras 25, 26 and 27.

[125] 87 of 1948.

[126] 98 of 1949.

[127] Para 26.

[128] (2006) 27 *ILJ* 2276 (SCA).

court also relied extensively on the wording of ILO conventions, particularly Convention 87, 98 and 154 to establish whether the failure by national legislation (the LRA), to "incorporate a compulsion to bargain" was an infringement on the right to engage in collective bargaining provided by the Constitution.[129]

South Africa also has international obligations by virtue of being a member of the Southern African Development Community (SADC). The regional bloc has a Charter of Fundamental Social Rights which provides, *inter alia*, that member states should create an enabling environment consistent with ILO conventions on freedom of association, the right to organise and collective bargaining, to give effect to basic labour rights.[130] The Charter also obliges member states to prioritise conventions on core labour standards so as to take necessary action to ratify and implement these standards.[131] The Universal Declaration of Human Rights (UDHR) also has an important Article on trade unionism. Article 23(4) of the Declaration provides that "everyone has the right to form and to join trade unions for the protection of his interests".

The LRA, which is the centre-piece of labour legislation and was enacted to, amongst other things, give effect to and regulate the rights conferred by the Constitution,[132] is worded almost in the same manner as the Constitution. It provides, *inter alia,* that all employees have the right to participate in forming a trade union or federation of trade unions,[133] and to join a trade union, subject to its constitution.[134] The Act not only recognises and protects the right to join and form trade unions but goes further to grant union members the right to participate in

[129] See also Van Niekerk *et al Law @ Work* 28.

[130] Article 4.

[131] Article 5.

[132] See s 1(a). It should be highlighted that the LRA was enacted when the interim Constitution was in force and therefore refers to the rights conferred by s 27. Such rights are now contained in s 23 of the final Constitutional and any further mention of constitutional labour rights will be in reference to the rights in the final Constitution.

[133] See s 4(1) (a).

[134] See s 4(1) (b).

union activities.[135] The LRA defines a trade union as "an association of employees, whose principal purpose is to regulate relations between employees and employers, including any employers' organisation".[136] Although trade unions have diverse functions, their primary role is to engage in collective bargaining on behalf of member employees and to represent them in grievance and disciplinary matters.[137] Apart from reflecting and confirming the rights contained in s 23 of the Constitution, the LRA also accommodates the Constitution in another way: its provisions must conform to those of the Constitution.[138]

The LRA was also enacted to give effect to various obligations incurred by South Africa when it became a member state of the ILO.[139] There are a number of conventions,[140] ratified by South Africa, which have a bearing on trade unionism. Convention 87 provides for the freedom of association, the right of employees and employers to join organisations, federations or confederations without previous authorisation and interference. It also obliges member states "to take all appropriate measures to ensure that workers and employers may exercise freely the right to organise". Article 1 of Convention 98 provides, *inter alia*, that there must be protection of workers "against acts of anti-union discrimination in respect of their employment". It goes on to list such acts as those "calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership" and those that "cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working

[135] S 4(2), (a) and (d) has numerous rights which members of trade unions are entitled to. Employees who are members of trade unions have the right to participate in the lawful activities of unions and in the election of office bearers, officials or trade union representatives. They can also stand for election and be eligible for appointment as an office-bearer or official and if so elected or appointed, to hold office. The section further provides that they are also eligible for appointment and can stand for election as trade union representatives, and if appointed or elected, to carry out the functions of trade union representatives in terms of the Act or any collective agreement.

[136] S 213.

[137] See J Grogan, *Workplace Law* 7 ed (2003) 272.

[138] Basson *et al Essential Labour Law* 19.

[139] S 1(b). South Africa rejoined the ILO in 1994.

[140] See a full list of ILO conventions available at http://www.ilo.org/ilolex/english/convdisp1.htm (accessed 28 August 2009).

hours or, with the consent of the employer, within working hours". Article 2 of the Convention provides for adequate protection of workers and employers organisations from interference by each other. It provides that any act putting workers organisations under control or domination of employers or their organisations shall be construed as interference.

Article 3 provides for the establishment of machinery unique to each member state's conditions to promote the culture of respect of the right to organise. Article 4 relates to collective bargaining and states that:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

According to Van Niekerk *et al,*[141] the FFCC which investigated the South African labour relations was a significant intervention by ILO. The Commission was responding to a complaint by COSATU about the 1988 LRA amendments. The Commission did not only file a report on the South African labour law and labour relations landscape but also recommended numerous changes consistent with the standards of ILO and these were influential in the drafting of the LRA.[142]

Whilst the Wiehahn Commission had far-reaching recommendations on trade unionism, it is the Constitution and the LRA which ended prospects of further debate about the future of trade unions in South Africa. Not only was the right to join trade unions fully recognised, the Act went on further to regulate this right and to grant trade unions various organisational rights which serve the purpose of assisting unions "in building up a presence in the workplace

[141] Van Niekerk *et al Law @ Work* 20.

[142] *Ibid.*

and thereby lay the foundations of a collective bargaining relationship with the employer".[143] Trade unions therefore enjoy sufficient recognition under the current constitutional and labour legislation framework. What remains to be seen is whether the movement has seized the various opportunities presented by the new dispensation to safeguard the gains made and to continue to militantly protect and promote the rights and interests of employees.

## 1.2 The general purpose of the study

The primary purpose of the study is to critique the effectiveness of the trade union movement in advancing the interests and rights of workers. In attempting to make this evaluation, the research will interrogate various issues pertaining to trade unions such as, their bargaining power under the current labour legislative framework, the nature and content of various organisational rights, their participation in institutions designed to promote corporatism and the general state of trade unionism in South Africa. The study will explore the challenges besetting the trade union movement in post-apartheid South Africa, the strategies, if any, devised by the movement to counter or meet these challenges and an assessment of the effectiveness of such strategies.

The broad aim of the research is to establish whether the trade union movement still remains a vibrant and a relevant force in the current labour relations dispensation. The research will attempt to establish whether the movement is adaptable to respond to a variety of challenges and to explore whether the trade union movement has seized all the opportunities offered by the current labour relations dispensation to strengthen its vibrancy in advancing the rights and interests of workers. The researcher hopes that an assessment of the legal framework and the various ways in which the trade union movement seeks to achieve the realisation and protection of workers' rights and interests will help to inform the development of trade union law.

[143] Basson *et al Essential Labour Law* 36.

## 1.3 The specific goals of the research

The study seeks to achieve the following specific goals:

i. To establish the nature and extent of various organisational rights and how unions have made use of these rights to protect and promote the interests of their members.

ii. To explore the architecture of the institution of collective bargaining, its purpose, and the participation and bargaining powers of trade unions.

iii. To give an overview of the regulatory framework for strikes and other related forms of industrial action, how they have been used by trade unions in the process of collective bargaining, and whether they still serve a useful purpose in a contemporary labour relations dispensation.

iv. To explore the various challenges besetting the trade union movement, such as negative aspects of globalisation, high levels of unemployment, slow economic growth and to establish whether the strategies devised by the labour movement are effectively countering such challenges.

## 1.4 Research methodology

There was extensive reliance on desktop research and sources of information consulted include labour legislation, the Constitution, relevant legal texts, cases, and journal articles. No empirical research was conducted on the subject. The subject of trade unionism has numerous subdivisions and great care was taken to ensure that the overarching subject of the research is the legal framework and how it impacts the effectiveness of trade unions in South Africa. This is not to say, however, that other aspects with a bearing on trade unionism have been given scant attention. The sociological, political and economic dynamics directly impact the legal framework regulating trade unions and are important factors to be taken into account if one is to attempt an informed speculation about future developments or trends in labour legislation. Reference has been made to previous empirical research on issues such as collective bargaining, and organisational and other challenges impacting the effectiveness of trade unions. The Internet was also used to source relevant online material.

## 1.5 Literature review

This is not intended to be a pioneering research. A lot of literature has been written on the subject of trade unionism in South Africa.[144] Most recommended labour law texts however give a cursory overview on the subject of trade unions in South Africa. They do not provide extensive information on the effectiveness of trade unions in continuing to protect and promote the rights of member employees in post-apartheid South Africa. The information that they provide does not go beyond such issues as their historical development, their recognition under the Constitution and the LRA and the nature and extent of various organisational rights that they enjoy.

This research will not just outline the legal framework regulating trade unions. It will attempt to interrogate the vibrancy of unions in the new labour relations dispensation and will highlight the various challenges faced by unions in post-apartheid South Africa. It will attempt to offer ideas on the strategies that trade unions can employ to continue to maintain a robust presence in the tripartite employment relationship.

## 1.6 Limitations of the research

The bulk of this study will be confined to trade unionism and related legal aspects. Although trade unions serve many purposes in post-apartheid South Africa, the sociological or political subdivisions of trade unionism will generally be beyond the scope of this research. This study will also not extensively cover the internal governance and administrative issues of trade unions.

## 1.7 Organisation of the study

The research has been planned into six chapters including the foregoing chapter. Chapter two will explore in detail the most important role of trade unions, which is to participate in the collective bargaining process on behalf of members. It will highlight the bargaining powers

[144] Leading researchers in the field include, *inter alia*, S Buhlungu, E Webster, K von Holdt and J Maree. These authors have undertaken impressive well-rounded conceptual and empirical research on the state of trade unionism in South Africa.

of unions, the nature and extent of the right to engage in collective bargaining, and the various platforms of collective bargaining.

Chapter 3 will focus on the importance of organisational rights to trade unions. It will highlight the nature and content of such rights, their importance in the collective bargaining process and the procedure regarding their acquisition and exercise. Chapter 4 will focus on the various forms of industrial action and how they are used by trade unions as weapons to bring pressure on employers or employer' organisations to accept their demands. It will critique the effectiveness of industrial action and whether it still serves a useful purpose in the contemporary South African labour relations landscape.

Chapter 5 will attempt to explore the general state of trade unionism in South Africa, how trade unions have seized the opportunities presented by a new constitutional democracy to further the rights and interests of workers, the extent of the effects or forces of globalisation on the South African and global trade union movement, how South African trade unions are attempting to redefine their role and reinvent themselves in the face of numerous challenges; and their future role in shaping relations of work in South Africa. Chapter 6 will be a summary of the dissertation and it will offer recommendations on how trade unions can continue to maintain a robust presence in the South African labour relations landscape.

## CHAPTER 2

## TRADE UNIONS AND THE INSTITUTION OF COLLECTIVE BARGAINING

### 2.1 Introduction

Trade unions in South Africa developed from an era where they were regarded as interlopers in management affairs, to the present day contemporary labour relations system where they have an important role; to promote the interests of workers and peaceful labour relations. The current South African labour relations system is premised on the acknowledgment that peaceful labour relations can only be achieved if trade unions are allowed to function without interference and that the pre-1994 labour relations dispensation, characterised by repressive laws and other measures designed to suppress trade unionism, failed in this regard.

The institution of collective bargaining plays a critical role in promoting peaceful labour relations in South Africa and worldwide. Bendix describes it as "the central process emanating from the conduct of a collective labour relationship".[145] It is an innovative institution and its indispensability in any contemporary labour relations system is attributable to the reality that a conflict of interests between workers and employers is inevitable. Although the process is characterised by antagonism and adversarialism, it nevertheless takes place because "its purpose is to contain conflict and even to promote co-operation".[146]

Kahn-Freund summarises the purpose of collective bargaining as follows:

> "[B]y bargaining collectively with organised labour, management seeks to give effect to its legitimate expectations that the planning of production, distribution … should

[145] Bendix *Industrial Relations In South Africa* 76. An important observation by the author is that "its conduct [collective bargaining] and outcome as well as the power of either party at a particular time, is subject to a number of environmental influences in the form of economic, socio-political and other practices and developments. Equally, the bargaining process itself will impact on the environment and particularly on the economy of a country".

[146] Bendix *Industrial Relations In South Africa* 77.

not be frustrated through interruptions of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure."[147]

Grogan describes the concept as a "process by which employers and organised groups of employees seek to reconcile their conflicting interests and goals through mutual accommodation".[148] What can be gleaned from these descriptions is that both management and labour recognise the need to participate in this institution. However, the competing interests of labour and management means that parties would often resort to their strength and power to make demands on each other.

It is trite law that collective bargaining is a voluntary process and that the drafters of the LRA intended that the effectiveness of the institution should not be influenced by judicial pronouncements. Courts have a limited role in the bargaining arena as the process of collective bargaining is not hinged on obscure legal rules which proved to be a complication in the pre-1994 labour relations dispensation. The current labour relations system allows parties to use their strength to seek concessions from each other and the recourse to strikes and other related forms of industrial action by trade unions is an integral part of the bargaining process.

The main aim of this chapter is to attempt to establish the complexities of the collective bargaining process, how trade unions have made use of this institution, and whether it is still the preferred method of promoting the rights and interests of employees. The chapter will explore the nature and extent of the right to engage in collective bargaining, more

[147] Kahn-Freund *Labour and the Law* 2 ed *(*1977) 5.

[148] J Grogan *Collective Labour Law* 86. The author also states that "the central objective of all modern industrial relations legislation is to promote collective bargaining as a means of regulating relations between employers and employees and for resolving disputes between them".

particularly, the controversies regarding the absence of the duty to bargain. It will dwell on the structure or architecture of the institution of collective bargaining, the bargaining powers of trade unions and whether the institution has been effective in promoting peaceful labour relations under the current labour relations dispensation.

## 2.2 Bargaining levels under the current legislative framework

There are two levels of bargaining under the current labour relations framework; sectoral and plant-level bargaining. The dichotomy between managements and trade union interests means that levels of bargaining will always remain a contentious issue. Du Toit *et al* attempt to highlight why unions find the system of centralised bargaining attractive and the arguments advanced in support of bargaining at enterprise or plant level.[149] The common arguments advanced by the unions in favour of the system of centralised bargaining include, *inter alia*, the following:

i. It is the only process through which minimum and reasonably fair employment standards can be established for the entire industry or sector.

ii. The negotiation processes at industry or sectoral level attracts highly skilled trade unionists and employer representatives.

iii. Collective agreements concluded at sectoral or industry levels are less likely to open floodgates for litigation or to be contested at courts because the use of highly skilled negotiators means that the possibility of "a plethora of poor quality collective agreements" is averted.

iv. Industry level bargaining promotes the development of a culture of pro-active trade unionism. The role of trade unions is widened beyond their often "narrow, defensive and reactive approach".

[149] D du Toit *et al Labour Relations Law* 244.

The arguments in favour of bargaining at enterprise level include the following:[150]

i. The conditions that cover an entire sector are often unproductive particularly for small enterprises and they have negative economic implications.

ii. The "key actors at plant-level" are disenfranchised from the bargaining processes.

iii. Trade unions which have strong organisational strength at enterprise level but poorly represented at industry or sectoral level are denied the access of participating in bargaining forums.

iv. There is no flexibility as the process is not sensitive to "regional and enterprise differences".

The conflicting and competing interests of business and labour mean that levels of bargaining are going to remain a contested issue. The courts cannot compel parties to bargain at particular levels as the scheme of the LRA favours a voluntary system of bargaining, which allows parties to use their economic strengths in determining bargaining arrangements.

## 2.3 Constitutional and legislative framework

The right to engage in collective bargaining is provided for in the Constitution and the LRA. Section 23(5) of the final Constitution provides, *inter alia*, that "[e]very trade union, employers' organisation and employer has the right to engage in collective bargaining".[151] The right is given effect to by the LRA; the principal national legislation referred to in the Constitution. The Act provides that its primary objectives are, amongst other things, to provide a framework within which trade unions and employers can bargain collectively,[152]

[150] *Ibid.*

[151] The section further provides that "national legislation may be enacted to regulate collective bargaining" and that "to the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)''.

[152] See s 1(c) (i).

"to promote orderly collective bargaining … and bargaining at sectoral level",[153] and, "to promote employee participation in decision-making in the workplace".[154]

### 2.3.1 The nature and extent of the right to engage in collective bargaining

The nature and extent of the right to engage in collective bargaining was extensively dealt with in what are now popularly known as the *SANDU* cases.[155] The issue that was common in all cases was whether there existed a justifiable duty on the South African National Defence Force (SANDF) to engage in collective bargaining with the South African National Defence Union (SANDU), a union set up by and comprising members of the defence force and allowed to function as a union by the decision of the Constitutional Court.[156] Another issue that was dealt with in *SANDU* 1 was the question: if there was a justiciable duty to bargain, was there an unfair refusal by the SANDF to engage in collective bargaining with the military union?[157]

The military union relied heavily on s 25(5) which has already been cited above. The Supreme Court of Appeal *per* Conradie JA held that the "right to engage in collective bargaining" may be subject 'to more than one interpretation' which might be that the piece of legislation to regulate it "must provide for an employer or a union called upon to bargain to comply with the demand on pain of being ordered to do so". Another possible interpretation mooted by the court was "that the envisaged national legislation must provide the framework within which employers, employers' organisations and employees may bargain'' or that "it

[153] See s 1(d) (i) and (ii).

[154] See s 1(d) (iii).

[155] Referred to as *SANDU* 1, 2 and 3.

[156] See the decision of the Constitutional Court in *South African National Defence Union v Minister of Defence* available at http://www.saflii.org/za/cases/ZACC/1999/7.html (accessed 28 September 2009) cited as 1999 (4) SA 469 (CC).

[157] See para 2 of the concise judgment of the cases, available at http://www.saflii.org/za/cases/ZASCA/2006/95.pdf.

may mean no more than that no legislative or other governmental act may effectively prohibit collective bargaining".[158]

The court stressed the importance of s 39 of the Constitution which serves as guidance for the interpretation of the Bill of Rights.[159] Section 39(1) (a) provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Section 39(1)(b) obliges courts, tribunals or forums to "consider international law" and s 39(1)(c) provides for an interpretative approach which "may consider foreign law". The Constitution also provides that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".[160] The court also made reference to s 39(2) which provides that any interpretive approach employed to develop customary or common law or for any legislation "must promote the spirit, purport and objects of the Bill of Rights". It ruled that legislation affecting the rights of military labour must be reflective of established international standards and their normative value system.[161]

In interpreting the nature and extent of "the right to engage in collective bargaining", the international law which is most relevant and helpful is the Right to Organise and Collective Bargaining Convention 1949, which reinforces the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948. The most important Article of Convention 1949 in as far as the nature and extent of the right to engage in collective bargaining is concerned is Article 4 which provides that:

> "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for

[158] Para [5].

[159] Para [6].

[160] See s 233.

[161] Para [6].

> voluntary negotiation between employers or employers' organisations and workers's organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

Conradie JA observed that the numerous international provisions relevant in interpreting the nature of the right to engage in collective bargaining clearly favour a voluntaristic system which functions without reliance on a justiciable duty to bargain.[162] Although the court was seized with many issues to deliberate upon, an important decision was the affirmation that whilst the Constitution recognises and protects the right to engage in collective bargaining, a justiciable duty to bargain does not exist in the current labour relations dispensation. Commenting on the argument by counsel of SANDU that the functions of the Military Bargaining Council (MBC), which included concluding and enforcing collective agreements and preventing and resolving labour disputes, implied that it could also compel parties to bargain, Conradie JA stated as follows:

> "Having regard to the prevailing labour relations philosophy on collective bargaining, it would be surprising if such bland language were thought sufficient to achieve the suggested object of judicially enforcing collective bargaining."[163]

The framework provided by the LRA, in as far as the nature and extent of the right to engage in collective bargaining is concerned, does not infringe on the constitutional right to engage in collective bargaining. Although this decision was made in respect of military unions, it also applies to all unions. The scheme of the LRA, which favours a voluntaristic system of collective bargaining, does not make it unconstitutional. The constitutional right to engage in collective bargaining is not violated by the failure of the LRA to provide a collective bargaining framework which recognises a judicially enforceable duty to bargain.

[162] Para [10].

[163] Para [32].

### 2.3.2 The importance of industrial action and organisational rights in the collective bargaining process

The Court also emphasised the importance of organisational rights and the right to strike in the collective bargaining process. The LRA provides for numerous organisational rights for trade unions which serve the purpose of assisting them "in building up a presence in the workplace" and facilitating the development of a collective bargaining relationship with employers.[164] As put by Du Toit *et al*, "[o]rganisational rights were enacted as a corollary to a voluntarist collective bargaining regime" and their aim is to assist "unions to build up a sufficient degree of power to persuade employers to negotiate".[165] The minimum requirements to be met by trade unions in order to qualify for the rights set out in the Act are that they must meet the required thresholds of representativity and that they must be registered. Trade unions which are sufficiently representative of the employees employed by an employer are entitled to the right to access the workplace, deduction of subscriptions and leave for trade union activities.[166] In addition to these rights, trade unions representing the majority of employees are entitled the right to elect trade union representatives (shop stewards) and to disclosure of information.[167]

It is worth noting that the LRA does not provide a precise definition as to what constitutes "sufficient representivity" for the purposes of acquiring the minimum organisational rights provided in sections 12, 13 and 15. The closest that the drafters of the LRA came to in attempting to give meaning to this concept is a provision in the Act "which deals with the criteria for the establishment of a statutory council" which states that the concept should be construed to mean "a registered trade union, or two or more registered trade unions acting

[164] A Basson *et al Essential Labour Law* 5 ed (2009) 259. See chapter 3 for a detailed discussion on organisational rights.

[165] Du Toit *et al Labour Relations Law* 198.

[166] See ss 12, 13 and 15 of the LRA respectively.

[167] See s 14 and 16 of the LRA respectively.

jointly, whose members constitute at least 30 per cent of employees in a sector and area".[168] Regarding the definition of a workplace, the Act provides that it is:

> "[T]he place or places where employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation."[169]

With regards to the question whether insufficiently representative unions may strike to demand organisational rights, the issue was dealt with extensively in *National Union of Metal and Allied workers of SA v Bader Bop (Pty).*[170] The brief facts of the case were that Bader Bop (the "employer"), granted organisational rights provided for in s 14 of the Act (the right to elect shop stewards) to the majority trade union, the General Industries Workers Union of South Africa (GIWUSA). The National Union of Metal and Allied workers (NUMSA), which represented 25% of the workforce, was only granted the s 12 and 13 rights which are the right to access the workplace and deduction of trade union subscriptions or levies.

The employer denied NUMSA the right to elect shop stewards and the dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) but conciliation failed.

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[168] See s 39(1) (a). See also generally S Vermaark "Organisational Rights-Sufficient Representivity". http://www.deneysreitz.co.za/index.php/news/organisational_rights_sufficient_representivity (accessed 28 September 2009). The author opines that this section is helpful in providing "some guidance" as to what constitutes a 'sufficiently representative' trade union. The article also makes reference to CCMA cases dealing with the issue of sufficient representivity. In *SA Clothing and Textile Workers Union v Sheraton Textiles (Pty) Ltd* 1997 (3) SALLR 48 (CCMA), the "Commissioner found that, generally, a union should be considered sufficiently representative if it can influence negotiations, the financial interests of those engaged in the industry or peace and stability within the industry or any section of the industry. Emphasis was placed on "the interests represented by the union" and that reliance should not be on "numerical representativeness". The Commissioner contended "that insofar as a numerical threshold is relevant, guidance may be obtained from the requirement of 30 per cent for all unions wanting to establish councils at sectoral level". Commissioners therefore do have a discretion in determining whether a union is sufficiently representative or not and they are guided by broad guidelines in the Act.

[169] See s 213.

[170] (2003) *ILJ* 305 (CC).

The union threatened to call a strike and the employer approached the Labour Court to seek an interdict barring the union from participating in a strike in support for demands of organisational rights on the basis that the strike was not protected. The Labour Court ruled against the employer and an appeal against the decision was made to the Labour Appeal Court (LAC). The latter Court found for the employer and granted the interdict.

The Constitutional Court heard an appeal against the decision of the LAC. The Court, *per* Ngcobo J set out the issues to be decided as follows:[171]

i. Whether minority unions, in this case NUMSA, were entitled to acquire organisational rights outside the statutory framework.

ii. If so entitled, whether such unions could resort to strike action to demand such rights.

iii. Whether the strike was "limited by section 65(1) (c)" which section states that "no person may take part in a strike … or in any conduct in contemplation or furtherance of a strike if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act".

iv. "Whether section 21 provides an exclusive mechanism for the enforcement of organisational rights, including those that fall outside Part A".

The finding of the court *per* O' Regan J was to the effect that there were no provisions in the LRA which precluded unions which do not meet the required thresholds of representivity from having recourse to collective bargaining and therefore concluding collective agreements granting them organisational rights. The court also put emphasis on the fact that the right to strike is an integral part of the collective bargaining process and that an interpretation that does not attenuate this constitutional right, but rather expands it, must be preferred. Under the current LRA, unions can acquire organisational rights through a collective agreement, by

[171] Para [58].

being a member of the statutory or bargaining council and by following the prescribed LRA procedure.[172]

In terms of s 21(1) of the LRA, "[a]ny registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights … in a workplace". The notice must be lodged with a certificate of registration and must contain all the prescribed information.[173] The legislative framework for the acquisition and exercise of organisational rights, as well as their nature and content, is dealt with in detail in chapter 3. Trade unions cannot engage effectively with employers on matters of mutual interests without the support of organisational rights. These rights can be described as constituting a firm base from where unions can build collective bargaining relationships with employers and they are a vital element for trade unions during bargaining processes and other engagements with employers.

### 2.3.3 The architecture of the institution of collective bargaining

The most popular avenue or mechanism through which collective bargaining is conducted in South Africa is the bargaining council. Bargaining councils are described as "centralised structures on sectoral level which are directed at bargaining and settlement of disputes".[174] The LRA provides that "[o]ne or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area".[175] This can be done by "adopting a constitution that meets the requirements of section 30" and "obtaining registration of the bargaining council in terms of section 29".[176] The minimum provisions of a bargaining council constitution are set out in s 30 whilst s 29 sets out the procedure for registration. The powers and functions of bargaining councils are wide ranging, but the most important for the purposes of this research are, "to conclude collective

[172] See Du Toit *et al Labour Relations Law* 201.

[173] See s 21(2) (a), (b) and (c).

[174] Slabbert and Swanepoel *Introduction to Employment-Relations Management* 87.

[175] See s 27(1).

[176] See s 27(1) (a) and (b) respectively.

agreements; to enforce those collective agreements; to prevent and resolve labour disputes; to perform dispute resolution functions referred to in s 51" and "to establish and administer a fund to be used for resolving disputes".[177]

The Act also provides for another avenue for collective bargaining called statutory councils.[178] The statutory council system is described as a "compromise" avenue to address the demands by the unions, particularly COSATU, for compulsory centralised bargaining in all sectors of the economy.[179] The powers of statutory councils include, performing "dispute resolution functions referred to in section 51", promoting and establishing "training and educational schemes", establishing and administering "pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the statutory council or their members" and lastly "to conclude collective agreement".[180] In terms of s 43(2) of the LRA, a statutory council may agree to include a function of a bargaining council in its constitution.

Another relatively new avenue created under the new labour relations dispensation is the workplace forum. It is described as "a relatively new concept and innovating aspect of the new labour dispensation".[181] Van Niekerk *et al* state that these "forums are not essentially collective bargaining agents and their purpose is to supplement the institution of collective bargaining by expanding worker participation in managerial-decision making".[182] The

[177] See s 28(1) (a)-(e).

[178] See sections 39, 40, 41 and 42 which generally deal with the registration of statutory councils and other related issues.

[179]A Van Niekerk *et al Law @ Work* (2008) 355. The authors state that the rationale behind the establishment of statutory councils is that they might be established in sectors where union representivity is relatively low and where there are no bargaining councils established.

[180]See s 43(1) (a)-(d).

[181]Van Jaarsveld and Van Eck *Principles of Labour Law* 257.

[182]Van Niekerk *et al Law @ Work* 362. The authors cite the Explanatory Memorandum to the Labour Relations Bill, published in 1995 in the International Labour Journal which states, *inter alia*, that "workplace forums are designed to facilitate a shift at the workplace, from adversarial collective bargaining on all matters to joint problem solving and participation on certain subjects". As further stated in the Memorandum "they are designed

function of workplace forums is therefore to promote a consultative relationship between labour and employers on issues which fall outside the normal collective bargaining process.[183] The Act provides that the general functions of workplace forums include, seeking to "promote the interests of all employees in the workplace, whether or not they are trade union members", seeking "to enhance efficiency in the workplace", being "consulted by the employer, with a view to reaching consensus" on various matters referred to in s 84, and "participating in joint-decision making about matters referred to in section 86".[184]

Section 80 of the LRA sets out how a workplace forum may be established. They can be established in any workplace where an employer employs more than one hundred employees and "any representative trade union may apply to the Commission in the prescribed form for the establishment of a workplace forum" and, "the applicant must satisfy the Commission that a copy of the application has been served on the employer". The Act provides for specific matters for consultation in s 84 which include matters such as, the restructuring of the workplace which includes the introduction of new technology and new operational methods, changes in the organisation of work, mergers and transfers of ownership which could affect workers, education and training, grading of jobs, the termination of employers' services based on operational requirements and exemptions from any collective agreements or any law. The consultative and joint-decision making functions are dealt with in detail in s 85 and s 86 respectively. Apart from the statutory system of collective bargaining provided in the LRA, collective bargaining also occurs at non-statutory centralised bargaining forums and enterprise or plant level.

