

https://dspace.org/

The impact of collective agreements on non-unionised employees in South Africa

Matumane, Nkwane Danger

2023
University of the Witwatersrand, Johannesburg
https://hdl.handle.net/10539/38648
Matumane, Nkwane Danger. The impact of collective agreements on non-unionised employees in South Africa [Master's dissertation, University of the Witwatersrand, Johannesburg]. WireDSpace. https://hdl.handle.net/10539/38648

Downloaded from a DSpace repository. https://dspace.org/

THE IMPACT OF COLLECTIVE AGREEMENTS ON NON-UNIONISED EMPLOYEES IN SOUTH AFRICA

BY

ND MATUMANE

STUDENT NUMBER: 304783

Submitted in partial fulfilment of the requirements for the degree

MASTER OF LAWS (LLM) (BY DISSERTATION)

In the

FACULTY OF COMMERCE, LAW AND MANAGEMENT

UNIVERSITY OF THE WITWATERSRAND

SUPERVISOR: PROF MC MARUMOAGAE

18 AUGUST 2023

DECLARATION

I, Nkwane Danger Matumane, hereby declare that the work on this LLM dissertation is my original work (except where acknowledgments indicate otherwise) and that neither the whole nor any part of it has been or is to be submitted for another degree in this or any other university.

Signature:

Date: 18 August 2023

ACKNOWLEDGMENTS

I am profoundly indebted to my family without whom I could not have completed this study. I particularly wish to thank my wife Elizabeth and our two children Theto and Thoriso respectively. I also wish to thank Ms Judy Mafika and Wits' librarians who also assisted me during the writing of this dissertation. I am also indebted to the panel of academics who interrogated my research proposal and provided me with useful suggestions that assisted me to shape this dissertation. I also wish to thank my supervisor, Prof MC Marumoagae for his guidance in the writing and completion of this dissertation. Furthermore, I also wish to express my gratitude to my erstwhile employer, Elias Motsoaledi Local Municipality for providing me with the practical experience and exposure that invoked a desire and interest to pursue my postgraduate studies. My final record of appreciation goes to the Most High. In God, I believe and trust. These acknowledgements would be incomplete without special mention of the role Zion Christian Church (ZCC) contributed to my studying life and career. It contributed immensely to my spiritual development. I was able to bond with my ancestors.

ABSTRACT

Collective agreements are recorded results of the resolutions reached during a collective bargaining process. This dissertation illustrates that in South Africa, non-unionised employees are excluded from taking part in the formulation of collective agreements that affect them in their workplaces. Decisions that impact their employment are taken by participating unions, even though they did not provide those unions with their mandate or demands. This dissertation argues that their exclusion from the bargaining system may adversely impact their right to fair labour practices, including the right to their dignity. They may be retrenched without consultation where a collective agreement was concluded and extended to them. This would effectively limit their rights to engage in productive work or the right to choose their trade, occupation or profession freely guaranteed in the Constitution of the Republic of South Africa, 1996. Given the importance of collective bargaining and the scope of issues discussed thereof, there is a case to be made to incorporate non-unionised employees in collective bargaining processes. Such incorporation would enable these employees to also play a role in determining their wages as well as terms and conditions of their employment, including other matters of mutual interest. Most importantly, this dissertation recommends ways in which these employees can play a role in major decisions relating to their employment, which are normally taken by employers and representative trade unions. The dissertation calls for policy or law reforms relating to the participation of non-unionised employees in collective bargaining processes. Their exclusion from collective bargaining processes, which usually considers service benefits that may not be provided by legislation such as medical aid and retirement funding coverage cannot be justified given the issues and challenges they face, including the impact collective agreements have on them. Non-unionised employees are bound by and usually have to adhere to collective agreements even though they were not involved in the collective bargaining processes. Although they have the right to fair labour practices and the right to freedom of association in terms of the Constitution, non-unionised employees do not have a say in the conclusion of collective agreements and in other processes, which have an impact on their lives and their terms and conditions of employment.

METHODOLOGY

A desktop method of research will be followed when writing this dissertation where relevant primary and secondary sources of law will be consulted, reviewed and analysed. Reference will be made to the primary and secondary sources of law such as legislation, case law, journal articles and books. Where necessary, international and regional instruments will be consulted and referred to, as well as relevant internet sources.

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
AJ	Acting Judge
AJA	Acting Judge of Appeal
BCLR	Butterworths Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
CONSTITUTION	Constitution of the Republic of South Africa, 1996
CCMA	Commission for Conciliation, Mediation and Arbitration
CUSA	Commercial Workers' Union of South Africa
COSATU	Congress of South African Trade Unions
COVID-19	Coronavirus disease. The disease broke out in 2019 to become a pandemic.
DNA	Deoxyribonucleic acid
ECHR	European Convention on Human Rights
Ed	Editor(s)
Et al	Latin word for et alia (and others)
GP	Gauteng Province
4IR	Fourth Industrial Revolution
GG	Government Gazette
GN	Government Notice
HOSPERSA	Health and Other Service Personnel Trade Union of South Africa
IBID	Latin word for ibidem (in the same source)
ICA	Industrial Conciliation Act
I.E.	Id est (that is to say)
ILJ	Industrial Law Journal

ILO	International Labour Organisation
J	Judge
JA	Judge of Appeal
LAC	Labour Appeal Court
LC	Labour Court
LLD	Doctor of Laws (also known as Legum Doctor)
LLM	Master of Laws (also known as Legum Magister)
LTD	Limited (i.e., limited liability company and usually used after the name of the company)
LRA	Labour Relations Act 66 of 1995
MATUSA	Municipal and Allied Trade Union of South Africa
MAWU	Metal & Allied Workers Union
MBC	Military Bargaining Council
Minister	Minister of Employment and Labour
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Education, Health and Allied Workers' union
NPC	Non-profit company
OBO	On behalf of
OECD	Organisation for Economic Co-operation and Development
OP CIT	Latin word for opus citatum (the work cited) or opera citato (in the cited work)
PAJA	Promotion of Administrative Justice Act
PARA	Paragraph
PARAs	Paragraphs
PSCBC	Public Service Coordinating Bargaining Council
PTY	Proprietary (used to denote a private company i.e., usually used after the name of the company)
SA	South African Law Reports
SACTU	South African Congress of Trade Unions

SADTU	South African Democratic Trade Union
SALGA	South African Local Government Association
SALGBC	South African Local Government Bargaining Council
SAMWU	South African Municipal Workers' Union
SANDF	South African National Defence Force
SANDU	South African National Defence Union
SAPU	South African Police Union
SASBO	South African Society of Bank Officials
SCA	Supreme Court of Appeal
Supra	Above
UDHR	Universal Declaration of Human Rights
V	Versus
ZA	South Africa
ZCC	Zion Christian Church

TABLE OF CONTENTS

DECLARATION ii

ACKNOWLEDGMENTS iii

ABSTRACT iv

METHODOLOGY v

ABBREVIATIONS AND ACRONYMS vi

CHAPTER ONE: EMPLOYEES' RIGHT TO BARGAIN IN SOUTH AFRICA 1

1.1 INTRODUCTION 1

1.2 STATEMENT OF THE PROBLEM 2

1.3 AIMS AND OBJECTIVES 4

1.4 BACKGROUND OF THE STUDY 5

1.4.1 FREEDOM OF ASSOCIATION IN THE LABOUR MARKET 5

1.4.2 WORKING IN CONCERT FOR COMMON PURPOSE IN THE LABOUR MARKET 9

1.5 RESEARCH METHODOLOGY 18

1.6 SUMMARY OF CHAPTERS 18

1.7 CONCLUSION 19

CHAPTER TWO: DEVELOPMENT OF COLLECTIVE BARGAINING IN SOUTH AFRICA 20

2.1 INTRODUCTION 20

2.2 THE CONCEPT OF COLLECTIVE BARGAINING 20

2.3 HISTORICAL OVERVIEW 22

2.3.1 INDUSTRIALISATION 22

2.3.2 FROM INDUSTRIAL CONCILIATION ACT TO LABOUR RELATIONS ACT 25

2.3.3 THE ROLE OF TRADE UNIONS 27

2.4 BARGAINING STRUCTURES 33

2.4.1 BARGAINING COUNCILS 33

2.4.2 STATUTORY COUNCILS 34

2.4.3 WORKPLACE FORUMS 35

2.5 INTERNATIONAL INSTRUMENTS DEALING WITH COLLECTIVE BARGAINING 36

2.6 COLLECTIVE BARGAINING AS A CONSTITUTIONAL RIGHT 39

2.7 COUNTERVAILING UNEQUAL BARGAINING POWER IN THE EMPLOYMENT RELATIONSHIPS 41
2.8 CONCLUSION 43
CHAPTER THREE: THE DUTY TO BARGAIN 44
3.1 INTRODUCTION 44
3.2 THE DUTY TO BARGAIN: A CONCEPTUAL ORIENTATION 44
3.3 THE POSITIVE CONCEPTION 45
3.3.1 SANDU II 45
3.3.2 SANDU III 46
3.4 THE NEGATIVE CONCEPTION 47
3.4.1 INTERNATIONAL OVERVIEW 47
3.4.2 SANDU I 49
3.4.3 THE APPROACH OF THE LABOUR COURT 50
3.4.4 THE SUPREME COURT OF APPEAL'S APPROACH 51
3.4.5 THE CONSTITUTIONAL COURT'S APPROACH 52
3.5 AVOIDING COMPULSORY BARGAINING 55
3.6 REFUSAL TO BARGAIN 58
3.7 GOOD FAITH BARGAINING 59
3.8 CONCLUSION 62
CHAPTER FOUR: THE IMPACT OF COLLECTIVE AGREEMENTS ON NON-UNIONISED EMPLOYEES 63
4.1 INTRODUCTION 63
4.2 GENERAL ORIENTATION OF COLLECTIVE AGREEMENTS 63
4.2.1 DEFINING COLLECTIVE AGREEMENTS 63
4.2.2 MATTERS OF MUTUAL INTEREST 65
4.2.3 COMMON TYPES OF COLLECTIVE AGREEMENTS 69
4.2.4 CONCLUSION OF COLLECTIVE AGREEMENTS 71
4.2.5 STATUS OF COLLECTIVE AGREEMENTS 73
4.2.6 NON-PARTIES TO COLLECTIVE AGREEMENTS 75
4.3 THE IMPACT OF COLLECTIVE AGREEMENTS ON NON-UNIONISED EMPLOYEES 77
4.3.1 SECTION 23(1)*(d)* OF THE LRA 78
4.3.2 SECTION 32 OF THE LRA 79

4.3.3 LEGAL EFFECT OF COLLECTIVE AGREEMENTS ON INDIVIDUAL CONTRACTS OF EMPLOYMENT 82
4.4 COLLECTIVE AGREEMENTS AND NON-UNIONISED EMPLOYEES 84
4.5 CONCLUSION 85
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS 87
5.1 INTRODUCTION 87
5.2 SALIENT RESEARCH FINDINGS OF THE STUDY 88
5.3 INTERNATIONAL LABOUR ORGANISATION (ILO) 93
5.4 THE RIGHT TO ENGAGE IN COLLECTIVE BARGAINING 94
5.5 POLICY OR LAW REFORMS 95
5.6 PROPOSED EXCEPTION TO PRINCIPLE OF MAJORITARIANISM 97
5.7 INVOKING EXEMPTION CLAUSE 97
5.8 THE NEED TO COMBAT EXCLUSION 98
5.10 CONCLUSION 99
BIBLIOGRAPHY 101

CHAPTER ONE: EMPLOYEES' RIGHT TO BARGAIN IN SOUTH AFRICA

1.1 INTRODUCTION

Collective agreements play an important role in reducing the vulnerability of employees within workplaces.[1] This dissertation investigates how collective agreements affect non-unionised employees in South Africa where not all employees within the workplace are trade union members. In terms of section 213 of the Labour Relations Act, collective agreement:

> 'means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand -
> (a) one or more employers;
> (b) one or more registered employers' organisations; or
> (c) one or more employers and one or more registered employers' organisations'.[2]

This definition illustrates the central role played by trade unions in collective agreements. Collective agreements are concluded and entered into by and between one or more registered trade unions and one or more employers or registered employers' organisations.[3] They are products of the collective bargaining process.[4] Collective bargaining process allows bargaining parties to advance their demands and counter demands while negotiating and convincing one another with a view to advance

[1] William Manga Mokofe 'The changing world of work and further marginalisation of workers in South Africa: an evaluation of the relevance of trade unions and collective bargaining' (2021) 54 *Comparative and International Law Journal of Southern Africa* 1 at 15.
[2] 66 of 1995 (hereinafter 'the LRA').
[3] Ibid.
[4] Susan Hayter and Jelle Visser 'The application and extension of collective agreements: enhancing inclusiveness of labour protection' in Hayter and Visser (eds) *Collective agreements: extending labour protection* (2018) 1 and Bongani Khumalo 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa CCT87/16 [2017]' (2018) 51*De Jure* 328.

their respective positions and/or make compromises until agreement is reached.[5] It cannot be disputed that 'negotiation' is an important component of collective bargaining and precedes collective agreements.[6] Collective agreements usually record aspects such as working conditions; procedure for grievances (dispute resolution mechanisms) and wages for employees. These agreements can also '… address the rights and responsibilities of the parties thus ensuring harmonious and productive industries and workplaces'.[7] In fact, they regulate employees' terms and conditions of employment.[8]

This dissertation seeks to determine whether the LRA is restrictive and proscribes non-unionised employees from entering into collective agreements. Usually, parties who engage in collective bargaining are registered trade unions and employers or registered employers' organisations. Non-unionised employees are employees who are not members of trade unions that represent employees in their workplaces.

1.2 STATEMENT OF THE PROBLEM

According to Samuel:

> 'The LRA did not make any provision whatsoever for any other form of worker representation for the purpose of collective bargaining outside the union structure … . The practice in South Africa is consistent with those in some other countries (e.g America, Canada, Poland, Japan and Belgium) where representation of employees for the purpose of collective bargaining remains the exclusive prerogative of union representatives'.[9]

[5] PS Nel et al *South African employment relations: theory and practice* 7 ed (2012) 196. See also PS Nel and PH van Rooyen *South African industrial relations: theory and practice* (1991) 166.
[6] Hayter and Visser op cit note 4.
[7] International Labour Organisation (hereinafter 'ILO') 'Collective bargaining and labour relations' available at *https://www.ilo.org/global/topics/collective-bargaining-labour-relations/lang--en/index.htm* accessed on 17 October 2021.
[8] M McGregor et al *Labour law rules* 3 ed (2017) 260-261.
[9] MO Samuel 'The mineworkers unprocedural strike: setting the path for redefining collective bargaining practice in South Africa' (2013) 10 *Journal of Contemporary Management* 239 at 242.

Samuel's observation raises important questions about the process of negotiation involving employees and employers. This indicates that there are employees who are excluded from negotiations that affect terms and conditions of their employment. There is no legislative framework that encourages non-unionised employees to meaningfully participate and actively engage in collective bargaining in South Africa. In most instances, non-unionised employees usually free ride on the efforts and achievements of trade unions that represent other employees in their workplaces. 'These non-union employees are sometimes called "free riders"'.[10] This is because '[[t]hey do not pay union subscriptions, but still obtain the benefits of the union's bargaining'[11] efforts in the same way as the union's members who pay prescribed union's fees.[12] Although a single employer can conclude a collective agreement, '… a single employee cannot be a party to a collective agreement'.[13] A single employee has no bargaining power as an individual. The term 'collective' envisage employees acting as a unit usually through their trade union to increase their bargaining power.[14] Non-unionised employees seem not to be provided room to bargain with their employers to directly protect their interests and rights within their workplaces.

In practice, when employers collectively bargain with trade unions that operate within their workplaces, they seem not to be consulting non-unionised employees regarding decisions that are about to be taken which may also bind them. In *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited*,[15] it was held that '[t]he exclusion of those who are not party to a collective agreement or are not members of a majority union is drastic'.[16] This dissertation highlights the exclusion of non-unionised employees from the bargaining processes with a view to

[10] C Garbers et al *The New Essential Labour Law Handbook* 7 ed (2019) 427.
[11] Ibid.
[12] *National Manufactured Fibres Employers Association v Bikwani* 1999 (20) ILJ 2637 (LC) para 21.
[13] Garbers et al op cit note 10. See also McGregor et al op cit note 8 at 256.
[14] McGregor et al op cit note 8 at 256.
[15] 2020 (4) BCLR 373 (CC) paras 61, 80 and 83 (hereinafter '*Royal Bafokeng*' case). See also *Association of Mineworkers and Construction Union v Chamber of Mines* 2017 (3) SA 242 (CC) paras 47, 61 and 78 (hereinafter '*Chamber of Mines*' case) and Stefan van Eck and Kamalesh Newaj 'The Constitutional Court on the rights of minority trade unions in a majoritarian collective bargaining system' (2020) 10 *Constitutional Court Review* 331 at 334.
[16] The minority opinion in *Royal Bafokeng* supra note 15 para 61.

determine how their right to be part of the negotiations regarding aspects of their employment is impacted. In South Africa, non-unionised employees are excluded from taking part in the formulation of collective agreements that affect them in the collective bargaining processes. Decisions that impact their employment are taken by unions that are participating in their workplaces, even though they did not provide those unions with their mandate or demands. The exclusion faced by non-unionised employees with respect to collective agreements is worth being considered with a view to determine how these agreements impact them. Non-unionised employees are bound by and must adhere to collective agreements even though they were not involved in the collective bargaining processes that produced these agreements. Although they have the right to fair labour practices and the right to freedom of association in terms of the Constitution, non-unionised employees do not have a say in the conclusion of collective agreements and in other processes, which have an impact on their lives and their terms and conditions of employment.

1.3 AIMS AND OBJECTIVES

The aim of this dissertation is to investigate the role (if any) of non-unionised employees in collective bargaining process in South Africa. It further seeks to evaluate the challenges (if any), experienced by non-unionised employees due to their non-participation and/or exclusion in collective bargaining processes. Furthermore, this dissertation aims to assess the impact of collective agreements on non-unionised employees when they have not participated in the negotiations that preceded the drafting thereof. In particular, this dissertation aims to assess how decisions taken by participating unions and employers through collective agreements impact non-unionised employees' employment and the benefits they receive in the workplace.

The objective of this dissertation is to contribute to the epistemology of collective bargaining and the participation or lack thereof by non-unionised employees. In particular, to establish whether there is a need for policy or law reform relating to the participation of non-unionised employees in collective bargaining processes. Most

importantly, to assess how non-unionised employees can effectively negotiate terms and conditions of their employment with their employers in South Africa within the system of collective bargaining.