There is debate about the effectiveness of the collective bargaining process envisaged by the LRA. An empirical and conceptual study done by the University of Cape Town Labour and Enterprise Policy Research Group published in 2007 reveals that the institution of collective

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to perform functions that collective bargaining cannot easily achieve: the joint solution of problems and the resolution of conflicts over production".

[183] Slabbert and Swanepoel *Introduction to Employment-Relations Management* 70.

[184] See generally s 79(a)-(d).

bargaining faces serious challenges which cannot be left unattended.[185] The study outlines the challenges in both the statutory and non-statutory system.

### 2.3.4 Bargaining councils

Formerly known as "industrial councils" under the old LRA, bargaining councils are the central pillar of the institution of collective bargaining.[186] The voluntary process of collective bargaining envisaged in the LRA means that participation in bargaining councils is also voluntary. The Act however provides that a council may make a request to the Minister that an agreement concluded be extended "to any non-parties to the collective agreement that are within its registered scope and are identified in the request".[187] This can only happen when a council holds a meeting and:

> "one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and … one or more registered employers' organisations whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension".[188]

[185] S Godfrey *et al* "The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining" (2007) http://www.commerce.uct.ac.za/research_units/dpru/.../WP_07-130.pdf (accessed 27 September 2009).

[186] Godfrey *et al* "The State of Collective Bargaining in South Africa" 1.

[187] See s 32(1). The Act provides that the Minister has no discretion but to extend the agreement if the council meets the representivity requirement, if the collective agreement provides for an independent body to pronounce on appeals brought by non-parties for applications for exemptions and the withdrawal of exemptions by the bargaining council and if the agreement "contains criteria that must be applied by the independent body when it considers an appeal" which criteria must be fair and also be seen to promote the objectives of the Act and that "the terms of the agreement do not discriminate against non-parties". See s 32(3)(e), (f) and (g) respectively. The Minister can however exercise his discretion and extend the agreement even if the council does not meet the representivity requirement. This can only happen "if the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council" and also if "the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole" (See s 32(5)(2) (a) and (b)).

[188] See s 32(1(a)-(b).

The possibility of extending collective agreements to non-parties coerces, to a certain extent, both labour and employers to participate in bargaining councils. The Minister is obliged to extend the collective agreement if the majority of employees covered by the collective agreement are members of the trade union which is a party to the collective agreement and the majority of the employees are employed by an employer who is a member of the employers' organisation.[189]

A challenge which threatens the existence and vibrancy of bargaining councils, as outlined in the study,[190] is the strict interpretation of the representivity requirement for the purposes of extending agreements. Simply put:

> "The more employers and employees that do not join the employers's organisations and trade unions that participate on councils, the harder it is for bargaining councils to maintain the necessary level of representivity to have their agreements extended to non-parties."[191]

The effect of not having agreements extended due to lack of representivity is the threat of undercutting of the employer party to the agreement by competitors who are not parties to the bargaining council. Godfrey *et al* state that when faced with this threat, employers who are parties to the collective agreement respond by terminating their membership with the employers' organisation in an attempt to avoid being covered by collective agreements.[192] As more employers cease to be members of the employers' organisation, the ultimate result is the collapse of the council. Although the Minister has discretion to extend agreements to non-parties in cases where parties are not "sufficiently representative", the interpretation of 'sufficiently representative' by the department of Labour is strict.[193] The reason mooted for

[189] See also "The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining".http://www.commerce.uct.ac.za/research_units/dpru/PBriefsPDF/PDFs/PolicyBrief08-18.pdf (accessed 28 September 2009).

[190] Godfrey *et al* "The State of Collective Bargaining in South Africa" 16.

[191] *Ibid.*

[192] *Ibid.*

[193] *Ibid.*

such a strict interpretation is that employers who are not parties to the collective agreements, particularly small enterprises, are opposed to such extensions.[194]

The issue of representivity almost caused the winding up of the Southern and Eastern Cape Building Bargaining Council, a case study in the conceptual and empirical study by Godfrey *et al*. In *East Cape Masterbuilders And Allied Industries Association v Building Industrial Bargaining Council (Southern and Eastern Cape)*,[195] the Labour Court dealt with an application from the employer party (East Cape Master Builders and Allied Industries Association (MBA) and the Electrical Contractors and Allied Industries Association) in the council to have it wound up, on amongst other grounds, that the Amalgamated Union of Building Trade Workers of South Africa and the National Union of Mine Workers (NUM), "were not sufficiently representative". The dispute was precipitated by the unwillingness of the employer party to consent to the extension of a previous main agreement which expired or lapsed on 30 September 2001. The other reasons advanced by the employer party were that its members were forced to provide subsidies to ensure that the council enforced collective agreements; that the council was failing to monitor the compliance of the agreement by the parties, that the councils' assets had shrunk; and that bargaining councils in the building industry in other provinces were closing.[196]

In exercising its discretion, the court refused to grant the application. It made the following important ruling:

> "In the Applicants' own submission they desired not to terminate their bargaining relationship with the Unions as they realised and acknowledge the crucial importance of such relationship in the building industry. All that the Applicants required was to have the collective bargaining process conducted not from the present statutorily-created council but from a non-statutory and informal bargaining forum which would,

[194] *Ibid.*

[195] Available at http://www.saflii.org/za/cases/ZALC/2004/4.pdf and cited as 2004 ZALC (4) (accessed 28 September 2009).

[196] See the arguments of the Applicants in Para [3].

> seemingly, be structured in the Applicants' own terms. Their proposed bargaining mechanism would not … augur well for the interests of all the parties, particularly the employees…. [S]uch arrangement would not be within the spirit and objective of the Act."[197]

The court further stated as follows:

> "In the event of any representative trade union party to the Council having lost such number of membership that it no longer had the requisite threshold which entitled it to admission to and membership of the Council then, any other party to the Council have the right, it seems …, to challenge the continued membership of the representative trade union party concerned. That challenge should be directed to the Council. Be that as it may, this factor also appears to be irrelevant to the question of winding-up of the Council."[198]

Although the bargaining council is still in existence, it has ceased to serve the function of bargaining as the employer party is refusing to negotiate. It administers various funds and performs dispute resolution and secretariat functions.[199]

Another challenge which threatens the effectiveness of bargaining councils is that most agreements prohibit bargaining at plant-level on matters covered in the collective agreement. As put by Godfrey *et al* "[f]irm and plant-level bargaining … [seem] to have largely disappeared within the jurisdictions of bargaining councils.[200] The other concern, according to the policy document is that the assistance that bargaining councils are getting for dispute

[197] Para [21].

[198] Para [20.3].

[199] Godfrey *et al* "The State of Collective Bargaining in South Africa" 26.

[200] Godfrey *et al* "The State of Collective Bargaining in South Africa" 99.

resolutions functions, in the form of subsidies, is inadequate and that this function has proved to be a drain on the finances of the council.[201]

There are other wide ranging criticisms about bargaining councils. There is a general feeling or perception among small enterprises that "large companies use the system to raise barriers to entry into their industry, thereby eliminating threats of competition emerging from smaller players" and that "the bargaining council system is the very basis of the trade union federation's inordinate power".[202] Bargaining councils are therefore seen by smaller businesses as nothing but "a way of killing off competition".[203] Du Toit *et al* warn that "the extension of an agreement of a council whose parties are merely sufficiently representative is potentially vulnerable to constitutional challenge on the grounds of a violation of employers' property rights or the right to engage in economic activity".[204] The authors however argue that "the policy considerations justifying extension … will generally amount to legitimate social objectives, outweighing competing interests".[205] They argue further that "[t]he key issue for decision will be whether the exemption procedures and practices are a satisfactory guarantee against any alleged disproportionate interference with interests not adequately represented by the council" and that "a more inclusive investigation introduces greater proportionality and insulation against a constitutional challenge".[206]

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[201] Godfrey *et al* "The State of Collective Bargaining in South Africa" 105.

[202] See "Bargaining Councils: Major Showdown Looms" *BusinessOwner* 08 March 2005 http://www.businessowner.co.za/Article.aspx?Page=23&type=23&Item=2404 (accessed September 2009).The article argues that "central bargaining is union paradise" because "only the few large factories have to be mobilised and one agreement negotiated to cover an entire industry".

[203]See "Bargaining Council Is Competition Killer"*BusinessOwner* 08 December 2004 http://www.businessowner.co.za/Article.aspx?Page=23&type=23&Item=2360 (accessed 28 September 2009).The article argues that the fear of being forced to pay "holiday bonus and full corporate perks" forces would be entrepreneurs to "stick to their corporate careers and never start a business".

[204]Du Toit *et al Labour Relations Law* 267.

[205] *Ibid.*

[206] D du Toit *et al Labour Relations Law: A Comprehensive Guide* 3ed (2002) 216.

Basson *et al* state that although the extension of bargaining council agreements to non-parties has the potential of violating the rights of non-parties to bargain collectively, there are some benefits to be derived from such extensions. They outline some of the benefits as follows:[207]

i. Uniform standards can be established in small workplaces where very few employees are members of trade unions and where there is no collective bargaining.
ii. Extending agreements averts the possibility of employers in the same sector "from competing with each other on the basis of the terms and conditions of employment that they offer their employees-these matters are taken out of competition".
iii. "Employers can therefore agree with unions to maintain reasonable conditions of employment without the fear that their production costs (in the form of wages and conditions of employment) will undermine their competitiveness in the market."
iv. On the possible unconstitutionality of such a process, the authors argue that the extensions promote "equality throughout a sector and area" and the right to fair labour practices which is also entrenched in the Constitution. The process does "not represent an undue infringement of the right to bargain collectively-collective bargaining is not prohibited or limited" as "the positive aspects of collective bargaining (such as the collective regulation of terms and benefits of employment) and benefits of collective bargaining are extended to employees who would not normally have these benefits".

### 2.3.5 Statutory councils

The idea behind creating this avenue of collective bargaining was to attempt to appease trade unions, particularly COSATU, which were demanding compulsory centralised bargaining in all sectors. Statutory councils were established "to provide a compromise between the voluntarism of the bargaining council system and the compulsion that was demanded by

[207] Basson *et al Essential Labour Law* 299.

COSATU".[208] The system of statutory council is criticised for failing to promote one of the most important objectives of the LRA, which is to promote centralised bargaining.[209] Only a few statutory councils have been registered[210] and the system might not achieve its intended objectives unless deliberate strategies are formulated to improve its efficacy. The idea behind their formation is to a large extent plausible and if their shortcomings are addressed, the councils can efficiently serve as a "compromise" between the system of voluntarism and compulsion. Godfrey *et al* state that the system needs to be modified or a viable alternative should be developed. The authors argue that there is little enthusiasm displayed by the DoL to revisit the system despite its glaring shortcomings.[211]

The failure of this system cannot be attributed to the fact that its architecture was not well planned. If the Department comes up with mechanisms and incentives for the unwilling parties, particularly employers to participate, the system can complement the bargaining council system.

### 2.3.6 The quasi-statutory system of collective bargaining

There is an interesting trend in some sectors where unions do not meet the required threshold of representivity which therefore means that bargaining councils cannot be formed because the agreements reached risk not being extended to parties which are not members. The fear of

[208] Godfrey *et al* "The State of Collective Bargaining in South Africa" 13.

[209] See s 1(d) (ii) of the LRA.

[210] Godfrey *et al* "The State of Collective Bargaining in South Africa" 37. At the time when the policy document was written there were only two councils set up and registered, the Statutory Council for the Printing, Newspaper and Packaging Industry of South Africa and the Amanzi Statutory Council. The Amanzi statutory council has since become a bargaining council. The constitution of the bargaining council was signed on 17 June 2010. The majority trade union in the sector is the South African Municipal Workers Union (SAMWU) which played a critical role in the establishment of the council. The other unions are the National Education, Health and Allied Workers' Union (NEHAWU) and the United Association of South Africa (UASA). The employers' organisation is the South African Association of Water Utilities (SAAWU). http://www.samwu.org.za/index.php?option=com_content&task=view&id=626&Itemid=1 (accessed 22 June 2010).

[211] Godfrey *et al* "The State of Collective Bargaining in South Africa" 102.

"undercutting" forces employers in such sectors to agree to some form of centralised bargaining outside the statutory framework. This quasi-statutory system is prevalent in the security and cleaning sectors and its hallmarks are that "collective bargaining takes place in a forum constituted in terms of the draft constitution of a yet to be established bargaining council" and that agreements reached by parties at such forum are given effect to by way of sectoral determinations issued by the Minister at the request of the Minister of Labour.[212]

### 2.3.7 Workplace forums

Workplace forums are extensively dealt with in Chapter 5 of the LRA. Their role is largely to supplement the collective bargaining process by promoting the participation of workers in management decisions. They serve the purpose of reducing adversarialism which is inherent in the collective bargaining process. Van Niekerk *et al* cite the Explanatory Memorandum to the Labour Relations Bill published in 1995, which states amongst other things that:

> "Workplace forums are designed to facilitate a shift at the workplace, from adversarial collective bargaining on all matters to joint problem solving and participation on certain subjects. They are designed to perform functions that collective bargaining cannot easily achieve … the joint solution of problems and the resolution of conflicts over production."[213]

[212]Godfrey *et al* "The State of Collective Bargaining in South Africa". The sectors which have made use of this system of bargaining, according to the study, are mainly the cleaning and security sector. In the security sector, the general challenges frustrating the collective bargaining process were, amongst other things, "that there is no guarantee that unions can achieve unity amongst themselves during negotiations" because there are more than 15 unions in the sector. There is also the problem of low union representivity and organising challenges. There are also questions about the "collective bargaining competencies" of the parties, that is, employers and employees. In the 1996 security guard strike, often referred to as probably the bloodiest strike in the labour history of South Africa, employers often resorted "to the old divide and rule tactic" and this did not help matters. The reality is that "collective bargaining is neither entrenched nor stable" in the sector. See also "Security strikes lessons must be learnt" *Business Report*, 12 October 2006 http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=3481854 (accessed 29 September 2009).

[213] Van Niekerk *et al Law @ Work* 362.

The question therefore is whether this "relatively new concept and innovating aspect of the new labour dispensation"[214] is achieving its purpose or objective of promoting the participation of employees in the decisions made by management and thereby promoting peaceful relations at the workplace. The general feeling among labour law experts and commentators is that workplace forums have failed in this regard.[215] There are wide ranging criticisms against workplace forums. There is the criticism that if the legislature intended to increase participation of workers in decisions made by management and thereby promote industrial democracy, then why can workplace forums only be established at the request of majority unions and not just any registered union.[216] The only justification might be that employers can use such forums "to forestall unionization" which is not a convincing argument since "unions have much to offer beyond the reach of the workplace forum".[217] Another criticism is that there should not have been an enumeration of issues for consultation as the result is that the reach of workplace forums is narrowed.[218]

The legislature also failed to sufficiently distinguish the process of collective bargaining from other models aimed at increasing or promoting worker participation at the workplace, particularly the workplace forum. The result is "the establishment of two overlapping channels of employee representation in the workplace … the union and the workplace forum".[219] A possible solution to this confusion created by the legislature is to abandon the workplace forum altogether and to place all its functions under trade unions, but such a move obviously defeats "the goal of providing a forum divorced from the adversarial bargaining process".[220]

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[214] Van Jaarsveld and Van Eck *Principles of Labour* 257.

[215] For example Godrey *et al* "The State of Collective Bargaining in South Africa" 5.

[216] C Summers "Workplace Forums from a Comparative Perspective" (1995) 16 *ILJ* 806 at 811.

[217] *Ibid*. The author opines that "the workplace forum will give workers a realisation of the possibility and potential for organisation, and provide an opening for union organisation".

[218] Summers 1995 *ILJ* 812. The authors argues that if trade unions can force employers to bargain and to embark on strike action on any matter of mutual interest, there is no justification why the legislature opted to narrow "the reach of the workplace forum".

[219] *Ibid*.

[220] *Ibid*.

Another criticism is that the LRA provides for the establishment of a trade union based workplace forum. In terms of s 8(1) of the LRA, "[i]f a representative trade union is recognised in terms of a collective agreement by an employer for the purposes of collective bargaining in respect of all employees in a workplace, that trade union may apply … for the establishment of a workplace forum". The LRA further provides that members of the workplace forum may be chosen from "its elected representatives in the workplace".[221] It also provides that such issues as the nomination, election and removal of representatives are governed by the constitution of the trade union. The result is that such a trade union will exercise total control over such a workplace forum and they ultimately become devoid of any independence. As put by Olivier, the control over workplace forums by majority trade unions blurs "the distinction between the (collective bargaining) role of trade unions and the consensus seeking functions of workplace forums …."[222]

The threshold of 100 employees in a workplace for a workplace forum to be established is also another criticism. Olivier states that "why the legislature opted for such a high threshold is unclear and unjustified, especially in view in which businesses organize themselves in South Africa".[223] The author further argues that "the apparent irony is that workplace forums as envisaged by the Act [LRA] cannot be introduced … where they are perhaps most needed".[224] The other criticism is directed at the failure of the LRA to "exclude the possibility that employees may embark on strike action if agreement on a matter meant for consultation cannot be reached".[225] This is a glaring oversight as it is essential in cooperative models that economic weapons should not be used when parties fail to reach agreement. The use of economic power strains the relationship of the parties as it introduces "adversarial elements into the relationship".[226]

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[221] See s 8(2).

[222] M Olivier "Workplace Forums: Critical Questions from a Labour Law Perspective (1996) 17 *ILJ* 803 at 812.

[223] Olivier 1996 *ILJ* 809.

[224] *Ibid*.

[225] Olivier 1996 813.

[226] *Ibid*.

Although workplace forums have failed in their current form, they offer trade unions an opportunity to establish collective bargaining at workplace or plant level. Du Toit states that "since bargaining councils are voluntary, their existence depends on employers' willingness to join them or unions' ability to persuade employers to do so".[227] A decline in the strength of unions means that their ability to coax unwilling employers to join these institutions is diminished which also means a reduction of incentives for employers.[228] He goes on to state that this will mean the collapse of the bargaining council system which will not mean that unions will automatically revert to bargaining at plant-level since diminished bargaining strength at sectoral level will also mean that they will experience hurdles in initiating bargaining at any level.[229] The author opines that if such situations arise, "the establishment of workplace forums may give unions footholds in workplaces which they might otherwise be unable to secure …" eventually leading to the creation of "negotiating relationships" which will result in the re-establishment of "a basis for collective bargaining at workplace level".[230]

The author argues that trade unions can use the failure of the current workplace forum to their advantage but cautions that this "radical reorientation" can only happen if there is shift of perception involving "reconceptualising such forums from Trojan horses of employer power to points of support for workplace bargaining and local union structures".[231] Such a shift, as argued by the author, can however only happen if trade unions become disillusioned with bargaining at sectoral level and no longer regard "bargaining councils as their primary focus".[232]

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[227] D du Toit "What is the Future of Collective Bargaining (and Labour Law) in South Africa?" (2007) 28 *ILJ* 1405 at 1428

[228] *Ibid.*

[229] *Ibid.*

[230] *Ibid.*

[231] *Ibid.*

[232] *Ibid.*

The question which the author poses about workplace forums is whether they "are a dead letter or an idea ahead of its time".[233] Given the fact that collective bargaining still remains an adversarial process in South African due to a variety of social and economic factors, such as high levels of unemployment, job insecurities, poor working conditions and the widening gap between the rich and the poor, trade unions will always be sceptical of the system of workplace forums as currently envisaged by the LRA. They will always think of it as a ploy to strengthen the power of management at the workplace and thereby diluting the power of workers to engage in militant collective bargaining for the improvement of their working conditions. The short answer is that workplace forums remain "an idea ahead of its time". They cannot be dismissed as having failed because there is still hope that they can be utilised by unions as a stepping stone in building relationships to bargain at plant or enterprise level. They are essential in promoting participation by workers in corporate decision making and they benefit all employees in workplaces where they are established, regardless of trade union membership. As put by Summers, "the potential value of developing a non-adversarial forum is too great [and] the basic principle ought not to be denied because of imperfection in the details, nor dismissed as impossible to achieve".[234]

### 2.4 The non-statutory system of collective bargaining

Collective bargaining does not only take place in terms of the statutory mechanisms. Employers and trade unions can opt to bargain at enterprise or plant level outside the statutory bargaining forums. The LRA does not place any restrictions on such a practice and parties to a bargaining council are not prohibited "from also entering into private bargaining relationships, provided that agreements do not conflict with council agreements".[235] This process, as put by Grogan,[236] is triggered by a request from a trade union to "an employer or a group of employers" to be recognised "for its support among the workers of the industry or enterprise concerned".

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[233] *Ibid.*

[234] Summers 1995 *ILJ* 813.

[235] Grogan *Collective Labour Law* 81-82.

[236] *Ibid.*

Upon satisfaction that indeed there is support for the union by the employees or workforce, the employer or a group of employees and the trade union concerned then start negotiations, the objective being to reach a recognition agreement which effectively means that the trade union is formally recognised and its "right to represent the interests of employees in a particular constituency or bargaining unit acknowledged".[237] The agreement also "sets out the rights and duties of the parties *inter se*, the procedures for the periodic negotiation of substantive agreements regulating wages and other terms and conditions of service and procedures for the resolution of disputes and grievances".[238]

The practice in the mining sector is the use of the centralised bargaining forum. The forum "exists and operates by virtue of agreements between the parties and established practice, as adapted from time to time".[239] The employer party to the forum is the Chamber of Mines and although there are numerous trade unions with recognition agreements with various firms in the mining industry, the Chamber of Mines bargains only four unions namely, NUM, UASA, Solidarity and the South African Equity Workers' Association (SAEWA).[240] According to the study, bargaining takes place in bargaining units which comprise of miners, artisans and officials. Although bargaining used to take place at mine level, a change occurred in 2005 which saw all bargaining units merging and a trend of bargaining at centralised level emerged. An agreement was reached in 1996 to the effect that bargaining on issues with "direct cost implications" must take place at the chamber level while bargaining on other issues such as organisation, operations and the workplace, should take place at mine level.[241]

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[237] *Ibid*.

[238] *Ibid.* According to Grogan, there is nothing stopping the parties from entering into agreements regulating such other matters as organisational rights even though these are regulated under the LRA.

[239] See Godfrey et al "The State of Collective Bargaining in South Africa" 63.

[240] Godfrey *et al* "The State of Collective Bargaining in South Africa" 63-64. The Chamber only engages in bargaining on behalf of coal and gold mining members "outside of the ambit of the Chamber's bargaining are covered by company or mine-level collective bargaining".

[241] Godfrey *et al* "The State of Collective Bargaining in South Africa" 66. The reality of the system is basically that members of the Chamber negotiate and "reach separate or individual deals with union parties, particularly in respect of wage rates" and the agreements concluded therefore reflect disparities in "wage rates and other conditions for different companies, although they are negotiated at the central forum". There is also a tendency, according to the study, of concluding "framework agreements … at the central level which set parameters for negotiations at mine or company level".

The criticism against this practice of bargaining, according to the study, is that it makes bargaining "complex", "protracted" and "confrontational" and the justifications for the system by the Chamber is that a "one size fits all" approach is inappropriate and that a flexible system is "advantageous".[242] The formation of a bargaining council was mooted in 2003 and a document was prepared by the Chamber which outlines contentious areas to be agreed upon.[243] A bargaining council in the mining sector, which is one of the biggest industries contributing to the South African economy, will go a long way in promoting orderly collective bargaining and thereby reducing protracted industrial action which often scares away potential investors.

Another sector which makes use of the system of the bargaining forum (and was a case study in the working paper by Godfrey *et al*) is the automobile industry. A bargaining forum, the National Bargaining Forum (NBF), was set up in 1990 and although it was characterised by adversarialism and instablility, it has gradually transformed with parties committing themselves to promote, *inter alia*, "the long term growth and viability of the industry and protection of jobs" and the elimination of "apartheid wage discrepancies".[244] The participants in the forum are NUMSA and the Automoblie Manufactures Employers' Organisation (AMEO). AMEO comprises seven original equipment manufacturers which are Toyota, VWSA, General Motors, Nissan, BMW, Ford and Daimler Chrysler.[245] One of the features of the agreement by the Forum which covers wide ranging issues is that it functions without a constitution, is voluntary, "has few rules and formalities" and "is not registered in any

[242] *Ibid*.

[243] Godfrey *et al* "The State of Collective Bargaining in South Africa" 71-72. The contentious areas include the council's scope, the criteria for the recognition of unions and employers' organisations, the bargaining levels and topics, the definition criteria for small and medium employers and the best ways of serving their interests, how sub-contractors would be dealt with, how the council will discharge its function of resolving disputes, how non-parties will comply with agreements, the extension of agreements to non-parties and the exemption body as well as the procedure for exemptions from council agreements.

[244]Godfrey *et al* "The State of Collective Bargaining in South Africa" 74.

[245]Godfrey *et al* "The State of Collective Bargaining in South Africa" 78. All employers are represented and at the time the Working Paper was written, NUMSA was representing over 25000 employees and was therefore representing "the vast majority of workers".

way".[246] Another key feature of the agreement is that although it "effectively prohibits dual-level bargaining", it "does provide for the negotiation of incentive schemes at plant level, gives guidance as to how such negotiations should take place, and also provides for the negotiation of a range of variations within parameters set by the NBF agreement".[247]

The bargaining forum has been lauded by the parties as having brought "significant achievements", "stability to the industry, as well as a greater predictability for employers".[248] There is real hope that the forum "will remain stable into the future" and that it will continue producing "what are generally seen as very sophisticated, cutting-edge agreements". [249] In their conceptual and empirical study, Godfrey, Theron and Visser state that in one of their interviews, it emerged that "the NBF agreement has been used by the Minister of Labour and the Governor of the Reserve Bank to impress the International Monetary Fund and World Bank with regard to the sophistication of industrial relations in the country".[250]

Although the forum is currently quite stable, there are fears that such stability may not last long. The union party plans "to create a mega bargaining council" which will include "the metal and engineering sector (and its bargaining council), the tyre sector (and its bargaining council), and the automobile sector (and the NBF).[251] The ambitious plan is to accommodate each sector "in a chamber within the mega council".[252] The employers, according to the study, seem to favour decentralised bargaining although they accept that "given NUMSA's power and the sort of pressure the union would bring to bear on employers"; there is very

[246] *Ibid*. Other features are that the forum has a dispute resolution function, that disputes regarding rights are settled "through arbitration and interest disputes" settled by conciliation and mediation failing which, the last resort is industrial action. Disputes arising at plant level and which "relate purely to the plant do not go to the NBF" but are resolved at plant level and the CCMA.

[247] Godfrey *et al* "The State of Collective Bargaining in South Africa" 79.

[248] *Ibid*.

[249] *Ibid.*

[250] *Ibid.*

[251]Godfrey *et al* "The State of Collective Bargaining in South Africa" 80.

[252] *Ibid.*

little likelihood of this happening".[253] If these differences are not resolved in an amicable way, then the future of the forum is uncertain.

## 2.5 Conclusion

Collective bargaining in South Africa takes place at various levels and is a complex process. The LRA does not prohibit plant-level bargaining and bargaining outside the statutory system. Trade unions still remain active in the bargaining process and the organisational rights that they are equipped with by the Act, coupled with the right to strike, are essential in assisting them to make their demands. Although the system of bargaining is now fairly entrenched, there is need to formulate deliberate strategies to ensure that it does not lose its vibrancy and that it remains the preferred method of resolving disputes. A constant review of the system is therefore important to identify and remedy its shortcomings.

The policy document by Godfrey *et al* identifies many challenges which the system of collective bargaining is grappling with.[254] The study made numerous reasoned policy recommendations on how to strengthen or revitalise the institution of collective bargaining to ensure that it does not lose its vibrancy and thereby remains the preferred method of resolving labour disputes in South Africa. Among the wide ranging recommendations is the proposition that the Department of Labour (DoL) should play a "proactive role in supporting bargaining councils" by developing "programmes to support and assist bargaining councils, disseminating best practices and coordinating systems and resources".[255]

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[253] *Ibid.*

[254] The authors cite challenges such as the decline of trade union membership due to decentralised production and a shift to services as well as the current definition of workplace in the LRA, the decline of plant or firm-level bargaining which they argue is evidence "that organisational rights have not been an adequate substitute for the duty to bargain", the challenges faced by parties in maintaining the required representivity thresholds and the strict interpretation of this requirement when extending bargaining council agreements, the negative effects of extending agreements to small non-party businesses, the failure by legislature to revisit the statutory council system despite overwhelming evidence that it is failing to achieve its intended purpose, the confusion regarding bargaining at plant level and bargaining councils and the failure of the legislature to revisit the workplace forum which still remains "a dead letter".