1.4 BACKGROUND OF THE STUDY

1.4.1 FREEDOM OF ASSOCIATION IN THE LABOUR MARKET

In South Africa, freedom of association is a recognised fundamental right. In terms of section 18 of the Constitution, '[e]veryone has the right to freedom of association'.[17] In the labour market, this right is exercised in terms of section 23 of the Constitution which is headed '[l]abour relations'. The LRA was enacted to realise the spirit and letter of the Constitution thereto give content to this right.[18] This right is equally recognised internationally. Article 20 of the United Nations' Universal Declaration of Human Rights (UDHR) declares that '[e]veryone has the right to freedom of peaceful assembly and association'.[19] However, '[n]o one may be compelled to belong to an association'.[20] Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms which is now entitled European Convention on Human Rights (ECHR) also proclaims that '[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests'.[21]

[17] Section 18 of the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution').
[18] Chapter 2 of the LRA is titled 'freedom of association and general provisions'. In particular, section 4 deals with employees' right to freedom of association. In this context, employees include non-unionised employees.
[19] United Nations 'Universal Declaration of Human Rights' (UDHR) (10 December 1948) Article 20 para 1 available at *https://www.un.org/en/about-us/universal-declaration-of-human-rights* accessed on 2 October 2022.
[20] United Nations op cit note 19 Article 20 para 2.
[21] Article 11 para 1 of the United Nations 'Convention for the Protection of Human Rights and Fundamental Freedoms' which is now entitled European Convention on Human Rights (ECHR) (4 November 1950) available at *https://www.unhcr.org/4d93501a9.pdf* accessed on 2 October 2022.

In the South African context, the African Charter on Human and Peoples' Rights (ACHPR) provides that '[e]very individual shall have the right to free association provided that he abides by the law'.[22] It also expressly provides that '… no one may be compelled to join an association'.[23] Although there is no express mention of the negative element of the right to freedom of association in the Constitution and the LRA, courts have held that freedom of association has two special aspects, the positive and negative elements. The negative element is about the freedom not to associate at all, where an individual chooses not to.[24] David contends that negative conception of rights posits non-interference by government with individuals' interests whereas the positive conception invites active and interventionist role of the state.[25] The positive aspect means 'the right of an individual to be free to form an association with whomsoever she or he wishes for whatever purpose'.[26]

It is submitted that non-unionised employees exercise, and by extension, follow negative element of the right to freedom of association because they chose not to join trade unions. These are associations that fall within the ambit of the positive element of the right to freedom of association. In *New Nation Movement* case,[27] it was held that section 18 of the Constitution must be viewed as encompassing the negative right not to associate at all. Madlanga J opined that he could '… conceive of no cogent reason why we too should not come to the conclusion that section 18, in fact, protects the negative right not to be compelled to associate'.[28] Crucially, freedom of association would be negated if an individual is coerced to associate with other people in as much as it would also be negated if others are coerced to join or associate with a specific individual. It is

[22] Article 10 para 1 of the African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' (27 June 1981) available at *https://www.achpr.org/legalinstruments/detail?id=49* accessed on 2 October 2022.
[23] Ibid Article 10 para 2.
[24] *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) para 22 (hereafter '*New Nation Movement*' case).
[25] Lawrence David 'A principled approach to the positive/negative rights debate in Canadian constitutional adjudication' (2014) 23 *Constitutional Forum* 41.
[26] *New Nation Movement* supra note 24. Analysing this right, Victor AJ in *National Union of Metal Workers of South Africa v Lufil Packaging* 2020 (7) BLLR 645 (CC) para 33 sees freedom of association as a positive right because it enables individuals to organise around specific issues of concern thereby contesting and ameliorating particular structures of social power in a collective manner.
[27] *New Nation Movement* supra note 24 para 42.
[28] Ibid.

about free exercise of choice. This means that freedom of association implies freedom to associate and freedom not to associate. People elect to associate or not to associate as they wish.[29] To coerce non-unionised employees to join trade unions would strike at the very substance of the right to freedom of association guaranteed in the Constitution.

Freedom of association has several advantages. It keeps workplaces democratic by promoting sound labour market governance. It is foundational to democratic society[30] and essential to sustained progress.[31] It is also central to decent work, decent conditions at work, equity, security and human dignity all of which are ILO's goals.[32] As such, freedom of association protects the right to dignity[33] which underlies all other fundamental rights i.e., it is a value that informs the interpretation of many, if not all other rights, in the Constitution. The Constitution asserts respect for the intrinsic worth of all human beings and redresses the past wherein human dignity was cruelly denied for the Black majority in South Africa.[34] Freedom of association is, therefore, a right that is at the very heart of human dignity. It makes it possible to promote other fundamental rights enshrined in the Constitution. It also protects the right to freedom of expression;[35] the right to freedom of conscience,[36] i.e., which also protects personal opinion;[37] and 'the right, peacefully and unarmed, to assembly, demonstration, picket and petition'.[38]

[29] Ibid para 43.
[30] Ibid para 24.
[31] Article I para (b) of the ILO 'Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia)' (1944) available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration* accessed on 1 October 2022.
[32] ILO 'Report of the Director-General: Freedom of association in practice: Lessons learned' (Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: International Labour Conference 97th Session (2008) ix available at *http://www.oit.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf* accessed on 27 September 2022.
[33] Section 10 of the Constitution provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'.
[34] *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.
[35] Section 17 of the Constitution.
[36] Section 15(1) of the Constitution states that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion'.
[37] *New Nation Movement* supra note 24 para 36.
[38] Section 17 of the Constitution.

Freedom of association guarantees personal liberty.[39] It protects not only the right to engage in collective bargaining but also employees' right to 'strike'.[40] The concept of freedom of association is said to be wide ranging i.e., it could cover rights to associate for social, political, religious, commercial, civil society, any other group or industrial purposes.[41] In this dissertation, however, it is restricted to the labour market, wherein all employees and employers have rights to establish, join, belong to and participate in organisations of their choice to promote and defend their interests.[42] This includes the right to negotiating collectively.[43] 'They should be able to do this freely, without interference by the other party or the State'[44] because '[f]reedom of association and collective bargaining are basic conditions of employment for the ILO'.[45] Freedom of association is both a collective and individual right. It therefore exists primarily to give a voice to the voiceless and powerless including non-unionised employees irrespective of whether they are individuals or in the minority.

Disadvantages that are cognate to freedom of association include that it is not an absolute right. It can be limited by statutory law necessary in a democratic society to protect public health, safety, prevent disorder or crime and maintain accepted public morals.[46] For instance in South Africa, there is lawful restriction on members of the defence force, police service and health care professionals from taking part in a strike because of the essential services they provide. In particular, section 65(1) of the LRA prohibits employees from taking part in a strike if they are engaged in essential service, maintenance service or bound by a collective agreement prohibiting a strike or if the dispute is arbitrable or justiciable. It is submitted that their limitation is reasonable and

[39] *New Nation Movement* supra note 24 para 23.
[40] This right is safeguarded by section 23(2)(c) of the Constitution. It is the pillar of collective bargaining.
[41] Mongezi Zacharia Jantjie An evaluation of certain limitations to the right of freedom of association (unpublished LLM dissertation, University Pretoria, 2018) 1.
[42] ILO op cit note 32 and section 23 of the Constitution.
[43] ILO op cit note 32 at 25 emphasises this in its definition of collective bargaining as the process by which employees 'collectively negotiate and agree with employers on their terms and conditions of employment'.
[44] Ibid ix.
[45] Mokofe op cit note 1 at 16-17.
[46] United Nations 'Convention for the Protection of Human Rights and Fundamental Freedoms (which is now entitled European Convention on Human Rights (ECHR) (4 November 1950) Article 11 para 2 available at *https://www.unhcr.org/4d93501a9.pdf* accessed on 2 October 2022.

justifiable because they provide services of which interruption may affect the health and safety of the population in terms of item 16(2) of the Code of Good Practice: Collective bargaining, industrial action and picketing. Notwithstanding this lawful restriction, uniformed members of the defence force, police service and health care professionals are permitted to join trade unions of their choice if they so wish. Conveners of protest action may be held civilly and criminally liable for unlawful activities under the auspices of the Regulation of Gatherings Act.[47] In *South African Transport and Allied Workers Union v Garvas*,[48] a trade union's protest action led to deaths, injuries, destruction, loss of property and damages estimated at R1.5 million. The Constitution protects peaceful gatherings only. Another disadvantage is that decisions made by trade unions are binding on their members even if those decisions may be contrary to personal opinions of some of their members. Where trade unions embark on strike action, non-striking members usually face reprisals and threats by striking employees. The use of violence and criminal conduct by striking employees to compel acceptance of their demands 'undermines the rights of those workers who are not participant in the strike and undermines the future relationship between the strikers and the employer'.[49]

1.4.2 WORKING IN CONCERT FOR COMMON PURPOSE IN THE LABOUR MARKET

1.4.2.1 Overview

Collective bargaining is a voluntary process where organised labour in the form of trade unions[50] and employers or employers' organisations negotiate to determine terms and

[47] Section 11(1) of the Regulation of Gatherings Act 205 of 1993 provides that an organisation is liable for damages if the gathering was under its auspices. However, section 11(2) provides a defence to this liability if the organisation can prove that it did not permit the damage, the act or omission does not fall within its scope and objectives, it was not reasonably foreseeable and that it took all reasonable steps to prevent the act or omission.

[48] 2013 (1) SA 83 (CC) paras 10-12.

[49] *Fawu obo Kapesi v Premier Foods Ltd t/a Ribbon Salt River* 2010 (9) BLLR 903 (LC) para 6.

[50] In terms of Section 213 of the LRA, trade union is an association of employees established principally to regulate relations between employees and employers or employers' organisations. Furthermore, Mokofe op cit note 1 at 21 suggests that 'the role of a trade union goes beyond dealing with workplace issues and simply representing wage earners'. Its influence in the broader society was manifest in the power Black trade unions wielded when they became countervailing force against Apartheid dualist system of industrial relations.

conditions of employment, remuneration as well as issues of mutual interest.[51] The outcome depends on power relations between parties.[52] The parties in these negotiations which are usually registered trade unions and employers or registered employers' organisation through their representatives[53] may establish a bargaining council for a sector or area.[54] These structures can also be established in the private sector. Available research indicates that these bargaining councils play a pivotal role by facilitating negotiations between the parties to collective bargaining (trade unions and employers).[55] They facilitate the conclusion of collective agreements at the national and provincial spheres of government.[56] They do not only conclude but also enforce collective agreements.[57] They prevent and help to resolve labour disputes[58] and determine through collective agreements matters which may not be resolved by means of an industrial action.[59]

1.4.2.2 Collective Bargaining at International Level

The ILO is the body established to develop international labour standards in the form of conventions and recommendations. It regulates terms and conditions of employment among states of the world and enhances social justice.[60] In its 103 years of existence, one of the ILO's chief tasks is 'to advance collective bargaining throughout the world'.[61]

---

[51] ILO 'Social Dialogue Report: Collective bargaining for an inclusive, sustainable and resilient recovery' (2022) 14 available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf* accessed on 8 October 2022. See also Item 4(1) of the 'Code of Good Practice: Collective bargaining, industrial action and picketing' (GN 1396 in *GG* 42121). See also Julien Hofman 'Across-the-board wage increases in extended collective agreements: fair or unfair?' (2009) 30 *Obiter* 197.