[255] Godfrey *et al* "The State of Collective Bargaining in South Africa" 104.

The study also proposes that there should be a more flexible approach in the interpretation of 'sufficient representivity' for the purpose of extending bargaining council agreements.[256] It argues that bargaining councils can also make efforts to meet the representivity thresholds by, for example, "incentivising participation".[257] Another recommendation, which is more drastic, is that the current system as envisaged by the LRA should be changed. The overhaul should start by re-introducing a justiciable duty to bargain which should replace organisational rights. Another recommendation is that the definition of 'workplace' should be revised given the fact there is now a shift from standard to non-standard employment.[258] The level of bargaining, which is often a contentious issue, can be resolved by "providing that the Labour Court can make an 'order' recommending to the parties the level at which bargaining should take place".[259]

The introduction of the duty to bargain will only create confusion and inconsistencies in the collective bargaining jurisprudence. The courts are not an appropriate platform to make determinations on collective bargaining matters. The study also proposes a revisitation of the workplace forum model and the creation of a "vehicle … that can develop productivity agreements, build workplace democracy and reduce adversarialism".[260] The authors argue that workplace forums can be utilised by unions "to address the problem of non-standard employees" which pose challenges for union organisation".[261] These wide ranging recommendations, if adopted by the policy makers, could revitalise and strengthen the institution of collective bargaining. Maintaining the vibrancy of the system is a challenge and there must be constant engagement by all stakeholders to identify its shortcomings and to formulate deliberate strategies to improve its efficacy.

[256] Godfrey *et al* "The State of Collective Bargaining in South Africa" 100.

[257] Godfrey *et al* "The State of Collective Bargaining in South Africa" 104.

[258] Godfrey *et al* "The State of Collective Bargaining in South Africa" 106.

[259] *Ibid*. Failure by an employer to comply with such an order would mean that "the union or unions can resort to power".

[260] Godfrey *et al* "The State of Collective Bargaining in South Africa" 107.

[261] *Ibid*.

Du Toit states that the process of collective bargaining is inherently adversarial in nature and suggests that in order to resolve disputes; it is necessary to promote worker participation and to avoid adversarial exchanges common in the ordinary bargaining process.[262] O'Regan argues that "[t]he process of collective bargaining accepts that management is the decision-maker and merely attempts by negotiation to affect those decisions".[263] The author quotes Brannen,[264] who states as follows:

> "[T]he development of collective bargaining does not in any central way impinge on the traditional forms of social relationships in industry. It does not challenge the basic division of the enterprise into the managers and the managed. Indeed, it might be seen as supporting that division …. The notion of management who have formal authority is exercised from the outside, so to speak, on those who have the right to give. In this sense the rights of management receive no major challenge from the process of collective bargaining …. Checks in the way managerial authority is exercised do not affect the principle; rather they underwrite it".

O'Regan also points out "that collective bargaining institutionalizes an adversarial approach to labour relations, which is not necessarily advantageous".[265] The author observes that:

> "Although autonomous worker organization and adversarial collective bargaining are essential, it may well be that co-operation within the enterprise should not be entirely excluded by collective bargaining".[266]

The above observations underscore the need to come up with innovative mechanisms to supplement the institution of collective bargaining. Collective bargaining cannot be the sole

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[262] D du Toit "Democratising the Employment Relationship" (1993) 3 *Stellenbosch Law Review* 325 at 331.

[263] C O'Regan "Possibilities for Worker Participation in Corporate Decision-making" (1990) *Acta Juridica* 113 at 119.

[264] P Brannen *et al The Worker Directors: A sociology of Participation* (1976) 240.

[265] O'Regan 1990 *Acta Juridica. Ibid.*

[266] *Ibid.*

panacea for a South African labour relations system with a history of adversarialism because by its very nature, it also institutionalises adversarial relations. O'Regan suggests that some challenges faced by the institution may be partly remedied by "increasing worker participation in decision-making in the enterprise …."[267] This is not to say, however, that worker participation must replace collective bargaining as the primary method of resolving labour disputes. It should play a supplementary role and parties should continue to explore other possible avenues offered by the new labour relations dispensation that would best serve their interests.

[267] *Ibid.*

## CHAPTER 3

## THE RIGHT TO ORGANISE: SCOPE OF ORGANISATIONAL RIGHTS

### 3.1 Introduction

Collective bargaining is an important process in promoting the interests of workers and peaceful industrial relations. Its effectiveness to trade unions is however dependent on a variety of factors, such as their strength and organisation. Trade unions can only bargain effectively if they are provided with adequate trade union rights. The LRA provides trade unions with numerous organisational rights which supplement their right to engage in collective bargaining.

The pre-1995 labour jurisprudence did not clearly define or grant organisational rights to trade unions. Trade union rights were often acquired through "the unfair labour practice jurisdiction of the Industrial Court".[268] Although the Act (old LRA) favoured a voluntarist approach to collective bargaining, the Industrial Court often used the wide unfair labour jurisdiction to coerce unwilling employers to the bargaining table, and in so doing, developed the duty to bargain jurisprudence. The intervention by the court in the bargaining arena meant that it was drawn to such issues as the determination of bargaining partners and topics.[269] In *Food & Allied Workers Union v Spekenham Supreme*,[270] the Industrial Court held that a voluntarist system of collective bargaining could not be relied upon without courts

[268] Explanatory Memorandum to the Draft Labour Relations Bill prepared by the Ministerial Legal Task Team, published in (1995) 16 *ILJ* 278 at 293. The Act only provided for a limited right to stop-order facilities.

[269] Explanatory Memorandum 292. The Ministerial Legal Task Team cautioned that "the fundamental danger in the imposition of a legally enforceable duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topis, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment". It unanimously adopted a model allowing "the parties, through the exercise of power, to determine their own arrangements". It argued that there was a "statutory impetus" for the exercise of such power in the form of "organisational rights and a protected right to strike".

[270] (1988) 9 *ILJ* 628 (IC).

intervening if the overall intention of the then labour relations system was to curb industrial unrest.[271]

The current labour relations jurisprudence does not expressly acknowledge the existence of a legally enforceable duty to bargain. It favours a system of voluntarism, albeit tampered by a variety of safeguards such as the right to have recourse to industrial action and a set of trade union rights. Mischke states that:

> "Organisational rights for trade unions are a pivotal part in the LRA's scheme of promoting and protecting collecting bargaining: they are a necessary corollary to the LRA's voluntarist collective bargaining approach, and provide trade unions with the essential elements for not only securing an organisational foothold in the employer's business, but also laying the foundations for a future collective bargaining relationship."[272]

Grogan states that unions, as custodians of workers interests and with a primary purpose of engaging in collective bargaining on behalf of their members, should be protected by law to ensure that they are not rendered ineffective by employers and their associations, who are often in a stronger position during bargaining processes.[273] The author further states that the law provides basic or minimum trade union rights which can be expanded through the

[271] Para [629D-E]. The court also found that since the overriding consideration in labour relations was fairness, it was time for it to state "firmly and unequivocally that in general terms it is unfair for an employer not to negotiate bona fide with a representative union".

[272] C Mischke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA" (2004) *CLL* 13 (6) 51at 60. The author further states that "collective bargaining, in its essence, is about power, counter-balanced by the power of the other party. In the absence of organisational rights, it would be difficult indeed for a trade union to gain the power it needs to function effectively in representing the interests of its members".

[273] Grogan *Collective Labour Law* 47. Mischke states that "[o]rganisational rights make it possible for a trade union to build up, consolidate and maintain a power-base of sufficient strength among the employer's employees … it is only once the union has attained sufficient strength, that it can exercise sufficient economic power on the employer to compel the employer to bargain on wages and other terms and conditions of employment".

process of collective bargaining.[274] The importance of organisational rights cannot be overstated. They are fundamental in the exercise of the broader right to organise and to engage in collective bargaining. These latter rights would be nothing but hollow rights without the support of organisational rights. It is now trite law that the absence of a duty to bargain was not an oversight by the drafters of the LRA. Organisational rights constitute a firm base from where trade unions can build bargaining relationships with employers and to maintain a robust presence in the workplace.[275] Statutory entitlement to these rights reduces, to a certain extent, the burden on trade unions of having to resort to coercive power to acquire and exercise them. The LRA provides for orderly acquisition of such rights, which leaves little room for disputes.

The purpose of this chapter is to give an overview of various trade union rights and the procedure for their acquisition and exercise. It will highlight the importance of such rights to trade unions in the collective bargaining process, the procedure for the resolution of disputes regarding their acquisition and exercise and will also briefly comment on the obligations incurred by South Africa as a Member State of ILO and the SADC as well as the framework for the acquisition and exercise of organisational rights in other jurisdictions.

## 3.2 The legislative framework: Acquisition and exercise of organisational rights under the LRA

Mischke states that a constitutionalised right to organise in s 23 implies that organisational rights provided for by the LRA are anchored on the Constitution.[276] The LRA gives effect and content to the right to organise by providing a detailed framework for the acquisition and exercise of organisational rights. The only requirements for the acquisition and exercise of such rights are that trade unions must be registered and achieve the required thresholds of representivity.

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[274] *Ibid*.

[275] Basson *et al Essential Labour Law* 36.

[276] Mischke 2004 *CLL* 53.

In terms of s 21(1) of the LRA, a trade union can initiate the process of acquiring and exercising any of the rights provided by the LRA by notifying the respective employer in writing about its intention. In terms of s 21(2), the notice of intention must be forwarded together with a trade unions' certificate and trade unions are obliged to specify the workplaces where they wish to exercise the rights, their representative status and the facts relied upon to prove that they meet the required thresholds of representivity. The rights which a trade union wishes to exercise and the manner of exercise must also be specified. An employer is thereafter required to meet the trade union for the purpose of attempting to enter into a collective agreement as to how the right or rights will be exercised.[277] Grogan states that the wording of the section is couched in "both permissive and peremptory language …."[278]

The employer must meet the union but is not obliged to enter into an agreement. In terms of s 21(4) and (5), the CCMA may be approached by either party, failing the conclusion of a collective agreement, and the party initiating the process must prove that it has served the other party with a referral copy. In attempting to resolve the attendant dispute, a commissioner of the CCMA is obliged to first attempt to conciliate the matter, failing which settlement by arbitration may be requested by either party.[279] A trade union may call a strike in lieu of arbitration and such an action can be embarked upon after the lapse of the conciliation period.[280] Failure by an employer to allow the union to exercise organisational rights as directed by the CCMA or a collective agreement leaves the union with no other option other than to approach the Labour Court for an order compelling the employer to allow it to exercise the rights.[281]

[277] See s 21(3).

[278] Grogan *Collective Labour Law* 58.

[279] See s 21(7).

[280] See s 65(2) (a).

[281] See s 158(1) (b) and (c).

In terms of s 21(8) of the LRA, if a dispute between the a trade union and an employer is about whether the trade union meets the required representative thresholds to claim and exercise organisational rights, a commissioner is obliged to minimise the multiplication of trade unions in a workplace and to promote trade union representativity in a particular workplace. The financial and administrative burden attendant on the process of granting organisational rights, which is borne by employers, must also be minimised. The commissioner must also be guided by other considerations such as the: "nature of the workplace", "nature of the one or more organisational rights that the trade union seeks to exercise", "nature of the sector in which the workplace is situated", and "organisational history at the workplace or any other workplace of the employer".[282]

A trade union which ceases to meet the required thresholds of representation may lose organisational rights previously enjoyed in a particular workplace. In terms of s 21(9), a commissioner may inquire about the representative status of a trade union which may include conducting a ballot of affected employees. Employers are obliged by s 21(10) to co-operate with the commissioner in making an inquiry about the representative status of the trade union. In terms of s 21(11), a trade union may lose organisational rights at the initiation of an employer which may apply to the Commission for the withdrawal of such rights. The provisions regulating referral of disputes to the CCMA apply in such a process.

A registered trade union with a majority membership of employees employed by an employer or bargaining council parties may conclude a collective agreement with that employer stipulating the representativity thresholds for acquiring the right to access the employer' premises, the right to have the employer deduct trade union levies or subscriptions and the right of employees who are office-bearers of a trade union to take reasonable leave to perform trade union functions. Section 18(2), however, provides that such a collective agreement will only have a binding effect if the representativity thresholds are equally applied to any trade union seeking to exercise the same organisational rights. The ss 12 and 13 organisational rights are extended to all trade unions that are parties to a bargaining

[282] *Ibid.*

council in workplaces falling within the scope of such council without any inquiry whether they meet the required thresholds of representativity.

### 3.3 Unrepresentative unions: Are they entitled to acquire organisational rights?

The LRA, in terms of s 21, provides a clear framework on how organisational rights should be acquired and how disputes regarding the claim and exercise of such rights should be resolved. The question whether the Act provides for an exclusive framework was once a contentious issue. The requirement that unions can only claim organisational rights if they are registered and representative means that unregistered and unrepresentative trade unions do not qualify for these rights and therefore cannot claim them. This issue was extensively explored in the *Bader Bop* case.[283] As noted by Grogan, "[t]he Labour Appeal Court majority judgments stood or fell on the assumption that any union seeking to acquire organisational rights must follow the procedure prescribed by section 21 of the LRA".[284] The silence of the Act on how unregistered and unrepresentative unions should acquire organisational rights can easily be read to mean that these rights are not extended to these unions and that s 21 provides for an exclusive framework. Another assumption is that whilst representative trade unions are automatically granted these rights, trade unions which do not meet the thresholds of representivity are permitted to acquire such rights through the ordinary process of collective bargaining and strike action.[285]

The pertinent issues raised in *Bader Bop* were, amongst other things, whether the Act provides for an exclusive framework for the acquisition of organisational rights and the exact meaning of s 20 of the LRA which provides that organisational rights can be regulated through collective agreements, notwithstanding the fact that there is a process prescribed by s 21 of the Act. The interpretation accorded to this provision by NUMSA was that a trade union which could not make use of the framework provided for by the Act due to its lack of

[283] *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd & Another* (2003) 24 *ILJ* 305 (CC).

[284] Grogan *Collective Labour Law* 59.

[285] Grogan *Collective Labour Law* 60.

representivity can still proceed to attempt to claim organisational rights albeit outside the statutory framework and through collective bargaining. The interpretation adopted by the Constitutional Court was that the LRA:

> "[E]xpressly confers enforceable organisational rights on … unions that are either sufficiently representative (ss 12, 13 and 15) or majority unions (ss 14 and 16). These are enforceable rights and the mechanism for their enforcement is also provided by part A. That mechanism is conciliation and arbitration. Unusually, in the overall scheme of the Act, unions and employers are given a choice between arbitration and industrial action should conciliation fail. There is nothing in part A of chapter III, however, which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards. These are matters which are clearly of 'mutual interest' to employers and unions and as such matters capable of forming the subject of collective agreements and capable of being referred to the CCMA for conciliation, the condition precedent for protected strike action."[286]

The Constitutional Court effectively found that s 20 was not merely a "clarificatory" provision as ruled by the Labour Appeal Court, but a "dominant provision … to which all other provisions are subject".[287] The Constitutional Court adopted a broad interpretation, which recognised two procedures for acquiring organisational rights.[288] The first procedure is obviously that which is provided for by s 21 and the second is that which is provided by s 134.[289] An unrepresentative trade union is not bound to follow the s 21 procedure if there is no dispute about its representativeness. A union which admits that it does not meet the required thresholds of representativity can proceed "to refer a dispute in terms of section 134, and to strike in support of a demand that the employer enter into a recognition agreement

[286] Para [40].

[287] Grogan *Collective Labour Law* 61.

[288] Grogan *Collective Labour Law* 62.

[289] *Ibid*.

regulating those rights".[290] The Constitutional Court chose or adopted an interpretation that sought not to limit the rights of minority unions to engage in collective bargaining and to strike.[291]

Chicktay disagrees with the approach and interpretation adopted by the Constitutional Court.[292] The author criticises the judgment of the court as "it sought to bastardize the language of the Act and maintain its validity".[293] He contends that the judgment of the court is "clearly mistaken" and attempts to advance this argument by stating that the emphasis on the 'representivity' requirement by the LRA means that the drafters clearly intended that minority unions are not entitled to these rights and therefore cannot make use of the right to recourse to industrial actions in support of a demand to acquire such rights.[294] The author argues that extending the application of s 20 to unrepresentative trade unions effectively renders the provisions on representivity meaningless and that the correct procedure which the court should have adopted was to have found s 21 and s 65(2) unconstitutional, as such sections failed to extend the right to organise to minority unions.[295] The author goes on to state that minority unions were not sufficiently protected by the ruling of the court as it merely found that they can strike in support of demands to acquire such rights without any other safeguards, such as the right to refer disputes regarding acquisition for such rights for arbitration.[296]

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[290] *Ibid*.

[291] Grogan *Collective Labour Labour Law* 61.

[292] MA Chicktay "Democracy, Minority Unions and the Right to Strike: A Critical Analysis *Numsa v Bader Bop (Pty) Ltd* 2003 2 BCLR (CC) (2007) 28 *Obiter* 159.

[293] *Ibid*.

[294] Chicktay 2007 *Obiter* 162.

[295] *Ibid*.

[296] Chicktay 2007 *Obiter* 165. Apart from the criticism that the LRA denied minority unions "significant protection", the author also argues that the interpretation adopted by the court also raises fears of future uncertainties on the interpretation of the LRA, particularly some "sections of the LRA that have clear majority requirements necessary to acquire rights". He gives an example of sections 25(2) and 2692) of the LRA, which provide that closed shop and agency agreements can be concluded only by a majority union and the employer. The implication of the Constitutional Court judgment, as argued by the author, is that unrepresentative or

Although the judgment of the Constitutional Court must be applauded for extending some protection to unrepresentative unions, it is doubtful whether the right to strike will be an effective weapon or a guarantee that minority unions will successfully claim and exercise organisational rights as majority unions. Chicktay correctly asserts that while strikes have proven to be useful weapons for trade unions with majority memberships, they can actually be ineffective and erode the leverage of a minority union to pursue its interests at the workplace.[297] The court missed an opportunity to fully canvass the issue, as expected from a court with a final say on constitutional matters, and overlooked certain important considerations, such as the importance of organisational rights to small unions; which do not have the collective strength to engage and bargain effectively with employers.

Failure by the court to pronounce as unconstitutional the absence of a clear framework for the acquisition and exercise of organisational rights by unrepresentative unions is a glaring oversight. Although an established trade union may find it easy to bargain with an employer through the threat or reality of a strike or by being a party to a bargaining council, the same cannot be said for a small union which, as put by Mischke, may find it a difficult task to build a presence at an employers' organisation without some legislative intervention.[298] The relevant provisions of the LRA are therefore defective in that they only recognise representative trade unions as qualifying for acquiring organisational rights and unrepresentative trade unions are left to use the onerous and tedious means such as collective bargaining and industrial action.

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minority unions can strike in support of a demand "to enter into such agreements despite the clear wording of the Act".

[297] Chicktay 2007 *Obiter* 163.

[298] Mischke 2004 *CLL* 60.

## 3.4 The impact of International Labour Organisation standards and the SADC Charter of Fundamental Social Rights

In terms of s 3(a) of the LRA, the relevant international law obligations applicable to South Africa must be taken into account when interpreting the provisions of the Act. The ILO played a significant role in the drafting of the 1995 LRA and its most important principles, such as the right to freedom of association, the right to organise, the right to engage in collective bargaining and organisational rights, are included in the Act. The FFCC of the ILO made numerous recommendations in 1992 about the state of South African labour relations in response to complaints lodged by COSATU against the LRA of 1956 and its proposed amendments.

The complaint by COSATU was that the industrial relations system which existed then was "incompatible with the principles of freedom of association" and that they were measures and acts being "taken or susceptible of being taken by the government against trade unions and their members …."[299] Although the Commission made recommendations on wide ranging matters, the most important for the purposes of this chapter were those concerning freedom of association and the right to organise. On the complaint by COSATU about the interference of the legislature on the constitutions of trade unions, the Commission reiterated the principles of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) which stated that it was not usual for the laws regulating trade unions to prescribe the contents of constitutions of trade unions in the form of detailed interventions such as how trade unions should manage their funds, the eligibility criteria for trade union office and how officials should be elected. Legislative interventions were however not to be dismissed as anti-trade union measures especially if they were purely a formality and public authorities did not enjoy an unfettered discretion to approve the rules.[300]

[299] See "Prelude to Change Industrial Relations Reform in South Africa" (1992) 13 *ILJ* 739 at 740. See also S Saley, P Benjamin "The Context of the ILO Fact-Finding and Conciliation Report on South Africa (1992) 13 *ILJ* 731.

[300] Para 580.

Although the Commission found s 8(1) of the old LRA to contain prescriptions and topics which trade union constitutions were to contain, it made a general finding that they were not a grave inroad on the freedom of trade unions to determine the contents of their own constitutions and rules. It however found s 8(4)(a)(iv) of the Act to be "too widely expressed" and that it gave "the Registrar an unfettered discretion to allow or disallow a particular provision in a trade union constitution". The Commission also examined section 4(5) (a) (ii) of the Act, which stated that the Registrar had discretion not to register a trade union when satisfied that such a union's constitution had provisions offending "the provisions of any law or … calculated to hinder the attainment of the objects of any law or … unreasonable in relation to the members of the public".[301] Its recommendation was that the provision gave rise to the risk of interference in what a trade union constitution should contain.[302]

On the protection of the right to organise, the Commission reiterated the argument advanced by the Committee on Freedom of Association (CFA) that trade unions cannot function freely and independently when there is "a climate of violence and uncertainty".[303] It found that there was overwhelming evidence of violence against trade unions and recommended that all necessary steps be taken by the government to make sure that the principles of ILO on freedom of association are implemented.[304]

The Commission also found that there were restrictions on access especially in mines, farms and the domestic sector. It found that the sectors where there was restriction of access employed "very large numbers of the South African workforce" and that the exclusion of domestic workers and farm workers by the LRA meant that trade unions had no legislated right to contact workers, which also meant that proceeding against employers for flouting fair

[301] *Ibid*.

[302] Para 583.

[303] Para 671.

[304] See para 687. Other sections found to be incompatible with the principle of freedom of association were s 8(6) which restricted political activities of trade unions, section 12, which gave the Registrar wide powers to interfere in internal affairs and elections of trade unions and s78 (1C)(a), which prohibited unregistered unions from acquiring stop-order facilities without ministerial approval.

labour practices was not possible. Its recommendation was that the LRA should extend its protection to these "categories of workers" and that "workers, and trade unions seeking to represent them, should be assured by law of the opportunity to function freely and undertake the activities envisaged by Article 3 of Convention No 87".[305] An important recommendation by the Commission was that all impediments to organisational rights be removed.[306]

The most important ILO conventions on the right to organise and organisational rights are the Freedom of Association and Protection of the Right to Organise Convention and the Right to organise and Collective Bargaining Convention.[307] Article 2 of the former Convention provides that "[w]orkers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation". Article 3 of the same Convention states that "[w]orkers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes". It further states that "public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof".

Article 2 of the Right to organise and Collective Bargaining Convention states that: "[w]orkers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration". It further provides that:

> "[A]cts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such

[305] Paras 695, 696 and 697.

[306] Paras 697-719.

[307] 1948 (No.87) and 1949 (No.98) respectively.

organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference…."

Article 3 provides that "[m]achinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise…."

The SADC Charter of Fundamental Social Rights also has provisions on freedom of association and organisational rights. Article 4 provides that "Member States shall create an enabling environment consistent with ILO Conventions on freedom of association, the right to organise and collective bargaining …" for the purposes of, amongst other things, ensuring that workers and employers of the SADC region have the right to form and join trade unions and employers organisations respectively. The Article also provides for organisational rights for trade unions and lists such rights to include accessing "employers' premises for union purposes subject to agreed procedures", deducting "trade union dues from members' wages", electing trade union representatives and "the right of trade unions to disclosure of information". Article 5 provides that "Member States shall take appropriate action to ratify and implement relevant ILO instruments and as a priority the core ILO Conventions", and that "Member States shall establish regional mechanisms to assist Member States in complying with the ILO reporting system". South Africa, as a Member State of SADC, is obliged to respect and promote the rights provided by the Charter.

## 3.5 The scope of organisational rights

### 3.5.1 The right to access employers' premises

Accessing employers' premises by trade union officials and representatives is important in the exercise of the broader right to organise. Trade union officials or representatives must maintain reasonable contact with members. Such contact not only enables officials or representatives to keep abreast with developments at the workplace but also allows them the opportunity to recruit new members. Entitlement to this right is extended to all trade unions

which are registered and representative.[308] The right serves the purpose of ensuring that the interests of trade union members are effectively served and that unions maintain and increase their support base.[309] The broad right to organise cannot be a practical right if trade union officials or representatives do not maintain reasonable presence at the workplace or employers' premises. Grogan states that "no union, whatever its support base, can effectively serve its members' if it cannot meet them in the workplace".[310]

In terms of s 12(1), officials of representative trade unions can access the premises of employers for the purpose of communicating with members, to recruit new members or to serve the interests of members. Section 12(2) provides that access can also be for the purpose of holding meetings with employees outside their working hours. Section 12(3) provides that the premises can also be used to hold an election or ballot provided for in a union's constitution. The potential for disruptions or undue interruptions of operations is averted by reasonable limitations of this right. The LRA provides that the exercise of the right is limited by "any conditions as to the time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work".[311] The reasonableness of this limitation cannot be overemphasised. Trade unions owe it to their members to maintain a robust presence at the workplace in order to effectively serve their interests but this should not prejudice the employer. The right to access employers' premises is not heavily regulated save for an exception with regard to the domestic sector, where the Act provides that "the right to access does not include the right to enter the home of the employer without consent".[312] Employees falling within the category of the "domestic sector" are described by

[308] A representative trade union is described in s 11 as "a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace".

[309] Grogan *Collective Labour Law* 49.

[310] *Ibid*.

[311] See s 12(4).

[312] See s 17(2) (a).

the LRA as those performing domestic work in the home of their employers or on property where the home is situated.[313]

To prevent unnecessary disputes, one would expect that a trade union entitled to this right, takes the initiative to engage an employer on whose premises the right is to be exercised on how best to exercise such a right. There can be no doubt that accessing the premises for whatever purpose as provided in the Act should be done with due regard to the sensibilities and needs of the employer. A practical solution to avoid potential disputes would be to conclude collective agreements on how such a right should be exercised. This would certainly leave little room for conflict. There is obviously no need for a far reaching policy intervention on how this right should be exercised. Parties can enter into agreements on how this right should be exercised and disputes can be resolved through the CCMA.

### 3.5.2 The right to collect union fees

Trade unions rely on membership subscriptions for funding. Section 13 provides for the "deduction of trade union subscriptions or levies". The Act provides for stop-order facilities. The drafters of the LRA were obviously aware that unions have to be assisted to collect subscription fees. Trade unions cannot effectively represent their members' interests without proper mechanisms to collect union fees. Stop-order facilities are a convenient way of collecting union fees and the Act provides that employees "may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages".[314] A written authorisation from an employee obliges the employer to deduct and remit the authorised amount to the trade union no later than the fifteenth day of the month first following the date each deduction was made.[315] After every monthly remittance an employer must furnish the union with a list of names of members from whom the deductions

[313] See s 17(1).

[314] See s 13(1).

[315] See s 13(2).

have been made, details of the deductions so made, the period to which they relate and also copies of notices of revocation, if any.[316]

The Act further provides that employees "may revoke an authorisation given in terms of subsec (1) by giving the employer and the representative trade union one month's written notice or, or if the employee works in the public service, three month's written notice".[317] After receipt of the notice, the employer must continue with the authorised deductions "until the notice period has expired and then must stop making the deduction".[318]

The statutory obligation to assist in the collection of union fees might be viewed as burdensome by some employers. The drafters of the Act obviously recognised the importance of funding to unions. Without adequate funding, unions cannot provide adequate services to their members.

### 3.5.3 The right to elect shop stewards

The Act entitles members of trade unions acting alone or jointly representing the majority of employees in a particular workplace, the right to elect shop stewards.[319] A union can elect shop stewards in a workplace where ten or more members of the trade union are employed. The role of a union representative as defined by s 14(4) is to render assistance to employees in grievance and disciplinary proceedings at their request, to monitor compliance of employment policies and collective agreements by employer and to report non-compliance or contravention to management, the union or any responsible authority. The constitution of a union should spell out the procedures for nomination, election, terms of office and removal

[316] See s 13(5).