[52] J Maree 'Trends in the South African collective bargaining system in comparative perspective' (2011) 35 *South African Journal of Labour Relations* 7. See also M Salamon *Industrial relations: theory & practice* 3 ed (1998) 305.

[53] See Section 213 of the LRA.

[54] Section 27(1) of the LRA.

[55] JM Pietersen 'Possible implications of COVID-19 for the conditions of service in the public sector' (2020) 55 *Journal of Public Administration* 435 at 440.

[56] Ibid.

[57] Section 28(1)*(a)-(b)* of the LRA.

[58] Section 28(1)*(c)* of the LRA.

[59] Section 28(1)*(i)* of the LRA.

[60] Mokofe op cit note 1 at 4.

[61] Bernard Gernigon, Alberto Odero and Horacio Guido 'ILO principles concerning collective bargaining' (2000) 139 *International Labour Review* 33 at 34.

It has solemn obligation to ensure effective recognition of the right to collective bargaining.[62] It plays a pivotal role in developing the right to engage in collective bargaining in South Africa. This right is said to have evolved from Articles 22-25 of the Universal Declaration of Human Rights (UDHR) of 10 December 1948.[63] The ILO enhances collaboration of employers and employees to improve productive efficiency.[64]

In freely joining the ILO, all member States including South Africa endorse principles and rights set out in its ILO Constitution and Declaration of Philadelphia.[65] In this instrument, it was declared that all member States, even if they have not ratified fundamental conventions, have an obligation, arising from the very fact of their membership of the ILO, to respect, promote and realise fundamental rights including the 'freedom of association and the effective recognition of the right to collective bargaining'.[66] This demonstrates that the field of freedom of association cannot be dissociated from collective bargaining. '[T]hese two fundamental rights are indivisible and mutually fortifying – the realisation of freedom of association is an essential precondition for the effective achievement of the right to bargain collectively'.[67] They are both fundamental human rights, 'the exercise of which has a major impact on work and living conditions, as well as on the development and progress of economic and social systems'.[68] They are both considered negative rights in that the state needs not do anything save for allowing employees to exercise these rights.[69] They are both also prerequisites for the realisation of the ILO's strategic goals, such as 'social protection, social dialogue, employment, and employment rights'.[70] They are among 'founding

[62] ILO op cit note 31 Article III para (e).
[63] Molusi AP 'Critical evaluation of the constitutional duty to engage in collective bargaining' (2010) 31 *Obiter* 156 at 158.
[64] ILO op cit note 31 Article III para (e).
[65] Article 1 para (a) of the ILO 'Declaration on Fundamental Principles and Rights at Work' (adopted in 1998 and amended in 2022) available at *https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf* accessed on 6 October 2022.
[66] Ibid Article 2 para (a). See also Mokofe op cit note 1 at 16.
[67] Mokofe op cit note 1 at 17.
[68] ILO op cit note 32.
[69] Molusi AP 'Critical evaluation of the Constitutional duty to engage in collective bargaining' (2010) 31 *Obiter* 156 at 159.
[70] Mokofe op cit note 1 at 5.

principles'[71] and 'core values'[72] of the ILO. Of significance, freedom of association is proclaimed in the ILO's Constitution.[73] It is clear that the ILO was established to improve working conditions, in particular, by promoting freedom of association and collective bargaining. All member States including South Africa undertook to work towards achievement of the overall objectives of the ILO to the best of their resources.[74]

1.4.2.3 Constitutional Recognition of Collective Bargaining in South Africa

Section 231 of the Constitution makes international instruments, such as conventions, entered into by the government binding in South Africa. Once ratified, conventions create rights that may be relied upon at a national level.[75] Other sections in the Constitution that are apposite to international law include sections 232, 233 and 39(1). Section 23 of the Constitution deals with labour rights in South Africa. It is divided into four distinct but interwoven themes: freedom of association, collective bargaining, fair labour practice and union security arrangements.

1.4.2.4 Legislative Collective Bargaining

The process of collective bargaining may lead to collective agreements between employees and employers. Once concluded, collective agreements bind parties that signed them[76] and 'those on whose behalf the agreements are concluded'.[77] They are also binding on those who become members after collective agreements became

[71] ILO Committee on Freedom of Association available at *https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm* accessed on 26 September 2022.
[72] ILO op cit note 32.
[73] Preamble of the Constitution of the ILO available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO* accessed on 1 October 2022.
[74] ILO op cit note 65 Article 1 para (a).
[75] Enelia Jansen van Rensburg 'The interaction between section 233 of the South African Constitution and the commentaries to the OECD Model Tax Convention on Income and on Capital' (2020) 53 *Comparative and International Law Journal of Southern Africa* 1 at 8-9.
[76] Section 23(1)*(a)-(c)* of the LRA. See also Section 31 of the LRA.
[77] Mokofe op cit note at 18. See also *SASBO v Standard Bank* 1993 (14) ILJ 706 (IC) paras 17 and 24 per Pienaar J wherein it was held that decisions of a trade union may bind minority dissenting members. These members are estopped from denying union's authority to conclude settlements on their behalf.

binding irrespective of whether such persons continued being members of a trade union or employers' organisation for the whole period of collective agreements.[78]

According to Khumalo, collective agreements are capable of being made binding to all employees of an employer including non-unionised employees, future employees, those who may have resigned or 'other parties who are not signatories thereto'.[79] These parties, however, will not automatically be bound by collective agreements unless certain requirements are met,[80] such as extension of collective agreements to non-parties as discussed below. They can also bind non-unionised employees if they have been extended to them in terms of section 23(1)*(d)* or section 32 of the LRA.[81] Two possibilities of extension are envisaged.[82] Section 23(1)*(d)* of the LRA only applies to collective agreements concluded outside the bargaining council,[83] whereas section 32 extension applies to bargaining council agreements that require endorsement of the Minister of Employment and Labour for them to be extended to a sector wholly.[84] Section 23(1)*(d)* which binds non-parties to collective agreements operates at workplace level whereas section 32 regulates collective agreements concluded in the bargaining councils.[85] In terms of section 23(1)*(d)* of the LRA, collective agreements can also bind non-unionised employees even though they did not participate in the process that produced them. Non-unionised employees can be bound by collective agreements if they are identified in the relevant collective agreement,[86] if the collective agreement expressly states that it binds them,[87] if trade unions that participated in collective bargaining process represent the majority of employees in the workplace,[88] and if the

[78] Section 23(2) of the LRA.
[79] Khumalo op cit note 4 at 239 and *Mzeku v Volkswagen SA (Pty) Ltd* 2001 (8) BLLR 857 (LAC) paras 55 and 67.
[80] Karin Calitz 'The extension of bargaining council agreements to non-parties' (2015) 27 *SA Mercantile Law Journal* 1 at 2. See also *Free Market Foundation v The Minister of Labour* 2016 (37) ILJ 1638 (GP) para 14 (hereinafter '*Free Market Foundation'* case).
[81] See also Maria-Stella Vettori Alternative Means to Regulate the Employment Relationship in the Changing World of Work (unpublished LLD thesis, University of Pretoria, 2005) 90.
[82] Khumalo op cit note 4 at 239.
[83] C Garbers et al *The New Essential Labour Law Handbook* 7 ed (2019) 433.
[84] Khumalo op cit note 4 at 239.
[85] *Free Market Foundation* supra note 80 paras 13 and 14.
[86] Section 23(1)*(d)(i)* of the LRA.
[87] Section 23(1)*(d)(ii)* of the LRA.
[88] Section 23(1)*(d)(iii)* of the LRA.

collective agreement has been extended to them.[89] What this means is that collective agreements are also extendable.[90] It has been argued that 'failure to extend the agreement would threaten bargaining at the sector level'.[91]

1.4.2.5 Exclusion of non-unionised employees from collective Bargaining

The LRA[92] excludes non-unionised employees in the bargaining process by stressing that only registered trade unions are competent to bargain. Collective bargaining in South Africa is restricted to and performed by bargaining agents (also known as 'bipartite') namely, registered unions and an employer or registered employers' organisation under the LRA. 'Only unions can engage in collective bargaining'.[93] 'The other participant to the collective agreement is customarily an employer, or multiple employers or an employer organisation'.[94]

Non-unionised employees are usually not participants in collective bargaining process in South Africa because they are not members of trade unions. It is the hypothesis of this dissertation that an extension of collective agreements may have adverse impact on non-unionised employees who are bound by extended collective agreements even though they were not involved in the negotiations precedent to their drafting

[89] In terms of Section 32 of the LRA.
[90] Rochelle Le Roux 'The tentacles of majoritarianism: how far can they reach into retrenchment?' (2020) 41 *Obiter* 483 at 484.
[91] Shane Godfrey, Jan Theron and Margareet Visser 'The state of collective bargaining in South Africa: an empirical and conceptual study of collective bargaining' (2007) *University of Cape Town Development Policy Research Unit* i at ii available at *http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP07-130.pdf* accessed on 26 August 2022.
[92] In terms of Section 213 of the LRA.
[93] McGregor op cit note 8 at 256.
[94] Mokofe op cit note 1 at 20.