[317] See s 13(3).

[318] See s 13(4).

[319] See s 14(2).

from office of union representatives.[320] In terms of s 14(5), shop stewards have a right to take reasonable leave to perform their functions and for training purposes. Employees who are office bearers of representative trade unions or federations of trade unions to which the representative trade unions are affiliated are "entitled to take reasonable leave during working hours for the purpose of performing the functions of that office".[321] An agreement can be entered by the trade union and the employer regulating the conditions of such leave.[322]

Shop stewards are the lifeblood of trade unions. Grogan describes them as "the infantry of the trade union".[323] They are at the grassroots level and as such are abreast with developments at the workplace. To many employees, the presence of shop stewards at the workplace serves as a sign that their interests are well looked after. They however occupy a delicate position in that they are "a conduit between management and the workplace … and between the workforce and the union itself".[324] Trade union representatives therefore effectively serve both management and the trade union. This should naturally lead to disputes. In an attempt to protect union representatives from being victimised for performing their functions, the Code of Practice: Dismissal provides that any disciplinary action against shop stewards should be preceded by informing and consulting with their unions.[325] There are a number of reported cases involving dismissals of union representatives. The suggestion by Grogan is that there must be an attempt to establish "the dominant reason for the dismissal" in such cases followed by a determination "whether that reason relates to the performance by the shop steward of his or her duties". If a shop steward is dismissed for a reason related to the performance of his or her duties, then such a dismissal is "automatically unfair, and the shop steward will invariably be reinstated".[326] Grogan further states that even if the dominant

[320] See s 14(3).

[321] See s 15(1).

[322] See s 15(2).

[323] Grogan *Collective Labour Law* 49.

[324] *Ibid*.

[325] Item 4 (2).

[326] Grogan *Collective Labour Law* 52. See also *Kroukan v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC). Grogan states that the case attempts to formulate a "test for evaluating the evidence in cases in which the

reason for dismissal is related to the performance by the shop steward of his or her duties, the conduct must not be "unacceptable" or dishonest "in other respects".[327]

In the case of *Adcock Ingram Critical Care v Commission for Conciliation, Mediation & Arbitration,*[328] the utterances of a shop steward: "You can treat this as a threat … there will be more blood on your hands", were a ground for dismissal by the employer.[329] The utterances were made at a meeting whose agenda was to end a protracted violent strike.[330] The finding of a presiding officer at a disciplinary hearing was that the words were to be construed as a threat and not just a mere warning. A commissioner of the CCMA found nothing wrong with the utterances and attempted to justify his finding by posing the following question:

> "Does this imply that the next time a vociferous and determined spokesperson acting on behalf of his/her constituency uses a threat as part of his negotiation tactic to put pressure on the management team to accede to his demands, that he too will run the risk of disciplinary action?"[331]

The finding of the commissioner was confirmed by the Labour Court.[332] The court emphasised the importance of parties treating each other as equals in the bargaining process. The court was of the view that it was quite natural for meetings for the purposes of

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employer purports to rely not only on the manner in which the shop steward conducted his activities as such, but also on alleged misconduct in the ordinary sense". In the case, the reason for dismissing a shop steward was for his participation in the "litigation against management". The court held that the dismissal undermined the protection that the Constitution conferred on union representatives or officials and employees against victimisation in exercise of their statutory and constitutional rights.

[327] *Ibid*.

[328] (2001) 22 *ILJ* 1799 (LAC).

[329] Para 1.

[330] Para 2.

[331] Para 6.

[332] (2000) 21 *ILJ* 1752 (LC).

bargaining to "degenerate" and added that giving "an employer the right to discipline an employee sitting as an equal opposite to him" defeats the whole purpose of such a meeting as it undermines "the whole process".[333] The court however cautioned parties not to seize such opportunities "to abuse or intimidate or license criminal acts".[334] A party aggrieved by the conduct of another may disengage from the "bargaining process for lack of any constructive discussion ... or if any criminal act is committed to call the police".[335]

The Labour Appeal Court heard an appeal against the decision of the Labour Court.[336] The court held that the finding of the commissioner "that when one acts in a representative capacity anything goes" was improper.[337] Whilst accepting that the reality of the bargaining process means that "meetings often degenerate", the court pointed out that this "does not mean that one should jettison the principle that as in the workplace also at the negotiating table the employer and the employee should treat each other with the respect they both deserve".[338] It further stated that "assaults and threats thereof are not conducive to harmony or to productive negotiation" and although an aggrieved party may invoke criminal law, it "is the last thing one looks for in the bargaining process".[339] The court confirmed the option of pulling out of negotiations "in the face of abuse" mooted by the Labour Court but seemed to favour "the inhibitory effect of possible disciplinary action in case of serious transgressions" which it opined "would lubricate the process into civility …."[340] It is thus expected that union representatives should exercise their rights with care and that "employers may not abuse their disciplinary powers to deter shop stewards from exercising their functions in good faith".[341]

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[333] Para 16.

[334] *Ibid*.

[335] *Ibid*.

[336] See particularly para 15 of the judgment.

[337] Para 14.

[338] Para 15.

[339] *Ibid*.

[340] *Ibid*.

[341] Grogan *Collective Labour Law* 53-54.

The delicate position occupied by shop stewards means that without protection, it is difficult for them to perform their duties fearing victimisation or dismissals. Trade union representatives are an integral and important part of the trade union movement and their functions must not be interfered with in any way.

According to s 14(2), more than ten members in a workplace entitle them to elect two shop stewards. If members of a trade union are more than fifty in a workplace, members are entitled to elect two trade union representatives for the first fifty members and one more representative for every fifty additional members to a maximum of seven members. In workplaces where a union has more than three hundred members, such members can elect seven shop stewards and one additional shop steward for hundred members more provided that the number does not exceed ten. A union is entitled to ten shop stewards in a workplace where more than six hundred members are employed. A union is also entitled to one additional shop steward if there are two hundred additional members provided that the number of shop stewards does not exceed twelve. One thousand members in a workplace entitle a trade union to twelve shop stewards and one additional shop steward for every five hundred additional members to a maximum of twenty.

### 3.5.4 The right to disclosure of information

Du Toit *et al* sum up the importance of the right to disclosure of information as follows:

> "Orderly collective bargaining and the effective resolution of labour disputes presuppose attempts at rational conciliation as a precursor to any power play invoked as a last resort. And, in order to be rational, conciliation and negotiation must be intelligent, informed and predicated upon each side having had an opportunity to refute the factual basis and interpretation of the other side's proposals or to recommend viable alternatives. Without the true facts adjustment is less probable, and premature or unnecessary industrial action the likely consequence. In which event the primary purpose of the legislation will have been undermined…. The sufficient disclosure of relevant information lies at the heart of the legislative endeavour to

bring about orderly collective bargaining, greater worker participation and the harmonious resolution of industrial disputes."[342]

Effective collective bargaining cannot take place in the absence of information relevant to the negotiations. The contention by trade unions is that "rational collective bargaining cannot proceed effectively unless it is informed" whereas employers, "on the other hand … regard the demand for greater disclosure as an intrusion upon the managerial prerogative and an unjustifiable invasion of privacy rights".[343] The Act provides that majority unions have a right to information.[344] To claim this right, "a registered union or two or more registered trade unions acting jointly" must "have as members the majority of the employees employed by an employer in a workplace".[345] This right, like the right to elect shop stewards, can only be claimed by trade unions with a majority membership in a workplace. Employers are obliged to make available or disclose "relevant information" to representatives of trade unions for the purposes of assisting such representatives "to perform effectively the functions referred to in s 14(4)".[346] The section also obliges employers when "consulting or bargaining with a representative trade union" to "disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining".[347]

The Act however provides that employers are not obliged to disclose information "that is legally privileged", that cannot be disclosed "without contravening a prohibition imposed on the employer by any law or order of any court", "that is confidential and, if disclosed, may

[342] D Du Toit *et al The Labour Relations Act of 1995* (1998) 148.

[343] *Ibid.* The authors state that the misgivings by employers are that "disclosure is frequently administratively burdensome, can be compromising and personally embarrassing, or may undermine the security, competitiveness or viability of the enterprise".

[344] See s 16.

[345] See s 16(1).

[346] See s 16(2).

[347] See s 16(3).

cause substantial harm to an employee or the employer" and information "that is private personal information relating to an employee, unless that employee consents to the disclosure of such information".[348] Section 17(2)(b) provides that the right does not apply in the domestic sector.

In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd,*[349] the court held that the purpose of disclosure should be to make the process of collective bargaining meaningful.[350] The approach adopted by the court in *National Union of Metalworkers of SA v Metkor Industries (Pty) Ltd,*[351] per Roth AM, was that "it seems to … be lawful, just and equitable that management should be obliged to disclose only such information as would reasonably enable employees to consider the consequences that that information held for them".[352] This construction was criticised by Du Toit *et al* as being too conservative. The authors argue that "[t]he policy of the new law stretches beyond this cautious reticence". They state that "[t]he effective interaction required by section 16 must be construed in the light of the Act's objectives to promote orderly collective bargaining and employee participation in decision-making in the workplace". They describe the test as formulated in the case as too narrow and that "the greater the extent of discussion, the greater the prospects of a harmonious workplace".[353]

With regards to confidential information, an employer must inform a trade union representative or union in writing that any information disclosed is confidential. By so doing, such information is confined to the negotiations. Employers can also ask trade unions to give undertakings to preserve confidential information. In *Atlantis Diesel Engines (Pty) Ltd v*

[348] See s 16(5) (a)-(d).

[349] (1993) 14 *ILJ* 642 (LAC).

[350] Para 652B.

[351] (1990) 11 *ILJ* 1116 (IC).

[352] Para 1124A.

[353] See Du Toit *et al The Labour Relations Act* 150.

*National Union of Metalworkers of SA*,[354] the court held that an employer's failure to make available to a trade union some confidential information in the absence of an undertaking by such a trade union to preserve confidentiality was not unfair, unreasonable or improper.[355]

In the United Kingdom, the ACAS Code of Practice for the Disclosure of Information to Trade Unions for Collective Bargaining Purposes[356] provides various factors to be considered in attempting to determine the relevance of information. The Code provides that:

> "The absence of relevant information about an employer's undertaking may to a material extent impede trade unions in collective bargaining, particularly if the information would influence the formulation, presentation or pursuance of a claim, or the conclusion of an agreement. The provision of relevant information would be in accordance with good industrial relations practice."[357]

The Code provides that in determining what information is relevant "negotiators should take account of the subject-matter of the negotiations and the issues raised during them; the level at which negotiations take place … the size of the company; and the type of business the company is engaged in".[358] The United Kingdom Trade Union and Labour Relations (Consolidated) Act, (TULRCA)[359] provides, like the South African LRA, for restrictions on the general duty to disclose information by employers. The Act provides that an employer is not required to disclose information "which would be against the interests of national security", which when disclosed will contravene "a prohibition imposed by or under an

[354] (1994) 15 *ILJ* 1247 (A).

[355] Para [1255A].

[356] Available at http://www.acas.org.uk/media/pdf/2/q/CP02_1.pdf (accessed on 08 April 2010). Also see H Gospel *et al* "The Right to Know: Disclosure of Information for Collective Bargaining and Joint Consultation" (2000) Centre for Economic Performance, London School of Economics and Political Science. Available at http://ideas.repec.org/p/cep/cepdps/dp0453.html (accessed on 12 April 2010). The authors state that the disclosure of information in the UK in 1970s was mainly for the purpose of collective bargaining and that a shift occurred in the 1980s and 1990s, with "a new emphasis on disclosure as part of joint consultation at work".

[357] Item 9 of the Code.

[358] Item 10.

[359] 1992.

enactment", "which has been communicated to him in confidence, or which he has otherwise obtained in consequence of the confidence reposed in him by another person", "which relates specifically to an individual (unless that individual has consented to its being disclosed)", "which would cause substantial injury to his undertaking for reasons other than its effect on collective bargaining" or which has been "obtained by him for the purpose of bringing, prosecuting or defending any legal proceedings".[360]

TULRCA provides that:

> "An employer who recognises an independent trade union shall, for the purpose of all stages of collective bargaining about matters, and in relation to descriptions of workers, in respect of which the union is recognised by him, disclose to representatives of the union, on request, the information required by th[e] section."[361]

The Act provides that such information might include that "without which the trade union representatives would be to a material extent impended in carrying on collective bargaining" with the employer and that "which it would be in accordance with good industrial relations practice that he [the employer] should disclose to them [trade union representatives] for the purposes of collective bargaining".[362] It further states that to determine "what would be in accordance with good industrial relations practice, regard shall be had to the relevant provisions of any Code of Practice issued by ACAS, but not so as to exclude any other evidence of what the practice is".[363]

The ACAS Code of Practice lists information which might cause substantial injury to the employer as including, "cost information on individual products, detailed analysis of proposed investments, marketing or pricing policies; and price quotas or the make-up of

[360] S 182(1) (a)-(f).

[361] See s 181(1).

[362] See s 18(2) (a) and (b).

[363] See s 181(4).

tender prices".[364] It further provides that "substantial injury may occur if, for example, certain customers would be lost to competitors, or suppliers would refuse to supply necessary materials, or the ability to raise funds to finance the company would be seriously impaired as a result of disclosing information".[365] The onus that disclosure will be detrimental to the company's interests rests with the employer.[366]

The LRA provides for a framework for dispute resolution. A party may refer a dispute to the CCMA which must first attempt to resolve it through the process of conciliation, failing which the dispute can be arbitrated.[367] The Act provides guidelines as to how a commissioner should attempt to resolve "any dispute about the disclosure of information contemplated in subsec (6)".[368] A commissioner is obliged to determine first the relevance of the information requested. If such information is relevant but is that which is "contemplated in subse (5) (c) and (d)" of s 16, the commissioner is obliged to attempt to:

> "[B]alance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14(4) or the ability of a trade union to engage effectively in consultation or collective bargaining".[369]

A commissioner may order that the information requested be disclosed if "the balance of harm favours the disclosure of the information" on conditions aimed at minimising any harm which might be caused to an employee or employer.[370] The Act also obliges a commissioner

[364] Item 14.

[365] Item 15.

[366] *Ibid*.

[367] See s 16(6), (8) and (9).

[368] See s 16(10).

[369] See s 16(11).

[370] See s 16(12).

to "take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information which might be otherwise be disclosed for a period specified in the arbitration award".[371] Any dispute concerning "any alleged breach of confidentiality" may prompt the commissioner to make an order withdrawing "the right to disclosure of information in that workplace … for a period specified in the arbitration award".[372]

TULRCA also provides for a dispute resolution mechanism. It provides that a trade union may refer a complaint about the failure by the employer to disclose any information in terms of s 181 to the Central Arbitration Committee (CAC).[373] If the Committee opines that the complaint may be settled by conciliation, such complaint shall be referred to the Advisory, Conciliation and Arbitration Service (ACAS) which "shall seek to promote a settlement of the matter". The complaint shall be referred back to the CAC if it is withdrawn or there is no settlement and; there are no further prospects (according to ACAS) of settlement through the conciliation process.[374] In terms of s 183(3) of TULRCA, a complaint which is not referred to ACAS or is referred but conciliation is unlikely, shall be heard and determined by the CAC, which must then declare whether it is well-founded or not and giving reasons for its decision. If the complaint is well-founded, the CAC shall make a declaration specifying "the information in respect of which the Committee finds that the complaint is well founded", the date when such information was refused to be disclosed or confirmed and the period, which should not be less than a week from the date of the declaration, "within which the employer ought to disclose that information, or, as the case may be, to confirm it in writing".[375]

[371] See s 16(13).

[372] See s 16(14).

[373] S 183 (1) (a)-(b).

[374] S 183(2).

[375] S 183(5) (a)-(c).

The ACAS Code of Practice provides for the "joint arrangements for the disclosure of information". It provides that "[e]mployers and trade unions should endeavour to arrive at a joint understanding on how the provisions on the disclosure of information can be implemented most effectively".[376] In terms of the Code, trade unions and employers "should consider what information is likely to be required, what is available, and what could reasonably be made available" as well as "the form in which the information will be presented, when it should be presented and to whom".[377] It also provides that parties should agree on procedures to resolve disputes "concerning any issues associated with the disclosure of information".[378]

The ACAS Code also attempts to list information which might be relevant in certain negotiations.[379] For example, in pay and benefits negotiations, it lists such information as "principles and structure of payment systems; job evaluation systems and grading criteria; earnings and hours analysed according to work-group, grade, plant, total pay bill; details of fringe benefits and non-wage labour costs". In conditions of service negotiations, it lists such information as "policies on recruitment, redeployment, redundancy, training, equal opportunity, and promotion; appraisal systems; health, welfare and safety matters". It also lists financial information as including "cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged". Grogan gives examples of potentially relevant information as including information about an employer's finances, how the employer distributes funds, any planned future investments and plans for production and marketing.[380] The criteria is how the information requested is relevant "in

[376] Item 22.

[377] *Ibid*.

[378] Item 23.

[379] Item 11 of the Code.

[380] Grogan *Collective Labour Law* 55. Personnel files may be claimed by trade union representatives "to acquire evidence for disciplinary proceedings, and unions may demand disclosure of managerial salaries".

relation to the purpose for which is sought".[381] Trade unions must not be refused access to information without compelling reasons.

The Act promotes the participation of employees in workplace matters through workplace forums. Such forums are formed by way of an application by a representative trade union, defined as "a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace".[382] In terms of s 79, the general functions of workplace forums include, promoting the interests of all employees in a workplace, enhancing workplace efficiency, to be consulted by an employer on various matters and "to participate in joint decision-making" about various matters. The Act also provides that "unless the matters for consultation are regulated by a collective agreement with the representative trade union", workplace forums can be consulted on proposals on, *inter alia*, matters such as how the workplace should be restructured which might include new technology and methods, "changes in the organisation of work", "partial or total plant closures", "mergers and transfers of ownership in so far as they have an impact on the employees", "dismissal of employees for reasons based on operational requirements", "product development plans and "job grading".[383]

The importance that the LRA attaches to the participation of employees in workplace matters naturally means that representative trade unions must have access to information to allow them "to engage effectively in consultation" with employers. Although the right to disclosure of information is an important right, it should be claimed and exercised in a manner which takes into account the sensitivity and confidentiality of certain information to employers.

[381] *Ibid*.

[382] See s 78(b).

[383] See s 84(1).

## 3.6 Conclusion

Any labour relations dispensation that does not accord trade unions organisational rights will be setting them up them for failure. The provision by the South African Labour Relations Act of basic organisational rights and adoption of a broader approach by the courts when determining the content of such rights affirms the importance attached to such rights. One of the objectives of LRA is to promote peaceful labour relations and this cannot be achieved if trade unions are not capacitated to make meaningful contributions on labour matters affecting their members. There exists a clear procedure for the acquisition and exercise of organisational rights and the Act goes further to provide a mechanism for dispute resolution. The dispute on whether minority unions can seek to claim organisational rights outside the statutory framework has since been resolved by the Constitutional Court in the *Bader Bop* case. The court emphasised that an interpretation which does not attenuate the right to collective bargaining and the right to strike was to be preferred. Although future disputes on the acquisition and exercise of organisational rights cannot be ruled out, the Act is clear and there already exists detailed judgments which will make the resolution of such disputes an uncomplicated process.

## CHAPTER 4

## TRADE UNIONISM AND INDUSTRIAL ACTION IN SOUTH AFRICA

### 4.1 Introduction

The effectiveness of the institution of collective bargaining to trade unions is dependent on adequate trade union rights and the threat or reality of industrial action. Industrial action, particularly in the form of strikes, is an important weapon to promote and protect the interests of trade unions and workers in general. It has a long history in South African labour relations dating back to more than a hundred years.[384] Industrial action has assumed such prominence in South Africa that trade unions find it impossible to engage or negotiate with employers without making constant threats to strike, protest or picket.

The pre-1995 labour relations dispensation recognised the symbiotic relationship between industrial action and the collective bargaining process. In *Num v East Rand Gold & Uranium Co Ltd*,[385] the court, referring to the LRA of 1956, stated that it was underpinned by the philosophy that good labour relations and resolution of disputes could only be achieved through the process of collective bargaining. It also observed that strikes were generally accepted as an essential part of the collective bargaining machinery. In *Food & Allied Workers Union v Spekenham Supreme*[386], the court stated, amongst other things, that the main objective of labour legislation was counteracting the inequality inherent in the employment relationship.

Commenting on the pre-1995 labour jurisprudence, Brassey[387] stated that the institution of collective bargaining, being the preferred means of achieving peaceful labour relations, could

[384] See generally, J F Myburg "100 Years of Strike Law" (2004) 25 *ILJ* 962-976.

[385] (1991) 12 *ILJ* 1221(IC) at 1237.

[386] (1988) 9 *ILJ* 628 (IC) at 637.

[387] M S M Brassey "The Dismissal of Strikers" (1990) 11 *ILJ* 213 at 235.

not thrive without recourse to strikes and other related actions. The threat by the parties to resort to industrial action drives the collective bargaining process. Put differently, without the threat or reality of industrial action, the bargaining process would be sluggish. The author observes that there was a striking paradox in the manner in which legislation attempted to promote peaceful labour relations. Although supporting collective bargaining as the preferred means of achieving peaceful labour relations, it also recognised that industrial action was an essential element and formed part of the collective bargaining machinery. It therefore discouraged acts designed to be anti-industrial action measures, such as dismissals by employers, of workers who participated in strikes. It effectively protected "industrial warfare in order to promote peace.[388]

Under the LRA of 1956, employers were restrained from dismissing workers engaged in strikes using the "unfair labour practice jurisdiction". One of the considerations by the courts was whether the exercise of the right was in good faith and whether the strike action served the function of promoting collective bargaining.[389] Dismissing employees who participate in strikes is generally considered a disproportionate counteraction which should be discouraged by all means.

As put by Van Niekerk *et al*, the right to industrial action is a weapon which redresses the inequality that exists between labour and capital.[390] The most accepted argument for granting employees a protected right to strike is that it is an integral part of the process of collective bargaining as the threat or reality thereof often coerces employers, who are generally regarded as occupying a powerful position in the employment relationship, to give in to their demands. In *Numsa v Bader Bop (Pty) Ltd*,[391] Ngcobo J suggested that collective bargaining cannot yield results without the right to strike. The learned Judge likened the importance of the right to the collective bargaining process to "what an engine is to a motor vehicle".

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[388] *Ibid*.

[389] See J Grogan *Collective Labour Law* 122.

[390] Van Niekerk *et al Law @ Work* 371.

[391] (2003) 24 *ILJ* 305 (CC) at 335.

In *Betha v BTR Sarmcol,*[392] the SCA heard an appeal against the decision of a court a quo which made an analogy to the effect that the struggles between employers and employees resembled a "battle and warfare" and that strikes and dismissals were ultimate weapons of trade unions and employers respectively. The finding of the court a quo was that recourse to strike action by a trade union automatically legitimised recourse to dismissals by employers. The SCA *per* Olivier JA stated that this was not a proper construction of the law. It associated itself with the argument of counsel of the Appellants that strikes are instruments which are legitimate in the collective bargaining process and that they weaken the resistance of employers when there is an impasse in negotiations. Dismissals on the other hand ended the employment relationship and the two actions cannot, therefore be equivalent, as found by the court a quo. The court held that the right to dismiss striking workers was "not a reciprocal right, but an extraordinary one" and should be exercised only when there are compelling circumstances.

The Constitution and the LRA provide for a clear and regulated right to engage in strikes and other forms of industrial action but there is some divergence of views on the effectiveness and future role of industrial action in South Africa. The prevalence or high incidence of strike action in post-apartheid South Africa has exposed organised labour to the general criticism that it wields too much power at the expense of business. The LRA provides that its purposes, are, amongst other things, to "promote orderly collective bargaining", "to promote employee participation in decision-making in the workplace" and also "the effective resolution of labour disputes".[393] The adversarialism which still exists in the bargaining process, and often culminates in industrial action, is to a certain extent indicative of the fact that labour and business are becoming polarised and that strikes and other forms of industrial action will soon become the preferred method by labour to further their rights and interests.

This chapter will focus on the various forms of industrial action, how they are regulated by legislation and how they are used by trade unions as weapons to bring pressure on employers

[392] (1998) 19 *ILJ* 459 (SCA) at 514.

[393] S 1(d) (ii) (iii) and (iv).

or employer' organisations to accept their demands. It will attempt to explore the effectiveness of industrial action and its role in shaping employment relations in South Africa.

## 4.2 Constitutional and legislative framework

The Constitution is the reference point for the right to strike. Section 23(2)(c) of the Constitution provides all workers have a right to strike. The LRA gives effect to this right by providing a detailed framework on how it should be exercised. It defines a strike as:

> "The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee …."[394]

The LRA extends the right to strike to all employees and provides that such an action must be preceded by the referral of a dispute to the CCMA or council.[395] A certificate must be issued, following the referral, to the effect that the dispute was not resolved.[396] The receipt of the referral of the dispute by the council or Commission must be followed by 30 days, or any extended period agreed by parties.[397] The LRA also provides that a 48 hour notice must be given to an employer before a strike commences, unless such notice must be given to a council, when the dispute is about a collective agreement to be concluded in that council, or to an organisation of employers, if the employer belongs to such an organisation.[398]

[394] S 213.

[395] S 64(1)(a).

[396] S 64(1)(a)(i).

[397] S 64(1)(a)(ii).

[398] S 64(b)(i) and (ii) respectively.

Section 64(d) of the LRA provides that in cases where the State is the employer, the proposed strike must be preceded by seven days notice. The 48 hours notice where the State is not the employer can only be made after an advisory award has been made in terms of s 135(3)(c) in cases where the issue in dispute is the refusal by an employer to bargain. The provisions of s 64(1) do not apply if the dispute has been dealt with according to a council's constitution, in cases where parties are members of a council,[399] if the strike is in conformity with the procedures set out in a collective agreement,[400] if the strike is a response to a lock-out by an employer which is not in compliance with the relevant provisions of the LRA,[401] or if the employer is not in compliance with the requirements of s 64(4) and (5).[402]

Subsections (4) and (5) provide that trade unions or employees, who refer disputes to the CCMA or council about changes to the terms and conditions of employment unilaterally effected by the employer, may in such referrals require the employer not to proceed to effect the envisaged changes for a period specified in subsec (1). In cases where changes have already been effected, a trade union or employee may request the employer to reverse such changes. In terms of s 64(5), when a referral notice is served on employers, they must comply with the requests set out on such referrals within a period of 48 hours.

The LRA provides numerous limitations on the right to strike. If an issue is covered by a collective agreement which prohibits a strike in the event that a dispute arises, the participation in a strike or any conduct that contemplates or furthers a strike by any person bound by such an agreement is prohibited.[403] Persons bound by collective agreements which require that certain issues in dispute should be arbitrated are also prohibited from taking part in a strike and other related actions regarding the specified issues in dispute.[404] When a party

[399] S 64(3) (a).

[400] S 64(3) (b).

[401] S 64(3) (c).

[402] S 64(3) (e).

[403] S 65(1) (a).

[404] S 65(1) (b).

has a right to refer an issue in dispute for arbitration or to the Labour Court,[405] or a person performs an essential or maintenance service,[406] the participation in a strike or related actions is also prohibited.

In terms of s 65(2)(a), a person may participate in a strike or any conduct which contemplates or seeks to further a strike, notwithstanding s 65(1)(c), if the issue in dispute relates to organisational rights in terms of sections 12 to 15 of the LRA. A trade union electing to issue a strike notice in terms of s 64(1) for an issue relating to organisational rights cannot refer such a dispute to arbitration as per s 21 of the Act for twelve months from the date such notice was issued.[407]

The LRA also provides that:

> "Subject to a collective agreement, no person may take part in a strike … or in any conduct in contemplation of furtherance of a strike … if that person is bound by … any arbitration award or collective agreement that regulates the issue in dispute; or … in any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or … any determination made in terms of Wage Act and that regulates the issue in dispute, during the first year of that determination."[408]

### 4.2.1 Secondary strikes

The LRA also regulates participation in secondary strikes. It defines a secondary strike as:

> "a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in

[405] S 65(1) (c).

[406] S 65(d) (i) and (ii).

[407] S 65(2) (b).

[408] S 65(3) (a) (i)-(ii) and (b) respectively.

pursuant of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand."[409]

The LRA prohibits such strikes unless the primary strikes are in compliance with the provisions of s 64 and 65.[410] An employer of the employees planning a secondary strike or an employers' organisation, if the employer belongs to such an organisation, must have been issued with a notice in writing proposing such a strike seven days before it commences.[411] The LRA prohibits participation in a secondary strike unless "the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer".[412] The LRA also allows an employer to approach the Labour Court for an order interdicting or limiting a secondary strike that does not comply with s 66(2) subject to the provisions of s 68(2) and (3).[413] In terms of s 66(4), an investigation as to whether there was compliance with the provisions of s 66(2) can be undertaken by the CCMA upon request by any person who is a party to the proceedings as per s 66(3), and the role of the Commission in such an instance would be to assist the Labour Court in determining whether the secondary strike was in compliance with the relevant provisions of the LRA.

### 4.2.2 The protection granted to employees participating in protected strikes

A strike that is protected in terms of the LRA or any conduct in contemplation or seeking to further a protected strike does not constitute a breach of the employment contract.[414] The LRA defines a protected strike as a strike that is in compliance with the provisions of Chapter

[409] S 66(1).

[410] S 66(2) (a).

[411] S 66(2) (b).

[412] See s 66(2) (c).

[413] S 66(3).

[414] See s 67(2).

IV.[415] Employers are however not obliged to remunerate employees for services not rendered during a protected strike but the LRA states that employers must continue any payment in kind if the remuneration of an employee includes such payment, if so requested by the employee.[416] An employer is, however, allowed to recover the monetary value of any payment made in kind to the employee after the strike by instituting civil proceedings in the Labour Court.[417] In terms of s 67(4), employees are protected from dismissals for reasons of participating in a protected strike or any conduct which contemplates or furthers a protected strike. The LRA provides that an employer can, however, dismiss an employee for the latter's misconduct during the strike or for reasons based on operational requirements.[418]

In *South African Chemical Workers Union v Mediterranean Textile Mills*,[419] the CCMA had to decide whether the dismissal of certain employees for reasons of misconduct during a strike constituted an unfair dismissal. The employer dismissed some employees belonging to the South African Chemical Workers Union (SACWU) for serious misconduct calculated to intimidate members of another trade union, the South African Clothing and Textile Workers Union (SACTWU), not to continue working for the employee during the strike. Such intimidation took the form of use of firearms and the shooting of the homes of some employees resulting, *inter alia*, in death and injury of the family of one employee. The CCMA held that "while s 187 of the Labour Relations Act 66 of 1995 declares it to be an automatically unfair dismissal to dismiss for striking *per se*, it is clear that that does not prevent an employer from dismissing an employee guilty of misconduct during the strike". It stated that "the freedom to strike does not mean that strikers have the right to prevent the employer from carrying on business in whatever way it chooses". It further stated that "the

[415] See s 67(1).

[416] See s 67(3) (a).

[417] S 67(3) (b).

[418] S 67(5).

[419] (2001) 22 *ILJ* 533 (CCMA).

fact that the Act does not prohibit replacement labour in all circumstances is an indication that an employers' right to carry on business persists throughout the strike".[420]

The LRA provides that no civil proceedings may be brought against persons who participate in protected strikes or conduct contemplating or furthering a protected strike.[421] An employer who is coerced through strikes or any conduct in contemplation or furtherance of a strike to conclude a collective agreement cannot thereafter attempt to resile from the agreement on the ground that he was forced to conclude it under duress. Generally, duress renders a contract voidable but it is not a concept that can be invoked in industrial disputes. Industrial action is an integral part of the bargaining process and therefore does not constitute a breach of contract or delict.[422]

### 4.2.3 Unprotected strikes

Section 68 of the LRA regulates unprotected strikes or strikes or conduct contemplating or furthering a strike that is not in compliance with the relevant provisions of the Act. The LRA grants the Labour Court exclusive jurisdiction over such matters and provides that the court can interdict or make an order prohibiting persons from continuing to embark on such a strike or any conduct which furthers or contemplates such a strike.[423] The court can also make an order that "just and equitable compensation" be paid for losses which are attributable to the strikers.[424] In making such an order, regard must be had to such factors as; whether there was an attempt by a person who participated in a strike to comply with the relevant provisions of

[420] Para 556-F, G and H.

[421] S 67(6).

[422] See generally A Landman "Protected Industrial Action and Immunity from the Consequences of Economic Duress" (2001) 22 *ILJ* 1509.

[423] S 68(1) (a) (i).

[424] S 68(1) (b).

the Act, whether the strike was planned, whether it was embarked upon to protest an unjust conduct and whether an order made in terms of s 68(1) (a) was complied with.[425]

The LRA further provides that unprotected strikes or conduct contemplating or furthering a strike "may be a fair reason for dismissal" and that the determination of the fairness of such a dismissal must be done in accordance with the Code of Good practice for dismissals.[426] In terms of the Code, participating in strikes not in compliance with the relevant provisions of the LRA constitutes misconduct but this does not necessarily mean that employees who participate in such strikes must be dismissed. The Code provides that there must be an enquiry into the fairness, in the substantive sense, of such dismissals. Factors such as the extent of the seriousness of violations, the efforts made to comply with the provisions of the Act, and the question whether or not the strike was embarked upon to protest an unjust conduct by the employer party, provide important guidelines when determining the substantive fairness of dismissals.[427] The Code further provides that the employer should clearly communicate the intention to dismiss employees to a trade union official as soon as possible and should also clearly communicate what he requires of the employees and the possible sanctions in the event of non-compliance. The affected employees must be allowed enough time to make a decision whether to comply or not to comply with the ultimatum.[428]

There is continuing debate on whether the LRA adequately gives effect to the constitutional right to strike. Maserumule[429] argues that the LRA fails to expressly give effect to the right to strike as it only emphasises "the limited circumstances under which the right to strike may be exercised and the penalties for exercising the right other than as prescribed".[430] The author criticises the Labour Courts and the LRA for being overly preoccupied with the limitations on

[425] S 68(1) (b) (ii)-(iv).

[426] See s 68(5).

[427] Item 6(1) (a)-(c) of the Code of Good Practice: Dismissal.

[428] Item 6(2) of the Code.

[429] P Maserumule "A Perspective on the Developments in Strike Law" (2001) 22 *ILJ* 45.

[430] *Ibid*.

the right to strike and in the process failing to adequately give effect to or protecting the right.[431] He argues that the jurisprudence that has emerged on the right to strike emphasises the limitations attendant on the right and overlooks the importance of having a framework that gives effect to the right.[432]

Commenting on the LAC judgment in *BSA* v *COSATU*,[433] the author opines that the overall impression created by the judgment was that the court exhibited a concern about the negatives associated with strikes and the importance of exercising this right in a responsible manner.[434] The case involved a planned strike by COSATU in relation to minimum employment standards legislation, the Basic Conditions of Employment Act (BCEA). The LAC interdicted the planned action on grounds of non-compliance with s 77 of the LRA. Maserumule argues that the approach adopted by the court overstated the limitations inherent on the right and in the process failed to address the issue on how the current legislative framework attempts to give effect to this right.[435] The author further argues that cases decided after *BSA* v *COSATU* followed this reasoning and blames the LAC decision for setting the trend where the approach by the courts when deciding on disputes about the exercise of the right to strike elevate the importance of the limitations inherent on the right and in the process deny workers the right to effectively exercise the right.

The LRA gives effect to the right to strike by providing a clear and detailed framework on how the right should be exercised. It reiterates the constitutional provision that all employees have the right to strike, but as expected from a law which seeks to give effect, substance and content to this right, it also outlines the procedures to be followed for such action to be protected. It further grants immunities to employees who participate in protected strikes. There is no justification for the criticism of the decision of the LAC since it merely

[431] Maserumule 2001 *ILJ* 46.

[432] *Ibid*.

[433] (1997) 18 *ILJ* 474 (LAC).

[434] Maserumule 2001 *ILJ* 47.

[435] *Ibid*.

interpreted and applied the provisions of the LRA and cannot formulate its own procedures or requirements. The LRA clearly provides for a positive right to strike and the procedures to be followed for strikes to be followed are meant to provide some clarity on the subject so as to avoid disputes.

### 4.2.4 The right to picket

The LRA also provides registered trade unions with the right to "authorise a picket by its members and supporters for the purposes of peacefully demonstrating … in support of any protected strike; or … in opposition of any lock-out".[436] The picket can be in any place accessible to the public but not inside employer' premises unless the employer grants such permission.[437] The CCMA, must, upon request by a registered trade union or employer, facilitate the conclusion of an agreement by the parties on rules regulating the exercise of the right to picket either in support of a protected strike or in opposition to a lock-out.[438] In the event that parties fail to reach an agreement, the Commission is obliged by the LRA to establish its own rules regulating the exercise of the right to picket and it must be guided by factors such as "the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised", or "any relevant Code of Good Practice".[439]

Disputes relating to the right to picket may be referred to the Commission in writing which must attempt to settle the dispute by way of conciliation, failing which a party to the dispute may refer it for adjudication in the Labour Court.[440] The right to picket is also regulated by a Code of Good Practice on Picketing which provides guidelines on how it should be

[436] S 69(1) (a) and (b).

[437] See s 69(2) (a) and (b) respectively. Section 69(3) further provides that the employer should not unreasonably withhold such permission.

[438] S 69(4).

[439] S 69(5) (a) and (b).

[440] See s 69(8) (a)-(d), (9), (10) and (11) respectively.

exercised.[441] The Code provides that "it applies only to pickets held in terms of section 69 of *the* [LRA] *Act*".[442] It provides that a registered trade union must authorise the picket in terms of its constitution and that such "authorisation applies only to its members and supporters".[443] It states that a picket in terms of s 69 of the Act is intended to generate support from the public to support striking workers or to oppose a lock-out.[444]

The Code provides that picketing is normally in support of primary strikes but also makes provision for picketing in support of secondary strikes and states that such pickets must comply with secondary strikes requirements.[445] The Code states that the parties, a registered trade union and employer, should make efforts to formulate rules regulating pickets and that such rules may be contained in a collective agreement.[446] It also provides that an employer may not withhold, unreasonably, the permission sought by a registered trade union to have the picket on the employer's premises and lists numerous considerations in determining the reasonableness of the decision of an employer to withhold permission.[447] It also makes provision for the appointment of a convenor by the registered trade union whose role is "to oversee the picket", the appointment of marshals for monitoring the picket and how picketers should conduct themselves as well as the role of the police.[448]

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[441] GN 765, *Government Gazette* 18887, 15 May 1998.

[442] Item 1(5). Item 1 (7) states that a picket which is for any other purpose other than supporting "a protected *strike* or a *lock-out is* not protected by *the Act*" and that its "lawfulness … will depend on compliance with ordinary laws".

[443] Item 2 (1) and (2).

[444] Item 3(1).

[445] Item 3(2).

[446] Item 4(1) and (2).

[447] Item 5(1) (a)-(h).

[448] Items 6 and 7. Item 8 states that participation in a protected picket does not constitute a delict or breach of contract and that employees participating in a protected picket are immune from disciplinary action unless their conduct during the picket amounts to misconduct in which case an employer is allowed to take appropriate disciplinary action.

### 4.2.5 Protest action

The LRA also provides all employees, excluding those engaged in essential or maintenance services, with the right to participate in protest action if such an action has been sanctioned by a registered trade union or a federation of trade unions and such a union or federation of unions has served NEDLAC with a notice outlining "the reasons for the protest action" and its nature.[449] The reasons for the protest action must have been considered by NEDLAC or any other forum appropriate for use by the parties to resolve the matter.[450] It defines a protest action as:

> "The partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending socio-economic interests of workers, but not for a purpose referred to in the definition of a strike."[451]

The action must be preceded by 14 days notice to NEDLAC by a trade union or federation of trade unions informing the forum that it intends to proceed with the action.[452] The LRA grants the Labour Court exclusive jurisdiction "to grant any order to restrain any person from taking part in protest action or in any conduct in contemplation or in furtherance of a protest action that does not comply with subsec (1). Section 77(2)(b) provides that in the event that the action complies with the relevant provisions, the Labour Court can grant a declaratory order having regard to such factors such as "the nature and duration of the protest action", "the steps taken by the registered trade union or federation of trade unions to minimise the harm caused by the protest action; and, also, "the conduct of the participants in the protest action".

Section 77(3) extends the s 67 protections enjoyed by employees who participate in protected strikes or conduct in contemplation or furtherance of strike action to persons taking part in

[449] See s 77(1) (a) and (b) (i)-(ii).

[450] S 77(c).

[451] S 213.

[452] S 77(d).

protest action or any conduct contemplating such an action, which complies with the relevant provisions of the LRA. [453]The LRA further provides that employees who participate in a protest action in violation of a Labour Court order or who act in contempt of such an order forfeit the protections of the Act.[454]

The inclusion of the right to participate in protest action was obviously premised on the recognition that workers should have a right to influence policies that affect their socio-economic interests. The role of trade unions in post-apartheid South Africa has also shifted from being merely organisations for workers that advance the interests of their members at workplace level. They are important social partners and they have an important role in influencing socio-economic changes at policy level.

## 4.3 The ILO jurisprudence and practice in foreign jurisdictions

### 4.3.1 ILO standards

Although the ILO conventions do not expressly provide for a positive right to strike, the jurisprudence developed by the CEACR and the CFA recognises the existence of the right to strike. As put by Servais:

> "The ILO organs of control have had numerous occasions to take a position on the subject. They have built up a body of principles, recognizing that the right to strike constitutes an intrinsic corollary to the right to organize and a fundamental right of workers and of their organisations."[455]

The author states that the recognition of the legitimacy and importance of the right to strike to further and defend the interests of workers by the CFA is to be found in Article 3 and 10 of

[453] See also generally *BSA v COSATU* on the argument about the legality of protest action by Maserumule..

[454] S 77(4) (a)-(b).

[455] J-M Servais "The ILO law and the freedom to strike". http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Servais.pdf (accessed 01 June 2010).

the Freedom of Association and Protection of the Right to Organise Convention.[456] The former provides, *inter alia*, that organisations for workers "have the right … to organise their administration and activities and to formulate their programmes". Article 10 defines "organisation" to mean a workers' organisation to further and defend workers' interests.

The interpretation by the CFA recognises strikes for the purposes of promoting and defending the interests of workers. Political strikes and those planned long before the commencement of negotiations are not protected by the CFA principles.[457] Generally, there is some consensus among members of ILO Conference Committee on the Application of Standards, on the right to strike although some divergence of views among the delegates namely, the Employers' Group, the Worker' Group and the Government delegates, are inevitable.[458] The Worker's Group fully accept the interpretation adopted by the Committee of Experts citing that it cannot be alienated form the broader right to freedom of association and that it is recognised and protected by the Constitution of the ILO and its conventions.[459] The argument by the Employers' Group is that industrial action, in the form of strikes for workers and lock-outs for employers, "could perhaps be acknowledged as an integral part of international common law and, as such, it should not be totally banned or authorized only under excessively restrictive conditions".[460] The Group further argues that since there is no explicit provision on the right to strike in the ILO Conventions, particularly Convention No. 87 and 98, "the Committee of Experts should [not] deduce from the text of these Conventions a global, precise and detailed, absolute unlimited right".[461] The government delegates generally agree

[456] *Ibid*.

[457] *Ibid*.

[458] See B Gernigon *et al* "ILO Principles Concerning the Right to Strike". http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087987.pdf (accessed 22 June 2010).

[459] *Ibid*.

[460] *Ibid*.

[461] *Ibid*.

with the approach or interpretation of the Committee of Experts on the right to strike whilst also raising some concerns about the exercise of the right, particularly in public service.[462]

The right to strike has been recognised by the CFA since 1952 which stated that its recognition is premised on the principle that it is a legitimate weapon by workers to protect and promote their interests.[463] The CFA has stated that striking is not just a 'social act', but a right to be enjoyed by workers and their associations. It has also reduced the excessive restrictions on the exercise of the right as well as the categories of workers excluded from exercising the right. It has emphasised that the objective of the right is to promote and defend socio-economic interests of workers which therefore means that strikes for purely political reasons are excluded and, has also "stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination".[464]

The CFA has accepted numerous procedures as conditions for the exercise of the right to strike. They include giving prior notice before embarking on a strike, using the machinery of conciliation, mediation and voluntary arbitration as a pre-condition to declare strikes provided that such proceedings are not cumbersome, taking decisions regarding strikes by secret ballot, establishing minimum services in some cases and guaranteeing non-strikers the freedom to continue to work.[465]

On the utilisation of the machinery of conciliation, mediation and arbitration the Committee of Experts has stated that:

[462] *Ibid.*

[463] *Ibid.*

[464] *Ibid.*

[465] *Ibid.*

> "In a large number of countries legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called. The spirit of these provisions is compatible with Article 4 of Convention No. 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements. Such machinery must, however, have the sole purpose of facilitating bargaining: it should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness …."[466]

In terms of the Voluntary Conciliation and Arbitration Recommendation,[467] if parties opt to use the conciliation and arbitration machinery, industrial action by the parties should be discouraged during such processes and parties should accept the arbitration award. With regards to compulsory arbitration, the CFA has stated that "it is only acceptable in cases of strikes in essential services in the strict sense of the term, in a case of acute national crisis, or in the public service …."[468] The approach by the Committee of Experts is that compulsory arbitration cannot be imposed by legislation as an alternative to strike action except in cases of essential services or when there has been an interruption of a non-essential service for too long that the safety, life or health of the population, in whole or in part, is endangered.[469]

A party cannot request for compulsory arbitration to be imposed by authorities as this erodes the voluntaristic nature of the principle of collective bargaining and the freedom of partners to determine their own bargaining processes.[470] Authorities should not, at their own initiative, impose compulsory arbitration since this intervention cannot be reconciled with the voluntaristic nature of the negotiation process enunciated in Article 4 of the Right to organise and Collective Bargaining Convention No. 98.[471] It however recognises "that there comes a

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[466] *Ibid*.

[467] 1951 (No. 92) http://www.ilo.org/ilolex/cgi-lex/convde.pl?R092 (accessed 22 June 2010).

[468] Gernigon *et al* "ILO Principles Concerning the Right to Strike".

[469] *Ibid*.

[470] *Ibid*.

[471] The Article provides that "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between

time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified to step in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part".[472]

Regarding the quorum and majority for taking decisions regarding strikes, the general approach of the CFA is that requiring that a strike can only be declared "by over half of all workers involved … is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises".[473] Also, requiring "that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members".[474]

The approach adopted by the CFA is that the responsibility of declaring strikes as illegal should lie with an independent body and not with government. The CFA maintains that persons contemplating or participating in legitimate strikes should not be penalised, that dismissing workers for reasons of participating in a legitimate strikes violates the Right to Organise and Collective Bargaining Convention 98 and also "constitutes serious discrimination", that the principles of freedom of association require that workers participating in a strike or other related actions should be protected from dismissals and that recourse to measures such as dismissing such workers and refusing to reinstate them gravely erodes the principle of freedom of association.[475] The body of principles that have been developed by the Committee of Experts and the CFA over the years now constitute a rich jurisprudence on the right to strike. The most basic principles regarding the right to strike include the following:[476]

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employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

[472] *Ibid.*

[473] Gernigon *et al* "ILO Principles Concerning the Right to Strike".

[474] *Ibid.*

[475] *Ibid.*

[476] *Ibid.*

i. It is a fundamental right for workers and their organisations and is protected in so far as it is exercised peacefully.
ii. It should be enjoyed by workers in all sectors, public or private, and the only category of workers who might not exercise it are “members of the armed and police forces, public servants who exercise authority in the name of the State and workers employed in essential services in the strict sense of the term (the interruption of which could endanger the life, safety or health of the whole or part of the population), or in situations of acute national crisis”.
iii. Strikes for purely politically reasons are not covered.
iv. Workers and trade unionists should be protected from acts such as dismissals for being participants or organising legal strikes “through prompt, efficient and impartial procedures, accompanied by sufficiently dissuasive remedies and sanctions”.
v. “The protection of freedom of association does not cover abuses in the exercise of the right to strike regarding lawfulness, or consisting of acts of a criminal nature; any sanctions imposed in the event of abuse should not be disproportionate to the seriousness of the violations”.
vi. Picketing can only be restricted when “it ceases to be peaceful, and picketing should not interfere with the freedom to work for non-strikers”.
vii. “The obligation to give prior notice, the obligation to engage in conciliation, have recourse to voluntary arbitration, comply with a given quorum and obtain the agreement of a given majority where this does not cause the strike to become very difficult or even impossible in practice and the secret ballot method to decide strike action are all acceptable conditions for the exercise of the right to strike”.

### 4.3.2 Foreign jurisdictions

The failure by the ILO Conventions to provide an explicit right to strike might be reason why there is no consistency in the application of the right by Member States. There have been many complaints regarding the right, with the Committee of Experts holding in the majority

of cases that some Member States are still failing to adequately give effect to and protect the right.

Some major reforms have been effected on the right to strike in certain countries. In Australia for example, participation in industrial action was not protected prior to 1993.[477] The system which existed prior to the promulgation of the Industrial Relations Reform Act 1993 was that of compulsory conciliation and arbitration premised on the idea that parties to an industrial dispute would not embark on industrial action if there was "an alternative forum for the resolution of disputes …."[478] Following the recommendations of the ILO Committee on Freedom of Association in 1991 to the effect that the compulsory conciliation and arbitration system could not be reconciled "with international standards on free collective bargaining and the right to strike", "[t]he perceived need for change within the Australian labour relations system led to the passage of the Industrial Relations Reform Act 1993".[479]

The Industrial Relations Reform Act modified the compulsory conciliation and arbitration model and included the right to freely engage in collective bargaining and "an express right to take industrial action".[480] One of the objectives of promulgating the Industrial Relations Reform Act as stated in the Explanatory Memorandum, was "to give effect to Australia's obligations under the *ILO Conventions*, as interpreted by the ILO Supervisory Committees".[481] The Workplace Relations Act 1996 sought to consolidate the transformation precipitated by the Industrial Relations reform Act, which envisaged "a new voluntary

[477] See R Dalton and R Groom "The Right to Strike in Australia: International Treaty Obligations and the External Affairs Power" http://www.austlii.edu.au/au/journals/MelbJIL/2000/9.html (accessed 22 June 2010).

[478] S McCrystal "Shifting the Balance of Power in Collective Bargaining: Australian Law, Industrial Action and Work Choices" (2006) 16 (2) *ELRRev* http://www.austlii.edu.au/au/journals/ELRRev/2006/9.html (accessed 22 June 2010).

[479] *Ibid*.

[480] *Ibid*.

[481] Dalton and Groom "The Right to Strike in Australia".

collective bargaining model, with industrial action assuming a central role as a potential weapon available to both employers and employees in collective bargaining".[482]

The changes brought by the 1993 and 1996 legislation articulated the role of industrial action in the collective bargaining process and participation in such action was protected from tort, breach of contract and State liability if the prescribed legislative processes for such action to be protected were followed.[483] Although facilitating "industrial action by parties to collective bargaining in a relatively straightforward, accessible manner", the process "attracted ILO criticism over excessive restrictions on the form, content and voluntariness of bargaining … and extensive litigation over aspects of the operation of the provisions in practice".[484]

Although stating "that the provisions for the right to strike were a valid exercise of the external affairs power" in terms of s 51(xxix) of the Australian Constitution, the High Court in *Victoria v Commonwealth*,[485] held that the ILO Conventions, the ILO Constitution and the approach or interpretation adopted by the CEACR and the CFA did not form the basis for the recognition of the right to strike by Australian legislation. The court reasoned that the basis for the inclusion of the right to strike provisions was the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 8(1) of the ICESCR provides that "[t]he States Parties to the … Covenant undertake to ensure … (d) [t]he right to strike, provided that it is in conformity with the laws of the particular country".

The Work Choices Act 2005 made some sweeping changes to the Australian labour relations system.[486] The role of the Australian Industrial Relations Commission (AIRC) in the

[482] McCrystal "Shifting the Balance of Power in Collective Bargaining".

[483] *Ibid*.

[484] *Ibid*.

[485] (1996) 187 CLR 416, 542-7.

[486] See "The Work Choices Legislation: An Overview (2006) http://www.federationpress.com.au/pdf/WorkChoicesOverviewDec06.pdf (accessed 22 June 2010).

determination of conditions of employment and resolution of labour disputes has been reduced, accessing workplaces by trade unions and organising industrial action has been made difficult and employers have been shielded from claims arising from unfair dismissals.[487] As summed up by McCrystal:[488]

> "Overall, the package of changes contained within the Work Choices Act represents a regressive step which has reduced the availability of protected action, increased the likelihood of sanctions for unprotected action, and provided employers with significant advantages in collective bargaining".

As argued by the author "[t]his does not represent a 'right to strike' designed to even the balance of power between employers and employees, but constitutes a legal entrenchment of the dominant position of employers".[489]

The absence of an explicit right to strike provision in the ILO Conventions means that some Members States would see this as an opportunity to provide for a right to strike which is overly restricted to the point that it is not practically exercisable. In the United Kingdom, there is some confusion on the issue whether the right to strike exists.[490] "[T]he statutory provisions which permit" the organisation of industrial action and participation in such action are framed in terms of immunities from the tortious and criminal liability that would otherwise attach".[491] The argument that the immunities provided by the statutory provisions do not give rise to a positive right to strike has been countered by some who suggest:

> "[T]hat the negative protection afforded by the statutory immunities ought to be regarded as equivalent to the positive protection of the right found in other

[487] *Ibid.*

[488] McCrystal "Shifting the Balance of Power in Collective Bargaining".

[489] *Ibid.*

[490] See R Dukes "The Right to Strike under UK Law: Not Much More than a Slogan?" *Metrobus v Unite The Union* [2009] EWCA Civ 829 (2010) 39 (1) *Industrial Law Journal* http://ilj.oxfordjournals.org/cgi/reprint/39/1/82 (accessed 22 June 2010).

[491] *Ibid.*

jurisdictions; that the choice to frame the law in terms of statutory immunities, rather than rights, was down simply to a technique of drafting".[492]

The basis for arguing that the right to strike is recognised in the United Kingdom is the European Convention on Human Rights (ECHR), particularly Article 11 and the Human Rights Act 1998.

## 4.4 Levelling the collective bargaining field: Justifications for a constitutionalised right to strike in South Africa

The inclusion of a right to strike and the absence of a right to lock-out in the Constitution was a contentious issue in the certification process.[493] Section 23(2)(c) of the Constitution provides that all workers have a right to strike. Its predecessor, the Interim Constitution of 1993, provided for both the right to strike for all employees and the right to have recourse to lock-outs by employers.[494]

The main objection against the inclusion of the right to strike and the absence of a right to lock-out in the New Text was that effective collective bargaining could not take place without some exercise of economic power by parties against each other and that this meant that the New Text should also expressly provide for a right to lock-out. The court dismissed this objection by reasoning that the New Text was not required by the Constitutional Principles, particularly CP XXVIII, to "expressly recognise any particular mechanism for the exercise of economic power on behalf of workers or employees …" and that it sufficed that the New Text specifically provided for the right to bargain collectively. The recognition of the right to bargain collectively implied that the right to recourse to economic strength existed within this right and that there was no need for the New Text to define the right and how it should be

[492] *Ibid.*

[493] *Exparte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of the Republic of South Africa* (1996) 17 821.

[494] Section 27(5).

exercised.[495]Another objection to the New Text was that including the right to strike and omitting the right to lock-out meant that the right by employers to engage in collective bargaining was "accorded a less status than the right of workers to engage in collective bargaining". The court evaluated this argument and dismissed it on the ground that the New Text did not diminish the right to engage in collective bargaining by employers and that it also did not diminish their right to use their economic strength against workers because the New Text expressly recognised the broad right to bargain collectively.[496]

The objectors also raised the argument that the inclusion of the right to strike and exclusion of the right to lock-out violated the Constitutional Principle of equality. The court dismissed the argument on ground that it was premised on a wrong construction that a lock-out should be treated as an equivalent of a strike. It therefore followed, if such an argument was to be accepted, that equal treatment of workers and employers meant that the New Text should expressly recognise both the right to strike and the right to lock-out.[497] The court dismissed this argument by stating as follows:

> "The argument that it is necessary in order to maintain equality to entrench the right to lock-out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock-out are not always and necessarily equivalent."[498]

The objectors also argued that including the right to strike implied that the LRA, which protected the right to lock-out, was unconstitutional. The court found the argument to be based on a "false premise" and held that the overarching framework was going to remain the Constitution given effect by the LRA, and developed by labour courts under constant

[495] Para 840- C, D and E.

[496] Para 840-F.

[497] Para 840-841 G.

[498] *Ibid*.

constitutional scrutiny to ensure that the rights of both employers and workers are protected.[499]

The certification of the Constitution, particularly in relation to labour relations, was a painful exercise as the court had to evaluate representations from all stakeholders. The debate about the desirability of having a constitutionally protected right to strike is still ongoing. There is an argument that constitutionalising the right does not afford it greater protection but effectively places upon it "unacceptable limitations".[500] The inclusion of the right to strike in the Constitution and the provision for recourse to lock-out by employers in the LRA, as opposed to a right to lock-out, might be viewed by employers as calculated to elevate the powers of employees in the bargaining process. It however simply counteracts the inequalities which existed in the bargaining power of employers and employees in the pre-1995 labour relations dispensation where the majority of employees were at the mercy of their employers and had no ammunition to militantly pursue their demands.