1.4.2.6 Duty to Bargain

Concerning duty to bargain, there are two schools of thought - voluntarism and compulsion. The Constitution is inclined to 'voluntaristic' system.[95] It does not create a duty for either of the parties to bargain with the other.[96] So is the LRA, which does not impose a duty to bargain in South Africa[97] notwithstanding that it permits collective bargaining. Du Toit is of the view that the LRA 'did away with the ''duty to bargain'' which the Industrial Court had placed on employers in certain circumstances and adopted an essentially voluntarist framework'[98] or unashamedly voluntarist approach.

1.4.2.7 Bargaining in the Fourth Industrial Revolution and COVID-19

Recent studies suggest that the world of work is going through profound changes.[99] Chief amongst these is the Fourth Industrial Revolution (4IR) which was defined as a fusion of technologies that blur the lines between the physical, digital and biological spheres – ranging from artificial intelligence to internet of things.[100] The 4IR impacts collective bargaining in a number of important respects. New technologies (4IR) could erode employee bargaining power in wage negotiations as it appears to have been the case in countries such as the United States of America.[101] If job security is lower because employees see their fellow colleagues increasingly becoming redundant as a result of automation (4IR), they may be hesitant to bargain for the rise in wages.[102] The 4IR has a potential to replace thousands and millions of employees with machines such as robots and artificial intelligence thereby making a major shift from labour-intensive to capital intensive.[103] It is submitted that the 4IR in South Africa is beginning to change

[95] Molusi op cit note 63 at 163.
[96] McGregor op cit note 8 at 256.
[97] Mokofe op cit note 1 at 17.
[98] Darcy Du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa?' (2007) 28 *Industrial Law Journal (Juta)* 1405 at 1418. See also Explanatory Memorandum on the Labour Relations Bill *Government Gazette* 16259 of 10 February 1995 and Godfrey et al op cit note 91.
[99] Scott Corfe *4IR in the workplace: ensuring employers and employees benefit* (2018) 10.
[100] Ibid 11.
[101] Ibid 33.
[102] Ibid 34.
[103] T Guliwe 'The Fourth Industrial Revolution and the future of the labour intensive sectors in the

collective bargaining processes in certain respects. There are employers who have raised concerns relating to what they regard as stringent labour laws that make it difficult to conduct business.[104] 'This is because a collective agreement concluded in a bargaining council lays down minimum wages and other terms and conditions of employment to be observed in respect of employees'.[105] The 4IR may be an easy way out for these employers to reduce their labour force and rely on technology which may be cost effective for them.

Between 2019 and 2021, most companies found out that business can be conducted through technological means. With most businesses moving from physical interaction to virtual interaction. Coronavirus disease (COVID-19) alerted institutions and individuals about the value of communication through online platforms or internet of things.[106] Parties to collective bargaining were no exception. For example, traditional physical meetings could no longer be conducted under COVID-19 lockdown for purposes of collective bargaining. Employers' organisations, for example, SALGA consulted member municipalities virtually i.e., through internet of things in 2021 to obtain mandate for purposes of concluding the new salary and wage collective agreement in the local

---

developing countries: "The Hailstorm in a Cup of Tea"' 2019 (16) *Africagrowth Agenda* 14. See also Ntwanano Erasmus Mathebula 'Public administration in the Fourth Industrial Revolution: implications for the practice' 2021 (19) *Gender and Behaviour* 18199 at 18202.

[104] In *Goldfields Logistics (Pty) Ltd v Smith* (LAC) unreported case no JA42/08 of 24 August 2010 paras 26-30, strict procedures for dismissing or retrenching employees were hinted by the employer. To circumvent onerous legal system that makes it extremely difficult to dismiss employees, some employers hire employees on fixed-term contracts and when these employees are no longer desirable, they simply allow their employment contracts to lapse. If, however, employers give employees 'reasonable expectation' that their contracts would be renewed, courts may compel them to renew the contracts. In *King Sabata Dalindyebo Municipality vs CCMA* (LC) unreported case no P437/03 of 1 February 2005 unparagraphed, the employer made a habit of regularly renewing fixed-term contracts. It allowed last contracts to lapse even though there was still work available for the terminated employees. The Labour Court found that the employees had a reasonable expectation to have their contracts renewed again. The employer was forced to renew the contracts. Many employers are required by law to register with industry-specific bargaining councils which then dictate the terms and conditions of employment in the particular sector such as minimum wages to be observed for employees.

[105] *Kem-Lin Fashions CC v Brunton* 2001 (22) ILJ 109 (LAC) para 20.

[106] JM Pietersen 'Possible implications of COVID-19 for the conditions of service in the public sector' (2020) 55 *Journal of Public Administration* 435 at 444. According to World Health Organisation (WHO) 'Coronavirus disease' available at *https://www.who.int/health-topics/coronavirus#tab=tab_1* accessed on 8 January 2023, COVID-19 is a communicable disease caused by a virus known as 'SARS-Cov-2' and most people infected with this disease tend to experience mild to moderate respiratory illness. WHO also cautioned that older people and those with underlying medical conditions such as cardiovascular disease, diabetes, chronic respiratory disease or cancer are at high risk of developing serious illness or die if infected with this disease.

government sector.[107] Network deficits, mobile data barriers or inadequate data and incapacity to use technology presented a challenge. Notwithstanding the changes brought about by this revolution, there is no provision for non-unionised employees to bargain with their employers under the 4IR. They remain largely generally excluded.

The ramifications of COVID-19 were felt in the arena of collective bargaining. For instance, the South African government as the major employer repudiated the collective agreement[108] which was not implemented in 2020/21 arguing that an extra R30 billion for salary increases was not affordable in the context of COVID-19 and bloated public sector wage bill.[109] The trade unions took government to court and argued that the collective agreement was binding.[110] It was held that Clause 3.3 of Resolution 1 of 2018 relating to salary increases in the 2020/2021 financial year was unlawful. Further that it contravened sections 213 and 215 of the Constitution as well as Regulations 78 and 79 of the Public Service Regulations, 2016 promulgated thereunder Public Service Act 103 of 1994.[111] Non-unionised employees did not have a direct voice in both the negotiations and litigation. Despite all these challenges, as business and labour seek new ways to interact and improve the South African labour market, it is important that adequate attention is also provided to non-unionised employees.

[107] In *Food and Allied Workers Union v South African Breweries (Pty) Ltd* 2020 (41) ILJ 2652 (LC) paras 31-33, Moshoana J dismissed trade union's application to postpone retrenchment consultation by employer until after COVID-19 period. Although the court acknowledged that consultations are through physical meetings, this was not a necessary requirement. It was held that the use of zoom or digital means did not amount to procedural unfairness but ensured social distancing and health and safety of parties involved.

[108] Clause 3.3 of Public Service Co-ordinating Bargaining Council 'Agreement on the Salary Adjustments and Improvements on Conditions of Service in the Public Service for the period 2018/19 to 2019/20 and 2020/21' available at *http://www.phsdsbc.org.za/wp-content/uploads/2018/06/PSCBC-Resolution-1-of-2018-Agreement-on-the-salary-adjsutments-and-improvements-in-conditions-of-service-for-the-period-2018-to-2021.pdf* accessed on 6 November 2021.

[109] Pietersen op cit note 106.

[110] *Public Servants Association & Others v Minister of Public Service & others* 2021 (3) BLLR 255 (LAC) paras 15-17 (hereinafter '*Public Servants Association*' case).

[111] Ibid paras 50 and 51. See also Pietersen op cit note 106 at 445.

1.5 RESEARCH METHODOLOGY

A desktop method of research will be followed when writing this dissertation where relevant primary and secondary sources of law will be consulted, reviewed and analysed. Reference will be made to the primary and secondary sources of law such as legislation, case law, journal articles and books. Where necessary, international and regional instruments will be consulted and referred to, as well as relevant internet sources.

1.6 SUMMARY OF CHAPTERS

This chapter provided a general introductory orientation of the subject matter. It identified the problem and set out aims and objectives of the study before delineating the background. Chapter two discusses and traces the development of collective bargaining in South Africa thereby demonstrating how it influenced the labour market. In chapter three, the duty to bargain in South Africa will be examined. Arguments for and against the duty to bargain will be presented and analysed. Chapter four investigates the impact of collective agreements on non-unionised employees in South Africa, particularly where not all employees within the workplace are trade union members. It further assesses whether automatic coverage of these agreements of non-unionised employees comply with the requirements of the ILO. Chapter five describes and synthesises key findings of this dissertation. It proposes solutions and recommendations for consideration.

1.7 CONCLUSION

The attainment of freedom of association is viewed as a necessary condition for the successful achievement of the right to engage in collective bargaining.[112] Non-unionised employees are excluded from taking part in the formulation of collective agreements that affect them in the collective bargaining processes. Decisions that impact their employment are taken by majority unions that are participating in their workplaces, even though they did not provide those unions with their mandate or demands. Trade unions appear to have a 'monopoly over collective bargaining'[113] in this regard. Although non-unionisation appears to be seen as an obstacle to orderly collective bargaining in the current industrial relations landscape, this dissertation suggests that inclusivity is possible by involving all categories of employees in collective bargaining because they are affected by collective agreements.

[112] Mokofe op cit note 1 at 4.
[113] Samuel op cit note 9 at 243.

CHAPTER TWO: DEVELOPMENT OF COLLECTIVE BARGAINING IN SOUTH AFRICA

2.1 INTRODUCTION

This chapter discusses collective bargaining and how it influenced the labour market in South Africa. It traces the development of collective bargaining in this country. It also reflects on how collective bargaining has been shaped by international instruments and the role of the International Labour Organisation (ILO) in promoting collective bargaining within the workplace.[1] In particular, this chapter illustrates that employees and employers have a right to engage in collective bargaining to safeguard their respective rights and interests.[2] Further that this right appears not to be enjoyed by employees who are not members of trade unions in South Africa.