### 4.4.1 The effectiveness of the right to strike

The role of trade unions in employment relations has changed since the advent of a new labour relations dispensation, precipitated by the Constitution and the centre-piece labour legislation, the LRA. There have been significant changes in employment relations management, with trade unions seizing the opportunities presented by a new labour relations dispensation and making significant gains in their fight to improve the terms and conditions of work on behalf of their members.

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[499] Paras 841-E, F and G.

[500] See B Hepple "The Right to Strike in an International Context" http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Hepple.pdf (accessed 26 May 2009). The author also argues that "as a generalisation … constitutionalisation of the right to strike is most likely to occur when political or legal power of workers exceeds their economic power. He further states that "the explicit constitutionalisation" of the right in such countries like Italy, France, Spain, Portugal and South Africa "was a recognition and reward for the role that labour organisations played in the struggle against authoritarian governments which repressed the right to strike, and for democracy … [which] resulted in broad definitions of the right to including the wide range of economic and social and, in some cases, even political objectives".

Apart from influencing changes at workplace level through the ordinary process of collective bargaining, trade unions also play a recognisable role in the tripartite relationship, lobbying for better working conditions on behalf of workers at policy level. Although wielding significant power at policy formulation level, their primary role of promoting the interests of workers at grassroots level, has not been diminished. Innovative institutions to enhance co-operation between labour and business have been created, such as NEDLAC and workplace forums, but the inevitability of competing interests often means that parties often resort to their economic power or strength to make their demands.

The current legislative framework allows for a voluntary system of collective bargaining backed by the freedom of parties to resort to coercive power. The role of the courts in the bargaining arena is very limited and in practice they have been wary of interfering in the bargaining process. In *Stuttafords Department Stores Ltd v SACTWU*,[501] the court stated as follows:

> "The LRA 1995 requires a party which wishes to resort to a protected strike or lock-out to take much trouble. However, once the requirements of the Act for such strike or lock-out to be protected have been complied with, the Act protects that lock-out or strike, and generally speaking any judicial interference or claims. The policy is that the courts should stay away from the collective bargaining arena and should not be available for assistance to any one of the parties who may seek the assistance of a court when it feels the pinch. If one of the parties cannot bear the pain in the fight, it can do one of three things:
>
> (I) it can conclude a compromised agreement with the other party in settlement of the dispute and ensure its own survival;
>
> (II) it can capitulate and accede to the other party's demands;
>
> (III) it can continue with the fight and risk destruction-annihilation.

[501] (2001) 22 *ILJ* 414 (LAC).

> Such a party cannot be allowed to seek the intervention of the courts to escape the consequences of a protected lock-out or strike."[502]

Strikes are an essential weapon for employees and trade unions in South Africa. The inclusion of the right to strike in the Constitution and exclusion of the right to lock-out should not have come as a surprise to business. The partnering of one of the major trade union federations, COSATU with the ANC, meant that the trade union movement was going to militantly lobby for a labour friendly Constitution and legislation. COSATU used industrial action for both political and economic reasons before the advent of democracy and there still exists some attachment with strikes which has gradually developed into a culture that is now firmly entrenched in the South African labour relations landscape and which will undoubtedly take many years to be wiped out.

Although the procedures imposed by the LRA are onerous, they are fairly clear. This has however not reduced disputes regarding the legality of strikes. Further regulation by means of legislation is not desirable since this might place unintended restrictions. A possible practical solution to avoid litigable disputes regarding the right might be a Code of Good Practice negotiated by labour and business at Nedlac, and outlining guidelines to be observed by parties when disputes relating to strikes and other related actions arise. The government should also play an active role in disputes which are potentially detrimental to the economy.

The task of attempting to critique the effectiveness of strikes is quite complex. The majority of collective agreements signed in South Africa, especially in the months preceding the 2010 soccer World Cup, were preceded by threats or reality of strike action. Among the most prominent strikes were the South African Municipal Workers Union (SAMWU) and the Transnet strike. The Eskom strike was averted by an early offer. The unions, NUM, NUMSA and trade union Solidarity committed themselves to continue negotiations but rejected an offer of 8% wage increase, 5% increase in allowances and a once-off payment to every

[502] 422-J and 423-A and B.

employee of R12000.[503] The unions were negotiating for a 15% wage increase and a housing allowance. The power utility offered a nine percent wage offer and a R1500 per month housing allowance. The unions however "vowed to lobby for a change to the law which describes all Eskom staff, including cleaners and security guards as, essential workers to ensure their right to strike is not curbed".[504] The parastatal had raised the issue that the planned strike action was illegal since its services are classified as essential.[505]

Venter[506] projected that high incidences of "wildcat strike at shopfloor level" were to be expected in the months preceding the World Cup and pondered the question whether the "[g]reat expectations of "premium" increases due to World Cup and perception of improvement in economy" will mean that some employers will easily give in to hefty wage demands or risk strike action. Generally, trade unions and employees managed to negotiate better deals in the majority of strikes which occurred in 2010. The protracted public sector strike was a manifestation of hardening of attitudes of both government and the trade union movement. It was evidence that there are some fissures in the corporatist structures and that the parties need to go back to the drawing board to restore the integrity of the institution of collective bargaining.

### 4.4 Conclusion

Although the inclusion of the right to strike in the Constitution and the LRA was a major victory for the trade union movement, there is need to rethink its effectiveness as the ultimate weapon to organised labour to protect and further the interests of workers. The rationale for a right to strike was to counteract the inequality which existed in the bargaining power of

[503] See "Unions turn down Eskom wage offer" *Times Live* 22 June 2010 http://www.timeslive.co.za/business/article515582.ece/Union-turns-down-Eskom-wage-offer (accessed 22 June 2010).

[504] See "Eskom strike averted" http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=5541534 (accessed 4 July 2010).

[505] "Unions turn down Eskom wage offer" *Times Live.*

[506] T Venter "Guarding the Goal on the Labour Field: What 2010 and the World Cup Hold For Labour Relations" http://www.saslaw.org.za/seminars.html (accessed 22 June 2010).

employers and employees in the pre-1995 labour relations dispensation where the majority of employees were at the mercy of their employers and had no ammunition to militantly pursue their demands. The traditional view that the withdrawal of labour by workers is the most important weapon at the disposal of organised labour against employers does not hold in a contemporary labour relations dispensation.

There are many factors that affect the employment relationship and trade unions cannot remain spectators and confine themselves to the traditional role of fighting for better wages and working conditions for their members. O'Regan states as follows:

> "As an exercise of power, strikes are effective only in certain circumstances. In a depressed economy where jobs are scarce and there is a large pool of unemployed labour, the threat of withdrawal of labour loses its edge."[507]

There is an over-reliance on the right to strike in South Africa and trade unions sometimes neglect to calculate the long term costs of embarking on such action. Employers often give in to the demands of labour even if this has catastrophic consequences for their enterprises. This in turn becomes a good reason or an excuse for them to retrench and casualise labour, leading to high levels of unemployment which in turn affects the strength of unions. This is however not to say that industrial action is no longer an effective method of protecting and promoting the interests of workers. Industrial action, particularly in the form of strikes, should be used with great caution and trade unionists should always fight off the urge to call for such actions especially if they have serious negative economic repercussions for the country and they have short term benefits for workers.

Public perception about industrial action, particularly strikes, has changed. There is a growing belief that most strikes do not serve the interests of workers but are merely an attempt by trade unions to display that they wield significant power and that in spite of their participation in various structures that promote corporatism, they are not a quiescent

[507] O Regan 1990 *Acta Juridica* 118.

movement. One newspaper posed the following question regarding the protracted 2010 public sector strike:

> "Some months ago, we posed the question of who Cosatu represents. Was it the entire working class, or was it only the employed working class? The consequence being that the working class representatives should work towards growth of a country's economy, while the employed workers' organisation will forever focus on getting more out of employers."[508]

Describing the coverage of the public sector strike, one commentator stated as follows:

> "In the main … the media's coverage of the strike has been in the style of embedded journalism. Volunteers that have gone to state hospitals have been interviewed and given the chance to tell their stories, but not striking workers. The plight of learners missing exam preparations and people being denied emergence services has been highlighted. Economists have been citing figures indicating that service delivery may have to be traded off against salaries. Whether radio, television or print. They all lined up to condemn the strikers and unleashed a tide of anti-striker sentiment amongst their listeners, viewers and readers."[509]

The involvement by trade union members in violent strikes has damaged the reputation of the labour movement. The negative publicity which the labour movement received during the public sector strike requires aggressive lobbying to change the perception of the public about trade unions. The Democratic Alliance (DA), an opposition party, initiated a process of a private members bill which seeks to impose penalties on trade unions for any damages arising

[508] See "Analysis: Vavi's 'scorched earth' threat will come back to haunt him" *The Daily Maverick* 25 August 2010 http://www.thedailymaverick.co.za/article/2010-08-25-analysis-vavis-scorched-earth-threat-will-come-back-to-haunt-him (accessed 25 August 2010).

[509] See L Gentle "The Wider Significance of South Africa's Public Sector Strike" http://www.sacsis.org.za/site/article/544.1 (accessed 14 September 2010).

out of illegal behaviour of their members during strike action.[510] The proposed Bill seeks to give courts jurisdiction to even award punitive damages and to make declaratory orders to the effect that an otherwise protected strike ceases to be one due to failure by members of a trade union to observe good practices.[511] It has received wide ranging criticism from trade unions. The first obvious criticism is that proper procedures were not followed as the current arrangement is that any labour legislation must be initiated through Nedlac. The national spokesperson for COSATU, Patrick Craven, made a comment that the Bill was "an anti-trade union measure".[512] Another criticism levelled against the Bill is that it is unnecessary as illegal conduct by striking trade union members is already dealt with under common law.[513]

The afore-going observations underscore the need for the trade union movement to work towards the restoration of credibility and confidence not only among members but the public at large. Whilst the primary function of trade unions is to service the needs of their members, they must be careful not to engage in actions that diminish their popularity. They must not engage in self-destructive actions unless this is absolutely necessary. There is a need to restore the reputation of the right to strike in South Africa, which has been tarnished by violence and the inability of trade union leaders to rein in members responsible for such acts.

[510] See "Unions: DA's proposed labour law amendment a 'publicity stunt'." http://www.mg.co.za/printformat/single/2010-10-07-unions-das-proposed-labour-law-amendment-a-publicity-stunt (accessed 03 November 2010).

[511] *Ibid.*

[512] *Ibid.*

[513] *Ibid.*

# CHAPTER 5

# TRADE UNIONISM AND EMERGING CHALLENGES

## 5.1 Introduction

The trade union movement in South Africa has seized the numerous opportunities offered by the current labour relations system and is probably the envy of other trade unions worldwide, for its resilience in fighting for the rights and interests of workers. Despite the shortcomings inherent in the institution of collective bargaining and industrial action, such opportunities remain the most widely used by unions to promote the interests of their members and workers in general.

The advent of democracy, although bringing about many benefits to trade unions, poses new challenges. It is ironic that trade unions risk being irrelevant in a new democratic dispensation; with institutions and numerous opportunities which they can make use of to protect and promote the rights and interests of their members. In order to remain a vibrant force, trade unions must redefine their role and come up with innovative strategies to contend with various pressures which have diminished trade union power in other countries.

This chapter will attempt to explore the state of trade unionism in South Africa, how the labour movement has seized the opportunities offered by a new constitutional democracy to further the rights and interests of its members, the extent of the effects or forces of globalisation on the South African and global trade union movement, how South African trade unions are attempting to redefine their role and reinvent themselves in the face of numerous challenges; and their future role in shaping relations of work in South Africa.

## 5.2 Trade unionism, democracy and corporatism in South Africa

Trade unions were actively involved in the struggle for democracy in South Africa. Black trade unions strongly resisted the policies of the apartheid government and their functions

extended beyond promoting and protecting the interests of their members at shopfloor level. The question to be asked 15 years after democracy is whether the democratic dispensation has presented trade unions with favourable conditions to retain, consolidate and extract new gains for their members.

The current labour relations system, ushered by a new constitutional order and numerous pieces of legislation, promotes, amongst other things, a corporatist system of managing employment relations.[514] Du Toit describes corporatism as concept which envisages a more pro-active role by labour, as it promotes consultations between social partners on matters of mutual interests at both macro and micro-levels.[515] Habib points out that the development of a corporatist system of labour relations can be traced back to attempts by the apartheid government to diminish the strength and effectiveness of trade unions.[516] The resilience displayed by trade unions in the face of numerous anti-trade union measures in the apartheid era, in the form of disruptive strikes, was a lesson that disenfranchising labour from processes where social and economic matters are debated fuelled tension and labour unrest. During the early years of democracy, it was difficult to tell which labour relations model was to become dominant or prominent. Whilst some commentators speculated that corporatism was going to emerge as the preferred model of labour relations, some argued in favour of strategic unionism and tripartism.[517] The overarching concept is social dialogue; which recognises the importance of involving all social partners in the debate about social and economic issues.

The watershed moment leading to a corporatist labour relations trend was the passing of the amendments to the LRA of 1988 which sought to suppress trade union activities and erode

[514] A Habib "From Pluralism to Corporatism: South African Labour Relations in Transition" 58.http://pdfserve.informaworld.com/170212_762317372_769357436.pdf (accessed 19 August 2010)

[515] D du Toit "Corporatism and Collective Bargaining in a Democratic South Africa" (1995) 16 *ILJ* 785 at 786-787.

[516] Habib "From Pluralism to Corporatism".

[517] See for example K von Holdt "Strategic Unionism: The debate" http://www.africafiles.org/article.asp?ID=4641 (accessed 11 September 2010). Commenting during the early 1990s on strategic unionism, the author states that "despite the dangers inherent in it, it is quite possibly the only hope for economic growth, job creation and the development of a dynamic manufacturing".

the gains already made by trade unions.[518] The reaction by COSATU and NACTU was massive lobbying against the amendments which eventually led to the signing of the historic *Laboria Minute* by the two trade union federations, SACCOLA, the NMC and the Department of Manpower. The parties agreed that no processes leading to the amendment of the LRA would be debated by parliament unless firstly deliberated upon by the social actors.[519] The major outcome of the agreement was the participation of the parties in negotiations leading to the amendment of the 1988 LRA to the promulgation of the 1991 LRA described as "the first Act in parliament that was the product of trilateral negotiations between the state, capital and black trade unions".[520]

Another event indicative of a shift to corporatism was an agreement signed by COSATU and the Minister of Manpower obliging the parties to enact a statute which was going to extend minimum labour conditions and labour rights to workers in the farming and domestic sectors. COSATU seized this opportunity to also make contributions on a draft statute that was going to extend labour rights to workers in the public sector.[521] Prior to the establishment of Nedlac, trade unions, particulary COSATU, actively participated in the NMC and the National Training Board (NTB). Maree points out that COSATU joined the NMC to attempt to assert the role of labour in the determination of labour related issues.[522] COSATU and NACTU wanted the NMC to be restructured from just being a "purely advisory body to a bargaining

[518] Habib "From Pluralism to Corporatism". Habib points out that unions won numerous gains after the recommendations and implementation of the Wiehahn Commission.

[519] See J Maree "Trade Unions and Corporatism in South Africa" http://digital.lib.msu.edu/projects/africanjournals/pdfs/transformation/tran021/tran021003.pdf (accessed on 17 August 2009). See also L van der Walt, "Against Corporatism: The Limits and Pitfalls of Corporatism for South African Trade Unions" http://web.wits.ac.za/NR/rdonlyres/68146294-4DFF-4CA5-946A-3540D432FBBC/0/againstcorp.pdf (accessed 19 August 2010). This agreement was called the *Laboria Minute* and as stated by the author "it established the principle that the labour movement participate in shaping the industrial relations system, including labour law, collective bargaining institutions, and multipartite forums, a principle that assumed an institutional form in the shape of a restructured, tripartite, National Manpower Commission…."

[520] *Ibid.*

[521] *Ibid.*

[522] *Ibid.*

forum with the power to negotiate labour market policy".[523] COSATU withdrew from the forum in 1991 due to delays in restructuring the forum and extension of labour rights to public sector, farm and domestic workers.[524] The labour movement (COSATU) lobbied that all draft labour legislation be debated by the NMC before being submitted to parliament and that if consensus ensued between the parties, the draft legislation should be presented to parliament unchanged.[525] The social partners finally agreed on the transformation of the forum in 1992 and the process of extending labour laws to workers in the farming and domestic sectors, as well as the input of COSATU on labours laws affecting the public sector, gained impetus when an accord was reached in the same year, which also bound the Minister of Manpower to these commitments.[526]

COSATU also participated in the NTB and this was to ensure that the unions played a role in the formulation of a training system for workers.[527] The corporatist trend was further enhanced with the establishment of the National Economic Forum (NEF) in 1992. The forum was established after a stand-off between the government and COSATU about the envisaged Value Added Tax (VAT) system and the unilateral changes to the economy effected by the government.[528] The union proposed the establishment of a forum that was going to facilitate tripartism on matters of economic policy but the government was firm on its resolve not to entertain representations on matters of public policy.[529] COSATU entered into an agreement with business leading to the formation of the NEF and the government relented and agreed to participate in the NEF, launched formally in October 1992.[530]

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[523] Du Toit *et al Labour Relations Law: A Comprehensive Guide* 15.

[524] *Ibid*.

[525] *Ibid*.

[526] *Ibid*.

[527] Maree "Trade Unions and Corporatism in South Africa".

[528] Du Toit *et al Labour Relations Law* 15-16.

[529] Du Toit *et al Labour Relations Law* 16.

[530] *Ibid*.

As pointed out by Habib, the adversarial system which used to be the hallmark of the labour relations system of apartheid South Africa was dismantled in the 1990s by efforts aimed at facilitating a corporatist model of labour relations.[531] The author further points out that the political negotiations during the same period spilled into the arena of labour relations as the social partners began an earnest debate on economic policies and how South Africa was going to enter the global economy.[532]

Corporatism did not only manifest itself at national level. In 1991, NUM organised a mining summit in response to massive retrenchments in the mining industry. The summit was attended by representatives from state, labour and capital. The trade union made a proposition for measures, both immediate and long-term, in response to the crisis in the sector.[533] Although the achievements of the union were minimal, the major outcome was the setting up of a Committee mandated to attend to the concerns raised by the trade union.[534]

Another forum which was established and indicated a shift to corporatism was the Textile-Clothing Working Group. Like the mining industry, the textile and clothing industries were experiencing huge job cuts and retrenchments.[535] The Ministry of Trade and Industry played a central role in attempting to redress the challenges faced by the industries by calling for the establishment of group with a mandate to formulate long-term strategies and transitional plans for the industries.[536] The working group known as the Hatty Commission, consisted of representatives from SACTWU, the Department of Trade and Industry, the textile and clothing industry, the Board of Trade and Industry as well as other representatives from

[531] Habib "From Pluralism to Corporatism".

[532] *Ibid.* Habib further states that the transition period saw the establishment of informal and legislated institutions aimed at facilitating the partnership of the social actors to realise the vision of making "the South African economy more competitive".

[533] Maree "Trade Unions and Corporatism in South Africa"

[534] *Ibid.*

[535] *Ibid.*

[536] *Ibid.*

numerous public sectors with the status of observers.[537] Other forums established were the Textile and Clothing Panel and a Task group which were to play the role of formulating strategies to restructure the clothing and textile industry to make it competitive and viable.[538]

A strong indicator that South Africa had embraced the concept of corporatism in its labour relations system was the establishment of Nedlac. The establishment of this institution signalled that corporatism did not just remain an abstract concept but a practical reality. It resulted from a merger of the NMC and NEF and it was established by the National Economic Development and Labour Council Act 35 of 1994. Its formation was premised on the understanding that it was going to serve the purpose of facilitating negotiations on matters of social and economic policies and agreements, and in so doing, promote the growth of the economy, the involvement of all social actors in the determination of economic policies and the achievement of equity for all South Africans in the social and economic spheres.[539] Its core purpose is therefore to change the relationship of the three social actors, that is, government, labour and business, often characterised by rivalry, to a relationship where there is co-operation in the formulation of policies in order to achieve the greater goals of "nationally unity, reconciliation and, development".[540]

The trade union movement has achieved numerous gains through its participation in Nedlac. In its 2008/9 annual report, the overall convenor of government, Les Kettledas articulated that the government's position was that challenges facing South Africa and adversarialism which is inherent in the relations of social partners can only be resolved through social dialogue and highlighted some of the achievements of this process as including the unity of

[537] *Ibid.*

[538] *Ibid.*

[539] Habib "From Pluralism to Corporatism".

[540] *Ibid.* The institution is described by Habib as "a corporatist mechanism that emerged and functions within the parameters of the governing ideology of national unity and reconciliation".

purpose displayed by social actors in tackling the electricity crisis and the global financial meltdown.[541]

The overall convenor for business, Raymond Parsons cited, amongst other things, the co-operation of social partners in coming up with strategies employed to cushion South Africa from the effects of the global financial meltdown, as being a good example of the effectiveness of social dialogue.[542] The overall convenor for labour counted the successes of the institution as including coming up with strategies to strengthen the competitiveness of the economy and the South African industrial capacity.[543]

The first major achievement of Nedlac was the drafting of the LRA of 1995. Van der Walt states that it was designed to promote a co-operative labour relations system and the global competitiveness of the South African economy.[544] Its hallmark features are an accessible dispute resolution system which emphasises conciliation as the means of resolving disputes, and the promotion of worker participation at workplaces through the innovative workplace forums.[545]

The trade union movement won numerous gains through its participation in the drafting of the LRA of 1995. As put by Du Toit *et al*, "[t]he previous Act [LRA] ... favoured employers and the new Act seeks to shift this balance onto a more even keel through the uniform extension of employee rights…."[546] The negotiations leading to the promulgation of the LRA

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[541] See "Nedlac Annual Report 2008/9" http://www.nedlac.org.za/media/4353/2009.pdf (accessed 21 August 2010).

[542] *Ibid*.

[543] *Ibid*.

[544] Van der Walt "Against Corporatism".

[545] *Ibid*.

[546] Du Toit *et al The Labour Relations Act of 1995* (1998) 40. The authors further state that "[u]nderlying mechanisms in the Act which accord additional rights to labour and increase the restrictions on managerial

1995 were protracted and there were many contentious issues. Although the parties reached an agreement at Nedlac, business and labour were not in complete agreement about the form of the Act.[547] The prominent misgiving from the business community is that the Act infringes the prerogatives of management and is the cause of labour market rigidities, whilst trade unions argue that it does not satisfactorily empower workers.[548]

In its 1997 September Commission Report,[549] COSATU made a finding that the role of Nedlac was still vague and that there was still debate about the legitimacy of the institution with other social actors, business and government, preferring to isolate the trade union movement from negotiations on economic and labour market policies. The Commission also noted that some trade unions were displaying an "ambivalent attitude" towards the processes of the institution.

Whether the tripartite relationship at Nedlac will endure remains to be seen. In its 2008/2009 annual report,[550] numerous challenges affecting the institution were highlighted. Chief amongst them were adversarialism, the inflexibility of government departments when it comes to timeframes to finalise issues, the tendency of side-stepping the institution on key issues, the difficulties in enforcing compliance of the Act exacerbated by the absence of a protocol on how to deal with such an issue; and the fact that stakeholders, both internal and external, now have a negative perception about the institution.

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prerogative, is an approach that sees the empowerment of labour and the development of human resources as the key to economic development."

[547] Du Toit *et al The Labour Relations Act of 1995* 41.

[548] *Ibid*.

[549] See "The Report of the September Commission on the Future of Trade Unions" August 1997 http://www.cosatu.org.za/show.php?include=docs/reports/1997/sept-ch3.htm (accessed 14 September 2010).

[550] See the "Nedlac Annual Report 2008/2009".

The "resurfacing of adversarialism" threatens the effectiveness of the Nedlac and defeats the whole purpose of corporatism. There must be a serious effort on the part of the social actors to attempt to revitalise corporatist institutions. The negligible use of institutions like Nedlac can only fuel adversarial relations between the social actors and the labour movement risks losing some of the gains already made.

## 5.3 Corporatism: A panacea for a labour relations system with a history of adversarialism?

The various institutions set up after the inauguration of democracy to facilitate social dialogue were meant to ease tensions between the state, labour and business. As articulated in the Explanatory Memorandum to the Draft Labour Relations Bills, an adversarial labour relations system was a hindrance to economic growth; "an approach uncomfortably suggestive of the view that strikes are the main cause of economic problems".[551] As aptly put by Habib, the articulation of issues by the labour movement "is [now] constrained by its commitment to the post-apartheid state's ideology of national unity and reconciliation".[552] Whether the corporatist arrangements which feature prominently in the post-apartheid labour relations landscape "benefit or jeopardise the interests of the labour movement" is a subject of great debate.[553]

A challenge besetting the labour movement in a contemporary labour relations system where social dialogue is preferred over adversarialism is how to compromise with other social actors but ensure that their independence is not eroded. Although it is still early days to predict the future of corporatist structures in the South African labour relations landscape, there are signs of discontent among the social partners which often degenerate into industrial action, in the form of protest action and strikes (mainly by the unions affiliated to COSATU), and mudslinging in the media. As noted, one of the challenges highlighted by Nedlac in its

[551] Du Toit 1995 *ILJ* 789.

[552] Habib "From Pluralism to Corporatism".

[553] *Ibid*.

2008/2009 annual report is the "[r]esurfacing of adversarialism of the past" as social partners are starting to display "rigidities in the engagements".

Hepple once stated as follows:

> "Where power bargaining by trade unions preceded political independence and democracy, the consequences for the newly independent regimes have been profound. The new governments have had to deal with explosive demands for wages and the redistribution of resources. They have tended to respond to this by establishing forms of state corporatism in which trade unions have been registered and tightly regulated by the state and, where possible, kept under close control by the ruling party."[554]

The observation by Hepple, made before the advent of a parliamentary democracy, holds true of the South African labour relations transition in some respects. Even before the advent of democracy, the then apartheid government was beginning to show some willingness to entertain representations from the labour movement on matters of economic and social policy. Participation of unions in various forums such as the NMC and the NEF has already been highlighted. After the apartheid government had accepted most of the recommendations of the Wiehahn Commission, black trade unions made negligible use of the post-Wiehahn Commission industrial institutions partly because they thought that such institutions were a ploy by the state to co-opt them and to diminish their strength.

Tripartism and corporatism appear to be the only favourable forms of engagement in a democratic state but unions have to be cautious that participation in such institutions does not diminish their independence. As put by Hepple, "[i]f trade unions are to retain credibility with their own members, and with workers generally, they have to remain an independent force".[555] The author further points out that the role of trade unions in a democratic society

[554] B Hepple "The Role of Trade Unions in a Democratic Society" (1990) 11 *ILJ* 645 at 653.

[555] Hepple 1990 *ILJ* 649.

"is complex and many sided".[556] The author argues that the role of trade unions in a democratic society is paradoxical. He observes as follows:

> "It is in their role towards the economic order of a democratic society that trade unions reveal their central contradiction. Unionism is a natural form of collective worker resistance to the power of capital. Yet this very form of organisation makes it possible to *channel conflict into manageable demands on which compromise can be reached through collective bargaining*. This contradictory mixture of roles as both the natural opposition and the natural ally of capital explains the ambiguous attitudes of both right and left to trade unions."[557][Own emphasis]

By participating in the formulation of policies of a capitalist society through various corporatist structures, it can be argued that trade unions are perpetuating the current capitalist economic order. In essence, their main function is how best to cushion the workers from all the negatives associated with capitalism. They are therefore not challenging the system as such, but merely countering the negative implications of capitalism on workers. Whilst corporatism is currently the preferred method for easing tensions between the major social actors, the labour movement must be careful that by participating in various corporatist structures it is not merely legitimising the policies of the state and the interests of business. It must use the various forums to continue to militantly lobby for the promotion and protection of the rights of workers.

The view of Van der Walt paints a rather gloomy picture about the attractiveness of corporatist structures in South Africa. The author states that:

> "There is … little basis for claims that corporatist forums can provide a site for reconstruction and redistribution, let alone a route to social-democracy or socialism … [C]orporatism imposes a range of costs on the labour movement, including *an erosion of trade union democracy, the development of tensions between the leadership*

[556] Hepple 1990 *ILJ* 654.

[557] Hepple 1990 *ILJ* 651-652.