2.2 THE CONCEPT OF COLLECTIVE BARGAINING

Collective bargaining is a process of negotiation[3] to reach agreement regarding better working conditions and wages.[4] It is a voluntary process of joint decision making where organised labour in the form of trade unions[5] and employers or employers' organisations negotiate to determine terms and conditions of employment, remuneration

[1] In terms of ILO *Collective Bargaining: A policy guide* (2015) 11 collective agreements imply legal instruments drawn up by the ILO setting out basic principles and rights at work. They may take the form of conventions or recommendations.

[2] *National Education Health and Allied Workers Union and Others v Minister of Public Service and Administration and Others* (ZACC) unreported case no 21/21 of 28 February 2022 para 67. See also *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) paras 4 and 55 (hereinafter '*CUSA'* case) and Bongani Khumalo 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa CCT87/16 [2017]' (2018) 51*De Jure* 328.

[3] ILO op cit note 1 at 2 and 42.

[4] Anton Steenkamp, Suzan Stelzner and Nadene Badenhorst 'The Right to Bargain Collectively' (2004) 25 *Industrial Law Journal* 943 at 944.

[5] In terms of Section 213 of the Labour Relations Act 66 of 1995 (hereafter 'the LRA'), trade union is an association of employees established principally to regulate relations between employees and employers or employers' organisations.

and issues of mutual interest.[6] The goal of collective bargaining is to conclude collective agreements.[7] Collective bargaining should be free and voluntary in nature to ensure that bargaining outcomes recorded in these agreements are generated by the parties themselves and not imposed on them.[8] The outcomes depend on power relations between parties,[9] i.e., to influence acceptance of demands.

The term 'collective' envisages employees acting as a unit usually through their trade union to strengthen their bargaining power. Usually a single employee has no bargaining power as an individual.[10] The process of bargaining attains 'collective' character because of trade union(s) representing interests of employees as a collective.[11] The term 'bargaining' is akin to negotiation and involves compromise and agreement by the bargaining parties. There are important conceptual differences between negotiation and consultation. To consult implies seeking the view of another, information or counsel from the person consulted on the decision that is about to be taken which may or may not be implemented. Consultation does not imply or involve any agreement, 'whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take'.[12]

[6] Item 4(1) of the 'Code of Good Practice: Collective bargaining, industrial action and picketing' (GN 1396 in *GG* 42121) (hereinafter 'Code of Good Practice: Collective bargaining, industrial action and picketing'). See also Julien Hofman 'Across-the-board wage increases in extended collective agreements: fair or unfair?' (2009) 30 *Obiter* 197.
[7] ILO op cit 1 at 3.
[8] Ibid 3.
[9] Johann Maree 'Trends in the South African collective bargaining system in comparative perspective' (2011) 35 *South African Journal of Labour Relations* 7. See also Michael Salamon *Industrial relations: theory & practice* 3 ed (1998) 305, J Piron 'The Theory of Collective Bargaining' (1978) 41 *THRHR* 183 at 190, Darcy Du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa?' (2007) 28 *Industrial Law Journal* (Juta) 1405 at 1419 and Tamsanqa Mila Collective Bargaining and Section 197 (unpublished LLM dissertation, University of Kwazulu-Natal, 2015) 3.
[10] M McGregor et al *Labour law rules* 3 ed (2017) 256.
[11] Maria-Stella Vettori Alternative Means to Regulate the Employment Relationship in the Changing World of Work (unpublished LLD thesis, University of Pretoria, 2005) 103.
[12] Mila op cit note 9 at 14. See also Item 15(2)(c) of the Code of Good Practice: Collective bargaining, industrial action and picketing for further exposition and distinction between consultation and negotiation processes.

As a corollary, collective bargaining can build trust, mutual respect and mutual understanding between parties including stable and productive labour relations.[13] It can also promote dialogue and constructive engagements in the workplace.[14] Oumarou & Tomei[15] have identified concerns over rising labour instability that could frustrate the role of collective bargaining in bringing about labour peace at the level of the workplace. These include growing inequality in wage distribution, discrimination on grounds of gender, disability or ethnicity.

In circumstances where there is no bargaining council or agreement to bargain, a group of employees or a trade union may bargain collectively as a matter of practice by making a demand on an employer under threat of a strike. In the same vein, an employer or employers' organisation may make demands and threaten to unilaterally introduce them under a threat of a lockout. In each case, a dispute must be referred for conciliation to a forum with jurisdiction prior to any industrial action.[16]

2.3 HISTORICAL OVERVIEW

2.3.1 INDUSTRIALISATION

In South Africa, collective bargaining was insignificant until industrialisation commenced with the discovery of diamonds in 1870 and gold in 1872.[17] Before the discovery of diamonds and gold, South Africa was predominantly a rural society. The economy was

[13] ILO op cit 1 at 4-5.
[14] Item 5(1) (a-b) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[15] See also Moussa Oumarou and Manuela Tomei 'Foreword' in ILO *Collective Bargaining: A policy guide* (2015) iii.
[16] Item 4(3) (d) of the Code of Good Practice: Collective bargaining, industrial action and picketing. In terms of section 64(1)*(a)(i)* of the LRA, the party must refer an issue in dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) established by section 112 of the LRA which must attempt to resolve the dispute through conciliation. If the dispute remains unresolved, CCMA must issue out a certificate of non-resolution stating that the dispute remains unresolved prior to the party embarking on a strike or recourse to lock-out.
[17] Steenkamp, Stelzner and Badenhorst op cit note 4 at 946-947.

agrarian - with agriculture being the dominant economic activity.[18] People depended on farming for subsistence. The relationship between employers and employees was one of a 'master' and 'servant' governed by the Master and Servants Act[19] to which blacks did not generally subscribe. They sought to challenge the applicability of this legislation.

The advent of mining which increased rapidly following discovery of diamond and gold led to a large-scale migration of skilled and unskilled whites and blacks to Witwatersrand area.[20] Many highly skilled European immigrants were employed at much higher costly rate than the rest of the workforce. Later, employers realised that many jobs previously done by skilled white employees could well be done by black employees with substantially reduced wages.[21] This triggered serious conflict between white and black employees especially after the First World War ended in 1918. Government responded with the enactment of the Mines and Works Act[22] to reserve various types of work for white employees only.[23] Executive positions and high paying jobs were reserved for white employees.[24] However, less skilled white employees were subjected to retrenchments. This led to several industrial actions of which most were illegal because trade unions were not recognised by the state or employers in South Africa in the earlier stages of industrial revolution (a period precedent to 1924). They were repressed, outlawed, and in some respects employees with traditions of trade unionism were arrested.[25]

[18] Urmila Bhoola 'National Labour Law Profile: South Africa' (2022) 3 available at *https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm* accessed on 1 May 2022.
[19] 15 of 1856.
[20] Steenkamp, Stelzner and Badenhorst op cit note 4 at 946-947.
[21] Regulated in terms of Union Native Labour Regulation Act 15 of 1911. See also Steenkamp, Stelzner and Badenhorst op cit note 4 at 946-947.
[22] 12 of 1911.
[23] Bhoola op cit note 18. J Grogan *Dismissal* 3 ed (2017) 5 hinted that it was a criminal offence to employ black people in certain posts.
[24] Stephen H Jacobson 'Collective Bargaining in Undemocratic Regimes: Francoist Spain and Contemporary South Africa' (1991) 12 *Comparative Labour Law Journal* 214 at 226.
[25] Vettori op cit note 11 at 91.

'In 1914 there was a general strike by white employees. The government reacted by enacting the Act of Indemnity and the Riotous Assemblies Act, which prohibited certain industrial actions'.[26] In 1922, over 21 000 white miners went on strike.[27] They opposed envisaged retrenchment of about 10% of white employees. 'The precipitating cause of the rebellion was the declared intention of the mine management to dismiss semi-skilled white miners in order to cut the wage bill'.[28] They viewed this as another initiative by employers to replace them with cheaper black labour.[29]

Trade unions are associations of employees established principally to regulate relations between employees and employers or employers' organisations.[30] They emerged during the early stages of industrialisation.[31] During this period, workplaces and most firms were smaller and family run making it easier to contain conflict between employers and employees.[32] It was rare for employees to coerce employers to provide them better working conditions and higher wages.[33] As factories became bigger and employed more people, conflict was inevitable. The result was a market polarisation between employers and employees. Collective bargaining became a means of containing such conflict.[34] Raday[35] identifies three policies that applied to the development of trade unionism in South Africa, namely deterrence policy, neutral policy and supportive intervention policy. Deterrence policy deters, prevents or limits union activity. Neutral policy bears no intervention.[36] Supportive intervention policy is wherein political and legal systems offer incentives for union development and collective bargaining.[37] Successive South African

[26] Ibid 3-15.
[27] For example, A Cooper Key 'The Strike in the Gold Mines of South Africa' (1922) 6 *International Labour Review* 893 at 893 and 899. See also Steenkamp, Stelzner and Badenhorst op cit note 4 at 947 and Vettori op cit note 11 at 95.
[28] Angela Patricia Molusi 'Critical evaluation of the Constitutional duty to engage in collective bargaining' (2010) 31 *Obiter* 156-166.
[29] Steenkamp, Stelzner and Badenhorst op cit note 4 at 946-947.
[30] Section 213 of the LRA.
[31] Vettori op cit note 11 at 90-91.
[32] Ibid 91.
[33] Ibid.
[34] Ibid 91-95.
[35] Frances Raday 'The Decline of Union Power – Structural Inevitability or Policy Choice ' in Conaghan, Fischl and Klare (eds) *Labour law in an era of globalisation: transformative practices and possibilities* (2002) 353 at 358.
[36] Ibid.
[37] Ibid.

governments' public policy generally followed sequence of these policies towards trade unionism.[38]

2.3.2 FROM INDUSTRIAL CONCILIATION ACT TO LABOUR RELATIONS ACT

To contain industrial conflict and strive towards labour peace, the South African government enacted the Industrial Conciliation Act[39] 'which was the first legislation to regulate collective bargaining in South Africa'.[40] This Act recognised white trade unions only and regulated collective bargaining. Even the first South African trade union, the Carpenters' and Joiners' Union that was established in 1881 largely to protect the interests of skilled foreign workers working on the mines, was only legally recognised in 1924 pursuant to enactment of ICA.[41] This was a relatively rudimentary statute that sought to introduce a skeletal framework for statutory system of centralised collective bargaining, voluntary establishment of industrial councils, and conciliation boards.[42] The present legislative framework[43] for bargaining councils has its roots in ICA which established industrial councils as permanent structures for multi-employer collective bargaining.[44]

The ICA excluded Africans in its definition of an 'employee'.[45] This meant that most African employees could not join trade unions that were registered under ICA. They were excluded from collective bargaining and were not represented in industrial council negotiations.[46] Even trade unions representing Africans were not recognised under

[38] Vettori op cit note 11 at 94.
[39] 11 of 1924 (hereafter ICA). See also Vettori op cit note 11 at 03.
[40] *South African National Defence Union v Minister of Defence* (2007) 9 BLLR 785 (CC) para 50 (hereinafter '*SANDU V*' case).
[41] Bhoola op cit note 18 at 3-4.
[42] Shane Godfrey 'Contested terrain: The extension of multi-employer collective agreements in South Africa' in Hayter and Visser (eds) *Collective agreements: extending labour protection* (2018) 138. See also Oumarou and Tomei op cit note 15 and Stella Vettori 'A judicially enforceable duty to bargain?' (2005) 38 *De Jure* 382 at 384.
[43] Section 27(1) of the LRA.
[44] Godfrey op cit note 42. See also Sandrine Anne Vauthier Collective Agreements: A comparative study between Belgium and South Africa (unpublished LLM dissertation, University of South Africa, 1998) 98.
[45] Vettori op cit note 11 at 03.
[46] Godfrey op cit note 42.

ICA.[47] This amounted to oppression and further marginalisation of pass-bearing African employees. The centerpiece of the legislative framework mirrored broader racial exclusion public policy that prevailed in the broader body politic at the time.[48] Much of the legislations were enacted to give legal force to ideology of racial discrimination and separate development.[49] Even for white employees, the ICA did not make provision for employees who elected not to join trade unions to bargain effectively with their employers. Bargaining was an exclusive reserve for unionised employees with their employers.

In 1930, the ICA was amended to allow for the extension of industrial council agreements to black employees.[50] It was further repealed and replaced by the new statute[51] in 1937 that provided for an exemption process from collective agreements.[52] Representatives of the Department of Labour were permitted to represent black employees' interests in industrial councils.[53] In 1948, the National Party came into power leading to the birth of Afrikaner Nationalism and large scale suppression of black trade union activists. In the 1950s, the Native Labour Settlement of Disputes Act[54] was enacted to provide certain procedures for resolution of disputes arising between black employees and their employers. However, black employees were neither permitted to join trade unions nor to strike.[55]

[47] Vettori op cit note 11 at 94. See also Steenkamp, Stelzner and Badenhorst op cit note 4 at 947.
[48] Ibid 03 and Godfrey op cit note 42 at 138.
[49] Mpfariseni Budeli Freedom of Association and trade unionism in South Africa: from apartheid to the democratic constitutional order (unpublished LLD thesis, University of Cape Town, 2007) 286.
[50] Steenkamp, Stelzner and Badenhorst op cit note 4 at 947.
[51] 36 of 1937.
[52] Godfrey op cit note 42 at 139.
[53] Steenkamp, Stelzner and Badenhorst op cit note 4 at 948.
[54] 48 of 1953.
[55] *SANDU V* supra note 40 para 50.

In 1956 the National Party government passed the new ICA.[56] This legislation was subsequently renamed the Labour Relations Act.[57] Although, it sought to curb unfair labour practices, this Act, excluded black women from its ambit. The registration of unions with members of mixed race was also prohibited'.[58] The legislation perpetuated the dual system of labour relations by recognising trade unions representing white employees and creating a separate system for trade unions representing black employees. This dual system was intended to ensure strict control of black employees, thereby refining racial divisions and deepening inferior status of black employees.[59] It did almost nothing to improve the bargaining situation for non-unionised employees.

2.3.3 THE ROLE OF TRADE UNIONS

2.3.3.1 Powerplay

The traditional role of trade unions is to deal with conflict between employees and employers.[60] Since employers have economic power over employees,[61] trade unions seek to level the playing fields between employers and employees within workplaces.[62] Bozalek found that a more equal employment dispensation is best created through collective bargaining and 'evolution of the relationship between the parties'.[63]

2.3.3.2 Recognition of Black Trade Unions

In the early 1970s, generally black trade unions were banned in South Africa. 'In terms of a War Measure … strikes by black employees were technically illegal from 1943-

[56] Industrial Conciliation Act 28 of 1956 (hereafter 'the ICA').
[57] 28 of 1956.
[58] Steenkamp, Stelzner and Badenhorst op cit note 4 at 948.
[59] Ibid.
[60] Vettori op cit note 11 at 91-95.
[61] According to Grogan op cit 23 at 3, the superior economic position of employers in South Africa is reflected and manifested in the social and political structures of the society.
[62] B Rust, 'So, you think being a trade union is plain sailing?' 2001 *South African Journal of Labour Relations* 58 at 59. See also Jacolien Barnard and Monray Marsellus Botha 'Trade Unions as Suppliers of Goods and Services' (2018) 30 *SA Mercantile Law Journal* 216 at 218, Paul Lydon Davies and Mark Robert Freedland *Kahn-Freund's Labour and the Law* 3 ed (1983) 18 and Du Toit op cit note 9 at 1410.
[63] *University of the Western Cape v University of the Western Cape United Workers Union* 1992 (13) ILJ 699 (ARB) 708F. See also Vauthier op cit note 44 at 91 who is of the opinion that the power play is given statutory impetus by, inter alia, provisions relating to organisational rights and the right to protected strike.

1973'.[64] It was the Bantu Labour Regulations Act[65] that later sought to provide legal strikes by black employees.[66] This Act allowed for the establishment of liaison committees at plant-level as an alternative to workers' committees.[67] In addition, the government amended the Native Labour Settlement of Disputes Act[68] to provide black employees with a more manageable alternative to trade unionism in the form of liaison committees and workers' committees, tasked with the handling of complaints.[69] The majority of black employees, however, rejected these bodies and instead joined new black trade unions that emerged in the wake of the strikes.[70] The growth of these black trade unions and spread of plant and enterprise bargaining led to development of 'unofficial' collective bargaining system which undermined 'official' collective bargaining system (the statutory system of industrial councils).[71]

The first legal strike by black employees was the Armourplate strike in 1976 which was aimed at obtaining equal rights for black employees, even though most of the black labour force were arrested.[72] This period was reawakening of black employees' consciousness. They were no longer prepared to accept their inferior status in the labour market. This led the Apartheid government to establish a commission chaired by Professor Wiehahn to enquire, make recommendations and produce a report about labour legislation.[73] During 1976 riots, Professor Wiehahn influenced the Minister of Labour, Fanie Botha to reform South Africa's racialised labour law.[74] The appointment of Wiehahn Commission in 1977 was as a result of unprecedented pressure placed on employers and the state by excluded black trade unions.[75] One of the main focus areas of this commission was the collective bargaining system in South Africa. [76]

[64] Steenkamp, Stelzner and Badenhorst op cit note 4 at 948.
[65] 70 of 1973. This legislation amended the Native Labour Settlement of Disputes Act 48 of 1953.
[66] Steenkamp, Stelzner and Badenhorst op cit note 4 at 948.
[67] Ibid.
[68] 48 of 1953.
[69] Godfrey op cit note 42 at 140 and 148.
[70] Ibid 140.
[71] Ibid.
[72] Steenkamp, Stelzner and Badenhorst op cit note 4 at 948.
[73] Molusi op cit note 28 at 156 at 157.
[74] Ibid 157-158.
[75] Vettori op cit note 11 at 04.
[76] Godfrey op cit note 42 at 140.

In its report, the commission recommended among other things, that freedom of association be extended to all employees irrespective of race and that black trade unions be allowed to register.[77] Steenkamp, Stelzner and Badenhorst characterise this as the most revolutionary recommendation of the Wiehahn Commission.[78] It was specifically recommended that black employees be statutorily recognised as 'employees' and be included in the definition of 'employee', be allowed to join registered trade unions and be directly represented on industrial councils and conciliation boards which were the centerpiece of collective bargaining.[79] This would then automatically permit them to join or form registered trade unions and participate directly in industrial council negotiations. It was further recommended that an industrial court with a broad unfair labour practice jurisdiction be established. This court looked for its unfair labour practice jurisdiction to impose duty to bargain in a litany of cases[80] in South Africa in some circumstances. Black trade unions were recognised as a sequel to the Wiehahn Commission's recommendations because:

> 'The government accepted most of the recommendations made by the commission and in 1979 the Industrial Conciliation Amendment Act,[81] which took the form of a series of amendments to the LRA 1956, was enacted to give effect to the recommendations made by the commission. In terms of the 1979 Act, black employees now had equal status to white employees and for the first time, black employees could participate in the statutory collective bargaining structures, and engage in strike action where mediation procedures have failed'.[82]

The adoption of Wiehahn Commission's recommendations by the Apartheid government led to the recognition of equal rights for all employees across all races for the very first time in the history of South African labour relations. However, the position of non-unionised employees across all races did not change. They remained excluded in

[77] Steenkamp, Stelzner and Badenhorst op cit note 4 at 943.
[78] Ibid 949.
[79] Godfrey op cit note 42 at 140.
[80] See *UAMAWU v Fodens (SA) (Pty) Ltd* 1983 ILJ 212 (IC); *East Rand Gold and Uranium Co Ltd v NUM* 1989 ILJ 683 (LAC); *NUM v East Rand Gold and Uranium Co Ltd 1991 ILJ 1221 (A) 1221 (A)*; *Mawu v Hart* 1985 ILJ 478 (IC) and *FAWU v Spekenham Supreme* 1988 ILJ 627 (IC).
[81] 94 of 1979.
[82] Steenkamp, Stelzner and Badenhorst op cit note 4 at 949-950.

collective bargaining. There was neither suggestion nor recommendation for involvement of non-unionised employees in collective bargaining. Legislative provision was not made for an alternative route of engagement between non-unionised employees and their employers.