> *and the rank-and-file and the involvement of the unions in the co-management of capitalism*. It is suggested that the trade unions should abstain from corporatist arrangements, and instead focus their energies on the consolidation of workplace organisation and *rely on struggle as a means of pressing demands-both reformist and transformative*."[558] [Own emphasis]

Van der Walt takes issue with claims from some commentators that corporatism is necessary for the achievement of growth and upliftment of society and that it can help in the consolidation of democracy through "matching political reforms with economic advances" and that "union engagement in macro-economic policy can constitute a 'radical reform' which will reshape the South African political economy in the direction of social-democracy".[559] The author argues that corporatism weakens "union democracy" and widens the "gap between union leaders and union members".[560] In the case of South Africa, there is not much evidence that there is tension between union leaders and members. Trade union leaders, although engaging with the state and business in various corporatist structures, appear to have resisted the divide and rule tactics often associated with such engagements. Trade unions, particularly COSATU, have reiterated that they are autonomous bodies whose primary function is to service the interests of their members. To some, the 2010 public service strike was a grand display of resilience by the trade union leadership and a sign that ordinary union members have no reason to believe that their leaders have lost credibility as a result of participating in corporatist structures defining economic and social policies.

In South Africa, corporatism has strengthened the labour movement in many respects. Trade unions must however be vigilant as participation in corporatist structures also diminishes their strength to a certain extent, and also legitimises the interests of the state and capital.

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[558] Van der Walt "Against Corporatism".

[559] *Ibid.*

[560] *Ibid.*

## 5.4 The ANC, SACP and COSATU Alliance: Implications for the South African labour movement

The ANC, mindful of the support that it could get from the labour movement, particularly COSATU, entered into a strategic alliance with the labour movement and the SACP. COSATU had displayed great organisational strength during a period when opposition political parties, including the ANC, were banned by the apartheid government. The labour movement pledged its support for the ANC in the 1994 elections and the trade-off was that the former was going to embrace labour-friendly policies and allow the labour movement to engage it on matters of social and economic policies.

The first major agreement between the alliance partners was on the Reconstruction and Development Programme which, as put by Du toit *et al*, "heralded a new vision of growth based on empowerment of the workplace".[561] Kochan points out that:

> "The RDP serve[d] as an important experiment in development policy not only for South Africa, but for all developing and advanced industialized economies as they struggle with the desire to promote the multiple objectives of economic growth, creation of good quality jobs and improvement in living standards."[562]

The RDP was a highly ambitious policy document which sought to redress the past imbalances in the job market, to improve the standard of living of the formerly disenfranchised and to promote economic growth. Du Toit *et al* state that the "[t]he RDP set out to design a strategy for rebuilding the economy and developing the human resources of the country, focusing on the basic needs of the people".[563] The undertaking by the ANC was that the programme was to be implemented through the formulation of detailed policies and other programmes.[564] The ANC committed itself to formulating labour legislation

[561] Du Toit *et al Labour Relations Law* 325.

[562] T A Kochan " Labour and Employment Policies for a Global Economy" (1994) 15 *ILJ* 689 at 691.

[563] Du Toit *et al Labour Relations Law*17.

[564] *Ibid*.

guaranteeing equal rights to all workers, organisational rights for trade unions, the participation of workers in decision-making at the workplace, a collective bargaining system at the national, industry and workplace level and the right of workers to engage in strike action and other forms of industrial action on socio-economic issues.[565]

The ANC unilaterally formulated and adopted the Growth, Employment and Redistribution Programme (GEAR) in 1996. In one of its discussion documents, COSATU points out that the main justification for GEAR by its proponents was "that it gave effect to the realisation of the RDP". The proponents of the GEAR programme argued that "the economy could not sufficiently generate sufficient resources to finance the programmes outlined in the RDP unless 'more deep-rooted reform' are given attention".[566] For government, the RDP was merely an overarching policy and there was a need to formulate other comprehensive policies in order to achieve its numerous commitments.

The aspirations of the ANC, COSATU and SACP tripartite alliance set out in the RDP were consolidated in the LRA of 1995. The labour movement won many gains through the central role played by COSATU in the tripartite alliance in lobbying for labour friendly legislation. The willingness by the new democratic government to involve the labour movement in the processes of policy formulation was to be understood in the context of South Africa's history of polarisation and adversarialism between the state, labour and capital. The newly elected government was aware of the dangers of alienating the labour movement from socio-economic processes and its alliance with one of the largest trade union federations was obviously a political strategy to appease the labour movement. As correctly observed by Habib, the ANC government was aware that it was politically and economically vulnerable and it embraced corporatism to avert the possibility of opposition.[567]

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[565] *Ibid.*

[566] See the COSATU Discussion Document "A Growth Path Towards Full Employment: COSATU Policy Perspectives" http://www.cosatu.org.za/docs/discussion/2010/cosatubooklet.pdf (accessed 14 Septemeber 2010).

[567] Habib "From Pluralism to Corporatism".

The victory of the ANC in the 1994 elections meant that the expectations of workers rose and employers and trade unionists were suddenly confronted with the challenge of negotiating improvements to conditions of workers.[568] The leadership of the ANC government, mainly from various trade unions affiliated with COSATU, were "particularly vulnerable to rank and file pressures because of the need to solidify their positions and demonstrate their competence".[569] The overall effect was that the labour movement made and consolidated numerous gains during the early years of democracy.

Although the adoption of GEAR might have been seen as a shift from the RDP, it was a necessary intervention as the latter programme was too broad and merely formed a basis for South Africa's future macro-economic policies.[570] Buhlungu however states that the abandonment of the leftist RDP was "a clear indication of its adoption of the logic of free market economics".[571] The trade union movement is still bitter about the ANC's unilateral adoption of a neo-liberal GEAR framework and this is going to be a matter of contestation for many years to come. The trade union movement states as follows:

> "Immediately before the democratic movement could settle on the levers of state power, the under handed and hidden policy contestation came to the open in 1996, with the emergence of the Growth, Employment and Redistribution Framework (GEAR)."[572]

The Tripartite Alliance woes were diagnosed as early as 1997. The September Commission acknowledged that the alliance was not working and cited a number of reasons for this which

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[568] Kochan 1994 *ILJ* 700.

[569] *Ibid*.

[570] G Wood "South African Trade Unions in a Time of Adjustment". http://www.historycooperative.org/journals/llt/47/06wood.html (accessed 28 August 2010).

[571] S Buhlungu "Gaining Influence but Losing Power? COSATU Members and the Democratic Transformation of South Africa". http://pdfserve.informaworld.com/477436_751316036_792041101.pdf (accessed 28 August 2010).

[572] See "A Growth Path Towards Full Employment".

included the following; the failure by Alliance partners to meet frequently and the meetings which yielded little or no results on matters of policy formulation, the general lack of unity of purpose by partners and the neglection of the RDP with emphasis being placed on the new unilaterally adopted GEAR policy.[573]

The recommendations of the Commission were, amongst other things that, the labour movement was to play a pivotal role in defining the direction of the transition. COSATU argued that embracing the ideals of neo-liberalism did "not mean there is no space to develop and implement progressive social and economic policies".[574] The labour movement has legitimate fears about its future and credibility and cautions that its legitimacy amongst its members and workers in general will be compromised if it cannot "demonstrate concrete gains in terms of worker rights and socio-economic progress …."[575]

COSATU faces an enormous task of asserting its influence in the tripartite alliance. This has been revealed by the protracted 2010 public sector strike where the state displayed an intransigent attitude even when, as put by Gentle, it was aware that "the leaderships of the COSATU public sector unions were drawn into … [the] strike reluctantly".[576] Despite all its shortcomings, the future of the Alliance cannot be predicted with certainty. In its discussion document, COSATU highlights that there is an urgent need to rethink how the Alliance should function and insists that its mandate is to lobby for a Pact with other Alliance

[573] See "The September Commission Report".

[574] "The September Commission Report".

[575] See "The Alliance at a Crossroads-the battle against a predatory elite and political paralysis" COSATU CEC Political Discussion Paper September 2010 http://www.cosatu.org.za/docs/discussion/2010/dis0903.pdf (accessed 14 September 2010).

[576] See L Gentle "The Wider Significance of South Africa's Public Sector Strike" http://www.sacsis.org.za/site/article/544.1 (accessed 14 September 2010). The author argues that the leaderships of the COSATU affiliated public sector unions were reluctantly forced to embark on a strike and that "[t]he main reason for endorsing the idea of a strike was that the ILC [Independent Labour Caucus] had opted for it. Forced with the prospect of being outflanked and fearing the consequences of militant action conducted outside its ranks … COSATU unions had little choice but to come out".

partners.[577] COSATU's strategies regarding the future of the Alliance are still vague but its belligerent attitude points that the Alliance will undergo a major overhaul in the near future.

Despite all its flaws, significant gains have been made through the Alliance. They include the adoption of labour friendly legislation, efforts to cushion workers from the consequences of the 2008 economic downturn and strides in attempting to close the inequality gap among workers. The closeness of COSATU to the ruling party however has numerous negative implications for the labour movement. The trade union is increasingly becoming embroiled in politics and plays a pivotal role in the ANC leadership succession debates. It has also lost many of its leaders to the ANC government which is a drain on the federation's human resources.

The tensions between the tripartite alliance members are also exposing the entire labour movement to the risk of losing the gains made in the last fifteen years. The government is increasingly becoming frustrated with the hardening attitudes of COSATU affiliated unions on matters of socio-economic issues and during collective bargaining. The hardening of attitudes will ultimately spill over and affect future bargaining tendencies of unions, the government and employers in general. The accusations that trade unions, particularly those affiliated with COSATU, wield too much power are an indication that government and employers are losing patience with the labour movement.

The joining of forces by government and employers is not good news for workers. The main problem within the Alliance is the unhealthy preoccupation by the parties, particularly COSATU and the ANC, to assert their role and influence. COSATU is insisting that although it forms part of the Alliance, it is an autonomous organisation and this should not impede its efforts to extract as many gains as possible for its members. The ANC, on the other hand, appears to be losing patience with the engagement tactics of the labour movement and is

[577] "The Alliance at a Crossroads".

always insisting that the alliance is an ANC-led alliance and that the other parties should not impede its efforts to efficiently govern the country.

The power struggles in the Alliance are exposing the labour movement to the criticism that its involvement in politics is compromising its efforts to effectively champion the rights and interests of ordinary workers. The closeness of COSATU to the ruling party, though not essentially a bad thing, should not jeopardise the integrity and credibility of the trade union movement. Woods observes that a challenge that besets the trade union movement is how "to retain the integrity of a union voice whilst continuing to compromise with both state and capital".[578]

Slabbert and Swanepoel observe as follows:

> "The danger of the political system in South Africa is currently that the gap between expectations of the masses and economic relations as a result of a variety of factors is widening, thus creating an ideal breeding-ground for conflict in the workplace and in the broader community. The freedom struggle is not over for the 'workerist' faction of COSATU who strives for a socialist labour party…. *There is consequently little doubt concerning the complexity of the political system and the impact thereof on employment relations*."[579] [Own emphasis]

Perhaps the cause of the tensions between COSATU and the ruling party is the absence of an appropriate neutral level where there can be a frank and robust debate on socio-economic matters. Most of the engagements and interactions between the tripartite alliance partners are at a political level and even pure labour and other socio-economic matters end up being overly politicised. This does not help the efforts of the trade union movement of attempting to come up with policies aimed at countering the numerous challenges that they face.

[578] Wood "South African Trade Unions in a Time of Adjustment".

[579] Slabbert and Swanepoel *Employment-Relations Mangement* 93.

## 5.5 The negative impact of globalisation on the trade union movement: A global and South African perspective

Buhlungu states that some of the challenges facing the labour union movement stem from the "insertion of South Africa into the global economy and the effects which that insertion entails for workplace reorganization and labour market restructuring".[580] The impact of globalisation on trade unions is a hotly debated topic. Bezuidenhout sums up implications of globalisation as follows:

> "Globalization is associated with increased reliance on the regulation of economic relations by markets. National governments turn to liberal approaches to macroeconomic management, implying privatisation, monetary liberalization, reduction in import tariffs, labour market flexibility and fiscal discipline."[581]

Globalisation is not always associated with negative implications on workers and the trade union movement. As put by the Global Research Network, globalisation is also associated with positives for workers such as enabling them "to negotiate with companies on a global level and to address global issues such as gender discrimination and sustainable development with actors from around the world."[582]

The September Commission pointed out that globalisation undermines trade union solidarity as "the balance of class forces between capital and labour" shifts. The Commission also observed that:

> "The increased mobility of capital, reinforced by the programmes of multilateral economic institutions, such as the International Monetary Fund (IMF) and the World Trade Organisation (WTO), has the same effect, weakening the influence of the state

[580] Buhlungu "Gaining Influence but Losing power".

[581] A Bezuidenhout "Towards global social movement unionism? Trade union reponses to globilization in South Africa" http://www.swopinstitute.org.za/files/bezuidenhout%20dp11500.pdf (accessed 12 September 2010).

[582] See the executive summary of "Trade Unions responses to globalisation: A review by the Global Union research Network" http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_088078.pdf (accessed 12 September 2010).

on the national economy and so undermining labour's claims or government as a vehicle for redistribution".[583]

In the South African context, the adoption of GEAR in 1996 was an indication that South Africa, like many other democracies, was succumbing to the pressures of the world economic institutions such as the IMF, WTO and the World Bank to embrace policies which underpin globalisation. As put by Bezuidenhout, the state began to exercise some restraint in restructuring the economy, an indication that the markets were to take over that role, and the dominance of the "language of the market" resulted in the closing "down … of the space available for the labour movement to insist on including social concerns in economic policy".[584]

As outlined by COSATU,[585] "GEAR sought to introduce numerous changes in the South African economic landscape such as fiscal reforms, exchange control relaxations, the influence of trade and industrial policies by the market, the restructuring of the public-sector and the "promotion of public-private partnerships", the expansion of social and economic infrastructure and a flexible labour market.

Although the main criticism by COSATU was that the ANC unilaterally adopted the macroeconomic policy and in the process flouted the ideals which informed the establishment of Nedlac, it also raised numerous objections on the content of the macroeconomic framework. COSATU's numerous criticisms are premised on the argument that the historical context of South Africa could not be reconciled with "the philosophical underpinnings of GEAR".[586]

[583] "The September Commission Report".

[584] Bezuidenhout "Towards global social movement unionism? Trade union reponses to globilization in South Africa".

[585] "A Growth towards Full Employment".

[586] *Ibid.*

It is not clear if the anger directed at GEAR by COSATU, its arch critic, is because it was sidestepped during consultations leading to its adoption or, because it sought to embrace the forces of globalisation at the expense of the interests of the working class. There is however some truth in the allegations by the labour movement that some of the adjustments that GEAR sought to introduce were not fully explained and that the macroeconomic policy has failed to deliver a vibrant economy which benefits all South Africans. Whilst the aspirations of the RDP policy framework, with an inclination or bias in social development issues, were to reconstruct and develop, GEAR emphasised on such issues as "stringent and monetary targets" which inevitably resulted in significant cuts in government spending in the period between 1996 and 1999 and limited the government's ability to create jobs "through public works-the building of houses and provision of services."[587]

On privatisation and restructuring of public enterprises, another goal of the GEAR policy framework in compliance with the standards of world economic institutions such as the IMF and the World Bank, the labour movement raised the objection that this was going to negate the social and economic interests of the workers and the poor. COSATU's objection was premised on the argument that the main goal of privatisation being to maximise profits and not to provide the services to the poor, was going to inevitably result in "job losses and increased costs for the services".[588]

The government accused the labour movement of misinforming the public and emphasised that its goal was to restructure public enterprises which cannot be equated to pure privatisation. It argued that restructuring and reforming public enterprises was actually one of the goals of the RDP and that it sought to achieve, among other things, a reduction in production and thus creating employment in the process, attracting "productive investment

[587] See "South Africa: Economic Policy and Development". http://richardknight.homestead.com/files/sisaeconomy.htm (accessed 17 September 2010).

[588] *Ibid.*

into the economy" and opening "the economy to those who were shut out by apartheid".[589] Government pointed out that contrary to the speculations by COSATU that the privatisation of public enterprises was going to lead to job losses, costly services, the envisaged reforms were likely to result in effective service delivery and that capital raised through this process was going to be invested in infrastructure development.[590]

Reforming and restructuring public enterprises to make them profitable is not, per se, detrimental to the interests if this is done to ensure that state owned enterprise are not a drain on the fiscus and that such reforms are done to create employment and to improve the lives of the workers. The fact that there was some misunderstanding between the allied partners, COSATU and the ANC, on the nature and extent of the restructuring process shows that parties neglected to consult each other on this aspect, which further points to a lack of a political will by the government to be a central player in promoting cooperation when it comes to socio-economic policy changes, especially when these changes are in reaction to the forces of globalisation.

On trade liberalisation, the argument by COSATU is that it diminishes "the power of the state to direct industrialization and has led to disintegration of productive structures at local level" as well as strengthening "the power of multinational corporations".[591] COSATU points out that the continual loss of jobs in the secondary sector is partly attributable to liberalisation of trade and that "[t]he policies of the past 16 years have thus failed to promote labour-intensive industrialization, in line with historical positions of the democratic movement".[592] The labour

[589] See MD Ayogu "Engaging the debate on privatization in South Africa: Theories, fables, facts, others" http://www.tips.org.za/files/Engaging_the_debate_on_privatization_-_tips_forum_2001.pdf (accessed 17 September 2010).

[590] *Ibid*.

[591] "A Growth towards Full Employment".

[592] *Ibid*.

movement correctly argues some sectors have been decimated as a result of liberal trade practices, particularly the clothing and textile sector.[593]

Trade union Solidarity has a different view on the issue of trade liberalisation. In its response to Nedlac's "Framework for South Africa's Response to the International Economic Crisis",[594] in which social partners agreed for a "strong, robust use of accepted trade measures, to ensure that the crisis does not cause job losses in the real economy" and to promote the procurement of goods and services from local suppliers, trade union Solidarity pointed out that this contradicted the calls by government for removals of barriers to trade in order to develop the competiveness of the South African economy in the global market.[595] The union argued that developing the competitiveness of the South African economy is not possible if the country shields itself from fully participating in a global economy through its reliance on protectionist measures. It however pointed out that protectionism was not essentially a bad economic decision, especially if such an action is necessitated by the need to protect newly established industries, otherwise known as "infant industries". These industries, including other sectors hard hit by the global economic downturn, were to be protected, albeit temporarily. The union cautioned that protectionist measures have long-term consequences. It cited the example of the textile industry, and how the measures employed to protect this sector after the Anglo-Boer War, were still in place notwithstanding that there has been "no sustained growth in the sector or in employment in the sector to show for it".[596]

The findings of COSATU on the issue of relaxing exchange controls, another indicator that South Africa is conforming to neo-liberal ideologies favoured by international economic institutions such as the World Bank and the IMF, was that it has essentially facilitated capital

[593] "A Growth towards Full Employment".

[594] Available at http://us-cdn.creamermedia.co.za/assets/articles/attachments/19552_frame_econ.pdf (accessed 10 September 2010)

[595] See "Speech at Scoping Workshop on Trade and Industrial Policy Reform in South Africa-13 August 2009" http://www.solidarityresearch.co.za/wp-content/uploads/2010/07/2-09-08-12-Speech-Scoping-workshop-on-trade-and-industry-reform.pdf (accessed 10 September 2010).

[596] *Ibid.*

outflows as many South African companies have delisted from the Johannesburg Stock Exchange (JSE) bourse and listed with the London Stock Exchange.[597] As put by the labour movement:

> "Gencor, Liberty Life, Anglo-American, De Beers, Old Mutual, SA Breweries, Investec and Didata are all big firms that have accumulated capital by exploiting South African and regional labour through the migrant labour system and apartheid repression. They have now found *a way to eschew the responsibility of financing industrial diversification in South Africa*".[598] [Own emphasis]

The trade union movement also points out that investment is deterred, especially in the manufacturing sector, by volatile exchange rates and that removing exchange rate controls "entrenches the power of global financial capital to hold domestic state policy hostage".[599] The observation by trade union Solidarity is that the fluctuation of the exchange rate means that it cannot be relied upon as "the only thing that can provide a firm foundation for sustained development of the South African economy".[600]

In his address to the Manufacturing, Engineering and Related Services SETA (MERSETA) Annual General Meeting, the President of NUMSA, Cedric Gina, remarked as follows on the shortage of skills, another challenge facing workers and trade unions in South Africa:

> "The GEAR policy played a major role in the shortage of skills. It is the GEAR policy that tried to compel state owned enterprises to prioritize profitability and productivity for the whole economy, thus cutting down on massive apprenticeship. It is GEAR policy that called for foreign direct investment with no conditions in terms of transfer of skills, just like China is demanding from foreign direct investments. It is GEAR policy that compromised the intellectual property of South African products. It is the GEAR policy that cut the tariffs even lower than the WTO standards for sensitive

[597] "A Growth towards Full Employment".

[598] *Ibid.*

[599] *Ibid.*

[600] "Trade and Industrial Policy Reform in South Africa".

> products. The neo-liberal approach to economic development has affected the country, including in the issue of skills."[601]

The globalisation discourse continues to attract diverse opinions from government, business and labour. COSATU is resolute that neo-liberalism exacerbates the plight of the workers. Unfortunately the trade union movement attributes its tenaciousness (neo-liberalism) on what it calls "the balance of power". It attempts to articulate its point as follows:

> "This balance of power finds expression in the economists' training in universities, short courses and training that politicians are offered by the IMF, World Bank and private banks. Having imbibed these courses, the appetite for alternative views about the economy that are in line with the political philosophy of the liberation is completely suppressed. But more importantly, the underlying class interests that have coalesced exert pressure on the state to solidify class compromise in state policy, so that the state acts to co-ordinate national activity in a predictable manner, in line with the interests contained in that class compromise."[602]

Although there is some truth in the allegations by the trade union movement that neo-liberal ideals have been accepted without a framework to counter the accompanying negative effects, the unfortunate trend is that trade unions have not taken a pro-active role in cushioning workers from such effects, preferring instead to lobby for support against macro-economic policies adopted by the government which champion the virtues of neo-liberalism, such as GEAR. This path of engagement has proven unhelpful, particularly to workers; as it should be accompanied by strategies form the labour movement on how to combat the negative effects of neo-liberal economic policies. Trade unions must vigorously engage business and government on the recently launched South African Decent Work Programme,

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[601] Available at: http://www.cosatu.org.za/show.php?include=docs/pr/2010/pr0920.html&ID=3981&cat=COSATU%20Today (accessed 01 September 2010).

[602] "A Growth towards Full Employment".

an ILO initiative, to ensure that it does not remain a political rhetoric but ultimately translates into concrete gains for the South African workforce. They must intensify efforts to ensure that the Decent Work Agenda does not remain an obscure ILO concept but gradually becomes a practical reality for workers. The Decent Work Country Programme can avert the problems of falling standards of employment and precarious working conditions currently being faced by the majority of the South African workforce. The key priorities of the programme are "strengthening fundamental principles and rights at work", "promotion of employment", "strengthening and broadening social protection coverage" and "strengthening tri-partism and social dialogue".[603] The programme is an excellent opportunity for trade unions to lobby for the Decent Work Agenda to be included in the country's economic and social policies.

Trade unions must accept the reality that globalisation is now a fairly entrenched and irreversible process. They must be proactive in exploring opportunities offered by the process of globalisation, opportunities that can be explored to benefit their members and workers in general. In his address at the Sixteenth World Congress of the International Confederation of Free Trade Unions (ICFTU), on "The Impact of Globalisation on Workers and Their Trade Unions" in 1996,[604] Michel Camdessus, then Managing Director of the IMF, stated as follows:

> "[M]arkets are ruthless and will challenge vigorously those that do not adapt. The world's common good will be greatly helped by the unions using their strength and their place at the table to help workers adapt and to engage employers and governments in dialogue to ensure-inter alia-that those who are unemployed through structural change are helped to retrain, to find new jobs, and to carry their entitlements from job to job".

[603] http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/genericdocument/wcms_145432.pdf (accessed 20 November 2010)

[604] Available at http://www.imf.org/external/np/sec/mds/1996/mds9613.htm (accessed 01 September 2010)

Trade unions have a big task of reassessing their role in a globalised world and extracting the best for their members and workers in general from the process of globalisation. Camdessus made numerous propositions to counter the negative impact of globalisation on workers. His most important observation was that:

> "A harmonious society requires the appropriate degree of emphasis on the market mechanism, on the role of the state, and on internal and external solidarity; a right emphasis which can better derive from another tripartite approach-this time, one of dialogue between employees, employers, and government."[605]

There is a school of thought to the effect that the traditional role of labour law, which is to protect workers, should be balanced against a new role; to promote rather than hinder job creation. Labour law, although not effectively relinquishing its traditional role "of protecting both work and the worker, must be much more watchful to the market and to the enterprise, in order not to impede job creation".[606] Put succinctly, "[l]abour law is not only subordinated to the economic reality, as it has always been. It is used as an instrument of economic policies, in order to reach certain economic objectives and job creation goals."[607]

The question to be posed is whether this trend has emerged in South Africa, and if so, the extent to which South African labour law has embraced this new role, as well as the implications for trade unions. As put by Bravo-Ferrer and Royo, "[c]hanging labour law into an instrument for employment policies means an increase of its own ambivalence of being both a workers' law, a law which protects them unilaterally from the employer, and an

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[605] *Ibid*.

[606] MRP Bravo-Ferrer and MRP Royo "The Role of Labour Law and Industrial Relations In Job Creation Policies" in M Biago (ed) *Job Creation and Labour Law: From Protection towards Pro-action* 15.

[607] Bravo-Ferrer and Royo "The Role of Labour Law and Industrial Relations In Job Creation Policies" 16. The authors further observe as follows: "[T]he acceptance of this new role implies a widening of managerial rights and a reduction of the protection levels workers used to enjoy, as this level was ensured precisely through a reduction of those rights. There is consequently a new balance between protection and efficiency, whose justification is once again a general objective of employment creation".

enterprise' law, a law at the service of the enterprise' demands".[608] In the South African context, there has been a robust debate about the impact of labour law on such issues as job creation and productivity of enterprises. Suggestions have been made that South African labour laws are rigid and must be relaxed to achieve the broader goal of employment creation.

Although the idea has not been openly accepted, in the form of a major overhaul of the current labour legislative framework to embrace the job creation role, it has not been openly rejected either. Bravo-Ferrer and Royo state that this "new balance" manifests itself in practices such as "a more favourable attitude towards temporary work, either fixed-term contracts or work through a temporary help-agency; a complete set of new, flexible rules governing working time …."[609] These practices, although not consolidated in labour legislation, are common in South Africa. The adoption of a liberal GEAR policy by government, which was a shift from the RDP policy, might be viewed as an acknowledgment that labour laws should be sensitised to other priorities such as the competitiveness of the economy and the creation of employment opportunities.

There have been attempts to amend labour laws to rid them of negative aspects. In its response to the proposed amendments of labour laws in 2000, which included propositions such as the consultation of every employer by bargaining councils before the extension of collective agreements to non-parties, the getting "rid of the premium for Sunday work" and a "facilitated consultation" in retrenchment processes as opposed to "compulsory negotiations", COSATU reacted strongly and accused the Minister of Labour and the team charged with overseeing the process of being "stampeded by the hysteria generated by some in business and the media around the claim of "labour market inflexibility", which threat[ened] to plunge [the] country into a period of protracted conflict".[610] Although there has been no major

[608] *Ibid.*

[609] *Ibid.*

[610] See "COSATU Campaigns Bulletin-Labour Law Amendments" http://www.cosatu.org.za/show.php?include=docs/misc/2000/cb-aug00.htm&ID=2004&cat=About (accessed 28 October 2010). Although accepting some of the proposals, the trade union federation stated that such positive

overhaul of the labour legislative framework, the debate about the rigidity of labour laws is still ongoing and trade unions must be vigilant to ensure that proposed amendments do not erode the rights and interests of their members and workers in general.

## 5.6 Conclusion

The South African trade union movement is still a force to be reckoned despite the numerous challenges that it is facing. Buhlungu states that although the role of the labour movement in the processes of development has been diminished worldwide, "the SA labour movement continues to enjoy a high profile as a central player in shaping developments in the economic and political landscape".[611] The author however states that:

> "But a closer assessment shows that the labour movement in the country is in a paradoxical situation. On the other hand, it exercises an incredible amount of influence in the new democracy and has embarked on spectacular forms of mass action to advance the interests of its members …. On the other hand, however, the movement is losing its organisational vibrancy and appears unable to take advantage of opportunities presented by the democratic dispensation."[612]

The observation by Buhlungu underscores the need for the trade union movement to urgently confront the negative forces that are threatening its vibrancy if it is to play a significant role in shaping work relations in the future. Trade unions must influence changes in the employment and labour relations landscape, instead of merely reacting to such changes. They must take proactive steps to encourage workers to join unions by incentivising membership, such as intensifying their efforts to provide skills training programmes for their members.

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aspects were overwhelmed and rendered null by "destructive elements" and stated that the mandate "to fine-tune those aspects of labour legislation which were having 'unintended consequences', and to deal with various concerns being raised including those around job loss, and protection of vulnerable workers", was not satisfactorily discharged.

[611] S Buhlungu "Losing its Vibrancy" *Financial Mail* 07 December 2007 http://free.financialmail.co.za/projects07/sa2008/ksa.htm (accessed 10 September 2010).

[612] *Ibid*.

They must also intensify their internal training programmes to ensure that the officials who participate in negotiations with government and business, be it at the workplace or policy formulation level, have the special skills required in such negotiations. Most of the strikes are a result of poor bargaining on the part of union officials and this is blamed on their lack of expertise on certain bargaining topics. Trade unions must also accept the reality of non-standard employment and intensify their efforts to organise atypical workers. They must also accept that globalisation is an irreversible process and come up with innovative strategies to counter some of its negative implications on workers.

The proliferation of trade unions and the "big-brother attitude towards other unions"[613] by COSATU affiliated unions makes it difficult for the labour movement to effectively protect and promote the interests of their members. The bully tactics of trade unions with big memberships, towards smaller unions, ultimately weakens the entire labour movement. Solidarity in the trade union movement is essential and unions must cooperate when they engage with each other during collective bargaining negotiations and formulation of policies at the level of Nedlac.

[613] *Ibid.*

# CHAPTER 6

# RECOMMENDATIONS AND CONCLUSION

## 6.1 Introduction

The future of trade unions in South Africa cannot be predicted with certainty. It is however doubtful that they will relent to numerous pressures that have diminished the strength of labour movements elsewhere in the world. The level of interactions and engagements by labour with the other social actors remains impressive. COSATU is by far the most vibrant trade union federation when it comes to the drawing of various discussion documents on various policy issues and lobbying for the protection and promotion of workers' rights. This is, of course, partly attributable to its accessibility to the ruling party and that it is the largest union federation in South Africa.

The trade union movement is struggling to survive in an economy which is increasingly being defined by macro-economic policies embracing neo-liberalism and globalisation. In a desperate attempt to increase the competitiveness of the economy in the global market and to attract investment, the interests of the working class are in danger of being marginalised. There is therefore a need for a vibrant labour movement which does not merely react to policy changes but takes proactive steps to influence and define such policy changes. Judging from the number of discussion documents that COSATU has produced on various socio-economic matters, it is certainly not a quiescent movement; an important characteristic for any trade union movement which wants to remain vibrant and relevant in an ever changing political, socio-economic landscape and the world of work.

This chapter will explore whether the current South African labour legislative framework offers a sound environment for trade unions to thrive, the overall state of trade unionism in South Africa; and how trade unions can maintain their vibrancy in an ever changing labour relations landscape.

## 6.2 The current labour relations dispensation and its benefits to trade unions: An overview

The labour movement played an important role in the processes leading to the enactment of various pieces of labour legislation making up the current labour relations dispensation. The centrepiece of labour legislation is the LRA, which was a result of protracted negotiations between government, labour and business. It is a dramatic shift from the pre-1995 LRA and was enacted to, amongst other things; effectively regulate the numerous labour rights provided for by the Constitution, and to effectively give effect to the numerous obligations acquired by South Africa by virtue of its membership of the ILO.[614] The numerous labour rights provided by the Constitution, which the LRA seeks to give effect to, include "the right to fair labour practices",[615] "the right to form and join trade unions" and employers' organisations by workers and employers respectively,[616] and the right of employers and workers "to organise and bargain collectively".[617]

The LRA bolsters the strength of trade unions by providing numerous organisational rights which serve the purpose of ensuring that they effectively engage with employers during bargaining and other related negotiations. It provides for a clear procedure for the acquisition and exercise of such rights thereby minimising potential conflicts between trade unions and employers. It also provides a framework for collective bargaining, a process which remains voluntary with the jurisdiction of the courts to make pronouncements on the processes of bargaining severely limited to the extent of being non-existent. To strengthen the effectiveness of the bargaining process in the absence of a justiciable duty to bargain, the LRA allows the parties to resort to their economic strength to pursue their demands. The Act grants all employees with a right to strike and employers with a right to lock-out. The conspicuous absence of the right to lock-out in the Constitution and the protracted debate about its inclusion underscored the fact the there was an acknowledgment that the previous

[614] See s 1(a) and (b) of the LRA.

[615] S 2(1).

[616] S 2(2).

[617] S 2(3).

labour relations landscape favoured employers and did not acknowledge that there was a disparity in the bargaining strength of employers and employees, with the former enjoying limited economic strength and often being at the mercy of employers during the bargaining processes.

The constitutionalisation of the right to strike was a victory for the labour movement. It represented a shift from the old labour relations dispensation where the right was severely limited with employees enjoying limited protection for participating in industrial action. The limitations placed on the right to strike under the old labour relations dispensation can lead one to easily conclude that the right to strike is unfettered under the current labour dispensation. Apart from prescribing certain procedures for a strike to have legal status, the LRA does not place onerous limitations on the right. The detailed and unambiguous framework regulating the right to strike means that there is certainty regarding the exercise of the right which is of critical importance even to employers since strikes have serious negative economic repercussions. The prevalence of strikes should therefore not be used by business or potential foreign investors as a scapegoat for citing productivity challenges and unattractiveness of South Africa as an investment destination.

The South African legal environment is sound and there is no uncertainty regarding the labour relations terrain. The apprehension by business and prospective investors that labour wields too much power because of the existence of a constitutionalised right to strike and a labour relations system which does not seek to curtail the right (but rather regulates it by providing numerous procedures), although legitimate, is to some extent misplaced because the overall reality is that there is a sound labour relations system with a clear legal framework and accessible institutions which can be approached by parties for redress in the event that their rights are infringed upon.

As put by Buhlungu *et al*:[618]

> "South African labour legislation is highly progressive, making provision for centralised bargaining, and a system of dispute resolution that enjoys a high degree of legitimacy…."

The LRA, in its current form, is arguably a perfect model for a labour relations statute. It is framed in a way which impliedly acknowledges the past injustices towards labour and attempts, in a number of ways, to level the playing field by empowering employees with numerous rights and creating a bargaining environment which is voluntaristic, thereby averting the possibility of a purely legalistic jurisprudence developed by the courts on bargaining processes, which proved to be cumbersome (to be applied consistently) under the previous labour relations dispensation. There are however numerous challenges in the world of work which are not addressed by the LRA and other pieces of labour legislation. The problems of atypical or non-standard employment and labour brokering pose a serious threat to the gains made by labour. Although it is still too early to judge its successes, the South African Decent Work Country Programme, an ILO initiative facilitated through the institution of Nedlac, is a commendable step towards ensuring that the Decent Work Agenda is sensitised and that practices that erode the already precarious conditions of work are discouraged. Trade unions can seize the opportunities presented by this ILO initiative to ensure that the Decent Work Agenda is implemented and features prominently in the country's labour and socio-economic policies.

The overall picture is that South Africa has a progressive and sound labour legislation framework, in the form of the LRA and other supporting pieces of legislation like, the Basic Conditions of Employment Act (BCEA)[619] and the Skills Development Act (SDA),[620] which

[618] Buhlungu *et al* "Trade Unions and Democracy in South Africa" 16-17.

[619] 75 of 1997. The BCEA seeks "to balance the protection of rights of employees against the demands for higher productivity, improved efficiency and the promotion of flexibility. Protection [is] … is gained through extending employment security, work security, job security and income security to unorganised and vulnerable workers by setting a floor of minimum rights covering workplace issues …." See C Cooper "Globalisation, Labour Law and Employment: The South African Case" in M Biagi (ed) *Job Creation and Labour Law: From Protection towards Pro-action* (2000) 241. Basson *et al* state that the BCEA limits the bargaining powers of

attempts to strike a balance between the rights and interests of employers and employees. In addition to providing clear rights, it establishes an institutional framework to adjudicate disputes in the form of the CCMA and the labour courts. The bargaining system envisaged by the LRA, although with all its flaws as highlighted in chapter 2, remains the preferred method through which the labour movement can improve their existing rights and interests and make new demands on employers. The innovative workplace forums, although ineffective, can be overhauled and reinvented at the initiation of trade unions because they represent an opportunity for increased participation by labour in managerial decisions. As put by Cooper, "in eschewing workplace forums unions have foregone the opportunity to shape the nature of work at the workplace and enhance worker security".[621] Although the argument that such forums are "a threat to collective bargaining and union power" is valid,[622] trade unions can be pro-active by defining the nature of such forums to avoid problems regarding demarcation of issues and such forums usurping their role.

Trade unions need to come up with sophisticated and less adversarial ways in order to effectively engage employers on delicate issues such as the restructuring and productivity of enterprises, as these often negatively impact workers. Bargaining processes must be decentralised to enterprise level and workers must have a say on issues that directly affect them. Increasing the participation of workers on unique issues that affect them at their workplaces, although to some extent reviving the individual employment relationship, does not diminish the strength of unions in that it promotes democracy, an important virtue for the trade union movement. The labour movement must come up with strategies which reflect the changing nature of employment relationships and which cater for the unique needs of individual member employees. Although industry wide bargaining has many benefits to the

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employers as a way of preventing them from unilaterally determining the nature of the employment relationship in relation to individual employees. See Basson *et al Essential Labour Law* 291.

[620] 97 of 1998. As put by Cooper: "International experience shows that a well trained workforce is central to high growth economies". South Africa has a small pool of highly skilled workers and this has a negative impact on the economy as it culminates in low productivity, "and a lack of new investment and employment opportunities". The SDA is aimed at addressing the problem of lack of skills in South African economy. See Cooper "Globalisation, Labour Law and Employment" 244.

[621] Cooper "Globalisation, Labour Law and Employment" 239.

[622] *Ibid*.

trade union movement, it can be strengthened by enterprise level bargaining and other forms of worker participation.

Nedlac continues to play an important role in promoting social dialogue and containing the inevitable conflict that exists between the state, business and labour. It constitutes a platform for all parties to jointly determine and influence labour market and industrial relations policies. As already highlighted, the institution has inherent shortcomings. Buhlungu *et al* argue that the engagement at the level of Nedlac:

> "[H]as not led to an institutionalized process of regular dialogue, negotiation and deal making as is commonly associated with corporatist countries…. [A]greements between state, labour and unions remain ad hoc and episodic, with many new government policies simply being imposed".[623]

The effectiveness of the body has however been revitalised by recent critical engagements. In February 2009 the social partners agreed on a document titled "Framework for South Africa's Response to the International Economic Crisis".[624] The social partners agreed to jointly take action on a number of critical areas such as:[625]

i. "Financing growth and investment;
ii. Addressing distressed sectors;
iii. Avoiding retrenchment, and managing it;
iv. Addressing the social impact of recession;
v. Engaging with the international response to the crisis."

[623] Buhlungu *et al* "Trade Unions and Democracy in South Africa" 14-15. The authors also argue that the "robust economic growth and political stability [might] have reduced the need for major compromises by business and the state".

[624] Available at http://www.info.gov.za/view/DownloadFileAction?id=96381 (accessed 15 October 2010).

[625] See the "Address by Deputy President Kgalema Montlante at the 15th NEDLAC Annual Summit" http://www.thepresidency.gov.za/pebble.asp?relid=2055 (accessed 03 October 2010).

The partners also agreed on a set of principles which included protecting the most vulnerable groups such as poor workers and the poor in general.[626] As articulated by Deputy President Kgalema Montlante, "[t]he main purpose of the Framework agreement was to save jobs; to prevent the needless loss of employment and businesses."[627]

The Deputy President reiterated that Nedlac, as one of the innovations of the democratic dispensation, counted many successes, such as contributing "to the development of an outstanding body of law, and many other really important legal and administrative innovations" and contributing in the avoidance of "some major potential mistakes in a range of economic laws and measures …."[628] Whilst acknowledging the various achievements of the body, the Deputy President emphasised that "Nedlac must build itself in such a way it becomes an indispensable cog in … [a] developmental societal machine … [and] to add so much more to the effectiveness of … institutions and … initiatives".[629] The social partners seem to have rediscovered the importance of canvassing issues at the level of Nedlac and the numerous benefits that can be derived by participating in such an institution. It is hoped that robust engagements are going to continue and that Nedlac is going to recapture its credibility and effectiveness in promoting peaceful labour relations in South Africa.

Although there are many pressures on the labour legislative framework, it is unlikely that there is going to a major overhaul of the current system in the near future. This however largely depends on political, social and economic dynamics. The trade union movement has in the past successfully lobbied and won support from the ruling party against calls for labour market deregularisation by some sectors in business and opposition parties. Buhlungu *et al* observe as follows:[630]

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[626] *Ibid.*

[627] *Ibid.*

[628] *Ibid.*

[629] *Ibid.*

[630] Buhlungu *et al* "Trade Unions and Democracy in South Africa" 17.

> "[D]espite the pressures from conservative sections of business and the opposition Democratic Alliance, the ANC has resisted demands for radical labour market deregulation. Indeed, earlier a number of loopholes in the 1995 Labour Relations Act, which, inter alia, allowed employers to escape the Act's provisions by classing workers as independent contractors … have now been closed".

The current South African collective bargaining system has been the subject of intense criticism. The main criticism, particularly from the business sector, is that the system "introduces rigidity into the labour market by setting constraints on wage flexibility and workplace flexibility".[631] The thrust of the argument is that the setting of wages through the process of collective bargaining, a process which is not influenced by market forces, is an undue intervention in the market and has long-term negative implications. Such interventions increase labour costs which in turn adversely affects the efforts aimed at creating and retaining jobs.[632] In the South African context, this argument has been rejected on the ground that "a spot market approach to wages would merely further encourage a low wage economy, thus exacerbating the problems of poverty and equality".[633]

The other counter argument is that "the view that lowering the wage rate would automatically lead to job creation is simplistic …. [E]ven if there is a correlation between wages and employment, other economic factors are equally, if not more, important".[634] Cooper cites previous research by ILO's *Country Review* which found that there was no evidence to back the claim that wages were rigid and that they hindered employment.[635] Perhaps the most important observation by the author is that:

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[631] Cooper "Globalisation, Labour Law and Employment" 239.

[632] *Ibid*.

[633] *Ibid*.

[634] *Ibid*.

[635] Cooper "Globalisation, Labour Law and Employment" 239-240. The author is however quick to point out that "[t]his is not to say that wage increases are sustainable over time if they are not accompanied by productivity enhancements".

> "[A] low wage regime or a cutting back of the hard won gains in relation to collective bargaining by unions through struggles in the 1970s and 1980s would breed resentment and lead to social and industrial unrest, which would have the effect of discouraging investment and new employment, and could lead to economic instability".[636]

The reluctance by the ruling party to initiate a process envisaging a major overhaul of the current labour legislative framework in response to the calls for labour market deregulation by some sectors in business and some opposition parties, particularly the Democratic Alliance (DA), means that the labour movement should not anticipate such a process, at least in the near future. It is also an indication that the state is not prepared for a major confrontation with labour and that it is merely deferring its role of being the initiator of key developments in the labour market and industrial relations policy arena. The calls for parties to rethink the current labour market and industrial relations legislative framework might therefore resurface, and the labour movement must always remain vigilant to ensure that it is prepared to make informed representations when the need to engage in such a debate arises.

## 6.3 Organisational challenges and possible solutions

Although the current labour relations legislative framework provides various rights and institutions which strengthens the effectiveness of trade unions in collective bargaining processes and other related negotiations, trade unions still have to embrace these favourable opportunities and translate them into concrete and practical gains. A sound labour friendly legislative framework, although constituting a firm base or platform for trade unions to build their presence and strength, and to effectively counter the historic imbalances in the collective bargaining process, has to be complemented with deliberate strategies and efforts by trade unions aimed at strengthening their organisational structures to effectively seize and make meaningful use of the numerous opportunities offered by the current labour relations dispensation.

[636] Cooper "Globalisation, Labour Law and Employment" 240-241. The author argues that "there is little evidence that collective bargaining and other provisions of the LRA play a major role in increasing rigidities in the labour market such that they have a negative impact on job creation. If anything, collective bargaining should be strengthened to ensure a stable relations environment which will lead to increased productivity and skills, increased investment, and in turn, increased employment."

Trade unions still have to come up with strategies to ensure that the labour friendly rights provided by the Constitution, the LRA and numerous labour legislation pieces are translated into a practical reality and not rendered meaningless due to poor organisation. The survival of trade unions will depend on the relations of the leadership and the rank and file. There has to be an intensified effort on the part of the leadership to resuscitate and sustain the militant spirit of members, to ensure that democracy prevails at all times and that members receive accurate information about bargaining processes, and other developments. The role of members in the final outcome of such processes should be strengthened.

The leadership must maintain high levels of accountability to ordinary members and should be vigilant not to succumb to elements calculated at destroying its credibility and to alienate it from the rank and file. The events of 2010, particularly the threatened disciplinary action against the secretary general of COSATU by the ANC, and also the confusion regarding whether public sector trade union members accepted or rejected the final offer by government after the protracted strike, underscore the importance of unity between the leadership and ordinary members as internal squabbles, whether perceived or real, can be manipulated or exploited by other negotiating parties to their advantage. Strengthening the unity between the leadership and ordinary is critical to ensure that the organisations do not become dysfunctional.

The greatest challenge threatening trade unions, particularly those affiliated with COSATU, is the exodus of experienced trade unionists to take up influential positions in both the private and public sector. There also seems to be no programme to attract highly skilled personnel and to encourage new members, especially young employees to acquire specialised skills on trade unionism and take up leadership positions. There are therefore no replacements for the highly capable leadership which is leaving the trade union movement to pursue other careers in the private and public sector.

Commenting on the human resource crisis facing trade unions, Buhlungu *et al* state as follows:[637]

> "Management are under increasing pressure-inter alia, in terms of Employment Equity legislation … to be seen to be advancing blacks into management; meanwhile the ending of apartheid has opened up new careers in government and the public sector. Both these phenomena have created a serious 'brain drain', with the position of shop steward becoming a good stepping stone to management or government."

The authors also argue that traditional organising methods are being abandoned and that there is now more focus on developing human resource skills which promotes "competitive individualism … depoliticized and stripped of its class identity".[638] The abandonment of traditional methods of organising in favour of conventional methods, which naturally mean that trade union officials must receive specialised training to effectively discharge their duties, is an inevitable process in a contemporary labour relations dispensation. Trade unions cannot continue to use strategies which proved to be effective in the pre-1994 labour relations dispensation. The labour relations dispensation which existed then, and which was influenced by the then prevailing social, economic and political factors, was generally characterised by strained relations and trade unions often won concessions through radical and militant actions. The post-1994 labour relations system ushered by the new Constitution and the LRA, has changed compared to its predecessor. It recognises and entrenches the right to freedom of association, to organise, to engage in collective bargaining and to engage in industrial action.

The terrain has dramatically changed. Trade unions do not have to fight for recognition at workplaces anymore. They also do not have to fight for organisational rights and the right to engage in collective bargaining. There is no longer a fear of participating in strikes and other related actions. There is easy accessibility to the CCMA and labour courts, established by the LRA to adjudicate labour matters and these institutions have developed a progressive labour jurisprudence which balances the interests and rights of employers and employees. A different labour relations system obviously requires trade unions to reinvent themselves and

[637] Buhlungu *et al* "Trade Unions and Democracy in South Africa" 21.

[638] *Ibid*.

come up with modern and sophisticated ways of protecting and promoting the gains already made. Traditional methods of organising will naturally become irrelevant in a modern labour relations landscape and trade unions should shift their focus to strategic and innovative ways of engaging employers in an ever changing world of work.

## 6.4 Whither trade unions in South Africa?

Buhlungu *et al* observe as follows:[639]

> "The South African labour movement has been a source of inspiration to unions worldwide. South Africa's largest and most active union federation, the Congress of South African Trade Unions (COSATU) has retained high levels of penetration in the private sector, and made concerted inroads into the public sector. At the same time, the federation has faced the challenges of coping with … and contesting-neo-liberal reforms, retaining and reenergising rank and file in the post-apartheid era, and in reaching out to potential members in the informal sector and other areas of insecure work."

Cooper states as follows:[640]

> "Although unions have been subject to intense pressures arising from the restructuring of the economy in the name of globalisation, nevertheless they have been proactive in their response to these pressures. Having fought hard for their rights, trade unions will not easily relinquish them."

The greatest challenge facing trade unions in South Africa is maintaining their credibility and trust earned during the 1970s and 1980s militant struggles against labour unfriendly policies. Whilst they still enjoy some trust and respect from members recruited during these periods, it remains to be seen if such trust and respect will trickle down to new recruits. There is also a

[639] Buhlungu *et al* "Trade Unions and Democracy in South Africa" 2.

[640] Cooper "Globalisation, Labour Law and Employment" 241.

need to reenergise the old membership as they should constantly see the benefits of trade union membership.

The consolidation of democracy and labour friendly practices, although a victory for the labour movement, does not automatically translate to long-term benefits for workers. Trade unions cannot afford the complacency that often comes with such achievements. The current labour dispensation, while exhibiting favourable conditions for trade unions to thrive and for the enhancement and protection of workers rights, is not an answer to fresh challenges facing trade unions and workers in general. Numerous challenges have emerged since the advent of democracy and a new labour relations dispensation and these challenges require trade unions to forego the traditional methods of survival in favour of sophisticated, innovative, and strategic tactics to ensure that gains already made are not eroded.

The current state of trade unionism in South Africa is, to some extent, characterised by anxiety, disillusionment and a sense of despair. Protracted and violent strikes are an indication that there is some sense of panic by the labour movement that gains already made are going to be reversed and that business and government are increasingly becoming unresponsive to its demands. The anxiety is further fuelled or exacerbated by external pressures influencing the policies of the national economy, which have been highlighted in chapter 5. The labour movement is suddenly confronted with the reality that it cannot continue to completely trust the state to be the custodian of the interests and rights of workers. The reality of limited state influence on labour market practices means that the rights and interests of workers are not always going to be a priority. There is a shift in policy making and issues such as the competitiveness of the South African economy, the creation of employment opportunities and incentives to attract foreign investment, are now being prioritised.

Trade unions cannot therefore continue to rely on the state to play a pivotal role in ensuring that the rights and interests of their members are protected and promoted. The labour movement must therefore formulate its own separate policies and aggressively engage the

state and business on these in order to secure and maintain a respectable presence in the South African labour relations terrain. South Africa's largest labour federation, COSATU, has made great strides to this end by producing various discussion documents and articulating its position on socio-economic policies. Its accessibility to the ANC has proven beneficial and it has seized the opportunities presented by the tripartite alliance to militantly lobby for the protection and promotion of workers rights and interests. COSATU also occasionally reviews its organisational strength and weaknesses, an important exercise for any labour movement if it is to remain relevant in a changing labour relations landscape. As far back as 1996, the federation established a Commission (the September Commission) briefed to "investigate the changed political and economic conditions in South Africa and assess whether COSATU's policies and strategies were appropriate to these new conditions".[641]

The idea to establish the Commission was premised on the acknowledgment that:[642]

> "[T]he political transition to democracy in South Africa posed new challenges for the trade union movement, which had emerged during the struggle against apartheid. The economic challenge, too, was enormous. On the other hand, there was the imperative of national economic development to overcome the legacy of apartheid. On the other were increasing global economic pressures."

The discussion document produced by the federation in September 2010 titled, "A Growth towards Full Employment: COSATU Policy Perspectives", is by far the most comprehensive policy document and it reflects a willingness by the labour movement to embrace the concept of strategic unionism, described by Von Holdt as:

> "[A] strategy that envisages a far-reaching transformation of the state, of the workplace, of economic decision-making and of the texture of civil society, a transformation driven by a broad based coalition of interest groups, at the centre of which is the labour movement".[643]

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[641] See the "September Commission Report on the future of Trade Unions".

[642] *Ibid.*

[643] See Von Holdt "Strategic Unionism: The Debate".

For such a process to be successful or effective it is essential that trade unions agree on major policy issues and in a country like South Africa, where trade union proliferation is rife, this may prove to be an enormous challenge. Trade unions must endeavour to promote a culture of solidarity as conflict on major employment issues, either at the level of policy formulation or during collective bargaining processes, weakens the strength of the entire labour movement.

The ever-changing social, political and economic factors require that trade unions constantly re-assess their role and effectiveness and to formulate strategies on how to preserve the gains already made and to address emerging challenges. The failure to adapt and complacency are reasons for the demise of most trade unions worldwide. Whilst COSATU's track record in engaging government and business is impressive, other COSATU non-affiliated trade unions seem to be content with a quiescent presence. They are however effortlessly benefiting from COSATU's strategic alliance with the ruling party and the federation's organisational strength.

The vigilance of COSATU about developments that are likely to affect the interests and rights of its members was also displayed when news filtered that Walmart, an American public corporation which is the largest retailer in world, was bidding for Massmart. The Western Cape branch of COSATU made a statement to the effect that it was "opposed to retailer Walmart's presence in South Africa …" and that it was surprised "that such an offer from Walmart to take over key strategic national companies in South Africa" was being entertained.[644] The trade union federation argued that "Walmart was 'notoriously anti-union' and an affront to workers rights wherever it operated" and that "the undermining of rights in one chain of stores would force non-compliance in other chain stores and put South Africa on a downward spiral in terms of labour law compliance".[645] The South African Commercial, Catering and Allied Workers Union made a statement to the effect that in the event that such

[644] See "Walmart not welcome" *Fin24.com* http://www.fin24.com/Companies/Walmart-not-welcome-20100928 (accessed 28 September 2010).

[645] *Ibid*.

a takeover was successful; it was committed to ensure that workers' rights were not eroded.[646] Aggressive lobbying and vigilance are therefore essential characteristics for trade union survival.

## 6.5 Conclusion

The South African trade union movement is under no illusion about the challenges that it faces. It is ironic that the challenges posing the greatest threats to the survival and vibrancy of trade unions surfaced after the inauguration of democracy and a new labour relations dispensation which, unashamedly, sought to redress past imbalances in the employment relationship and to advance the rights and interests of workers.

The qualified observation by Buhlungu that although the South African labour movement continues to have an influence in shaping social and economic policies of a democratic South Africa, it is at the same time losing its vibrancy, something which is attributed to its failure to seize the opportunities presented by the new democratic and labour dispensation, is entirely true.[647] The new social, economic and political space precipitated by the inauguration of a constitutional democracy, although bringing many benefits to the labour movement has generated new challenges which require sophisticated strategies and responses.

The plight of the labour movement in South Africa is attributable to many factors which have been highlighted in chapter 5. Chief amongst them is the inability of South Africa to generate decent jobs. This means that there is rampant casualisation of jobs as most employers cannot afford to provide secure employment. Organising casual labour has proven to be a difficult

[646] See "Bosses and Workers Diverge as Walmart eyes SA" *BusinessReport* 28 September issue http://www.busrep.co.za/index.php?fArticleId=5664170 (accessed 28 September 2010). The article suggests that the strategies by SACCAWU may include "preparing a submission to the competition authorities on public interest grounds" and points to the fact that '[t]he Competition Act makes provision for entities such as trade unions to participate in transactions"; an opportunity which the South African trade union movement has not explored to its advantage.

[647] S Buhlungu "Losing its Vibrancy".

task for trade unions. The strength of unions depends on their ability to recruit and retain members. External pressures such as globalisation are also threatening to erode the gains made by trade unions. The preoccupation to grow the competitiveness of the economy and to embrace the ideals of world economic institutions such as the IMF and the World Bank, does not always translate into positive outcomes for the trade union movement and workers in general. Trade liberalisation policies have opened the South African economy to competition from international companies and local companies have closed down leading to huge retrenchments. The downsizing of state enterprises, an idea which is favoured by world economic institutions, is yet to be fully embraced by the government but it could lead to huge job losses and weaken the strength of trade unions.

The public perception about trade unions is also changing. The involvement of trade union members in violent strikes has damaged the reputation of the labour movement. The negative publicity often received by trade unions during such strikes requires aggressive lobbying to change the perception of the public about trade unions. It is also the responsibility of trade unions to educate their members about issues such as good practices when engaging in strikes and other related actions. As already pointed out, the South African trade union movement has maintained a resilient presence in the face of numerous pressures and challenges. As put by Buhlungu *et al*, it is indeed "a source of inspiration to unions worldwide"[648] and it is hoped that it will not succumb to numerous pressures and will continue to militantly shape work relations in South Africa.

[648] Buhlungu *et al* "Trade Unions and Democracy in South Africa" 2.

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