Black trade unions were initially skeptical to register in the central bargaining system for fear of being co-opted. They thought industrial councils were an extension and replica of oppressive government.[83] However, they gradually began to register with industrial councils.[84] One of the first black trade unions that registered and joined the industrial council was the rapidly expanding Metal & Allied Workers Union (MAWU) in 1984 because many black trade unions followed suit thereafter.[85]

As industries began to flourish, more unions were established and grew in power and strength vis-à-vis the employer.[86] In particular, the Congress of South African Trade Unions (COSATU) was established in 1985 as a successor-in-title of the South African Congress of Trade Unions (SACTU of 1955). As a federation, COSATU played an influential role in the drafting of the 1996 Constitution and the LRA. 'The rights presently enjoyed by employees were hard-won and followed years of intense and often grim struggle by workers and their organisations'.[87] It is submitted that these include the right to engage in collective bargaining. The presupposition of black trade unions rests on the fact that industrial relations in South Africa could not be divorced from politics. It therefore openly engaged in political activities as a trade union alliance partner of the African National Congress (ANC) rather than restricting itself to traditional trade union activities and shop floor issues.

[83] Ibid 950.
[84] Vettori op cit note 11 at 05.
[85] Steenkamp, Stelzner and Badenhorst op cit note 4 at 950.
[86] Vettori op cit note 11 at 88-97.
[87] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 74.

At the time of drafting constitutional text, COSATU argued that collective bargaining by employers be conducted through employers' organizations only, but this suggestion was rejected.[88] Individual employers are now clothed with necessary authority to engage in collective bargaining which was non-prevalent prior to 1924 and only became available to black trade unions in 1979.

Viewed in its historical setting, collective bargaining is intrinsically linked to evolution of trade unions and their role. Large-scale, mass production and employing large numbers of workers were the historical basis of trade unions and collective bargaining.[89] A union's bargaining power depended on its ability to control a (local) labour market by recruiting a significant number of members.[90] It is submitted that the relationship between collective bargaining and the evolution of the role of trade unions is axiomatically reflected in the main purpose of collective bargaining. It has been stated that the main purpose of collective bargaining is the regulation of terms and conditions of employment including job security[91] and stability of employment.[92] It also institutionalises industrial conflict[93] by serving as a dispute resolution method.[94] Trade unions seek to protect physical integrity and dignity of their members by bargaining collectively with employers.[95] It is an alternative to dictatorship of capital and at the same time a means of maintaining industrial peace,[96] industrial democracy, social justice and fulfilment of the international legal obligations, consistent with the rule of law.[97] Reference is made to security of employment, as held by the former Canadian

[88] Albie Sachs 'Constitutional Developments in South Africa' (1996) 28 *New York University Journal of International Law and Politics* 695 at 700.
[89] Du Toit op cit note 9 at 1408.
[90] Ibid.
[91] Vettori op cit note 42 at 383.
[92] Du Toit op cit note 9 at 1405.
[93] Clive Thompson 'Collective bargaining' (1990) 1 *South African Human Rights and Labour Law Yearbook* 281 and Vettori op cit note 42 at 383.
[94] Steenkamp, Stelzner and Badenhorst op cit note 4 at 945.
[95] Davies and Robert op cit 62 at 69.
[96] Du Toit op cit note 9 at 1405 and 1409.
[97] Keith Ewing and John Hendy 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' (2017) 46 *Industrial Law Journal* 23 at 24.

Chief Justice Dickson '[w]ork is one of the most fundamental aspects of a person's life'.[98]

In general, trade unions have always played an important role in demanding greater democracy, involvement in decision-making of employees in the workplace as part of checks and balances[99] and procuring better working conditions, wages and salaries for their members through collective bargaining process.[100] As a component of society, trade unions also play an important role in decision making that virtually concerns the interests of society, in the economic life, social consciences, and development of employees in particular.[101] The speed with which the ANC government went about amending labour laws could to a large extent be attributable to the role that black trade unions have played in the struggle against apartheid and in the ANC's electoral success.[102]

Although 'government took a neutral stance toward labour relations and left the parties to themselves'[103] during the period 1980-1990, black trade unions influenced government to change non-interventionist stance to supportive interventions. A combination of the aforementioned considerations led to the adoption of the LRA[104] in 1995 which came into operation on 11 November 1996. However, construed wholly, these efforts did little to improve the bargaining situation for non-unionised employees. Nonetheless, important bargaining structures aimed at advancing collective bargaining in South Africa were introduced.

[98] *Reference re Public Service Employees Relations Act (Alta)* 1987 (1) SCR 313.
[99] Barnard and Botha op cit note 62 at 217–218.
[100] Vettori op cit note 11 at 88.
[101] Barnard and Botha op cit note 62 at 217.
[102] Darcy Du Toit *Labour Relations Law: A Comprehensive Guide* 3rd ed (2000) 13-20. See also Vettori op cit note 11 at 03.
[103] Vettori op cit note 11 at 101.
[104] 66 of 1995.

2.4 BARGAINING STRUCTURES

Collective bargaining is the key instrument of labour market regulation[105] and employment relations.[106] It comprises mechanisms through which bargaining takes place.[107] The LRA provides two statutory forums for collective bargaining, bargaining councils and statutory councils. There is also provision for establishment of workplace forums[108] which supplement collective bargaining.

2.4.1 BARGAINING COUNCILS

Bargaining councils are governed by sections 27-38 and 49-63 of the LRA. In practice, bargaining councils are predominant mechanisms relative to any other statutory forum for collective bargaining. They are bipartite forums established voluntarily by one or more trade unions and one or more employer organisations for a specific industry or in respect of different sectors and areas and serve as pillars of collective bargaining.[109] However, there is no duty on a trade union or an employers' organisation to establish bargaining councils.[110]

Collective bargaining process may be established institutionally, by agreement or in practice.[111] In the public sector, Public Service Coordinating Bargaining Council (PSCBC) has been established for public service sector whereas South African Local Government Bargaining Council (SALGBC) is created for local government sector. These structures can also be established in the private sector. The Constitutional Court

[105] Du Toit op cit note 9 at 1405.
[106] Maree op cit note 9.
[107] Carole Cooper 'Labour Relations' (undated) 1 at 32 available at *https://africanlii.org/sites/default/files/CLoSA%20Ch%2053%20Labour%20Relations.pdf* accessed on 8 May 2022.
[108] Sections 78-94 of the LRA.
[109] Section 27(1) of the LRA. See also Shane Godfrey, Jan Theron and Margaret Visser 'The state of collective bargaining in South Africa: an empirical and conceptual study of collective bargaining' (2007) 2 *University of Cape Town Development Policy Research Unit*. Also available at *http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP07-130.pdf* accessed on 26 August 2022. They are construed as successors to old industrial councils.
[110] Steenkamp, Stelzner and Badenhorst op cit note 4 at 956.
[111] Item 4(1) of the Code of Good Practice: Collective bargaining, industrial action and picketing.

in *CUSA v Tao Ying Metal Industries*[112] held that bargaining councils constitute forums for negotiating, concluding and resolving disputes about collective agreements. The main function of the bargaining councils is to produce collective agreements dealing with wages, conditions of work and benefits, and to ensure that these are implemented by all employers and employees within their jurisdiction.[113] Available research indicates that these bargaining councils play a pivotal role by facilitating negotiations between the parties to the collective bargaining.[114] They facilitate the conclusion of collective agreements at the national and provincial spheres of government.[115] They do not only conclude but they also enforce collective agreements.[116] They prevent and help to resolve labour disputes[117] and determine through collective agreements matters which may not be resolved by means of industrial action.[118] It is submitted that in practice bargaining councils are the most effective structures for collective bargaining in South Africa. They conclude wage and salary collective agreements including disciplinary codes and procedures.

2.4.2 STATUTORY COUNCILS

Statutory councils are another statutory forum for collective bargaining. They are regulated by sections 39-48 and 49-63 of the LRA. A representative trade union[119] or a representative employers' organisation[120] may apply to the Registrar of Labour Relations for the establishment of a statutory council in circumstances where registered

[112] 2009 (2) SA 204 (CC) para 4.
[113] Godfrey op cit note 42 at 138 and 143.
[114] Johnny M Pietersen 'Possible implications of COVID-19 for the conditions of service in the public sector' (2020) 55 *Journal of Public Administration* 435 at 440.
[115] Ibid.
[116] Section 28(1)*(a)-(b)* of the LRA.
[117] Section 28(1)*(c)* of the LRA. See also Thompson op cit note 93 at 282.
[118] Section 28(1)(i) of the LRA. Vauthier op cit note 44 at 102 suggests that the fact that section 28(1) states that these powers and functions 'include the following' indicates that the list is not exhaustive and thus these bargaining councils could perform other powers and functions.
[119] In terms of Section 39(1)(a) of the LRA, representative union refers to a registered trade union, or two or more registered trade unions acting jointly, whose members constitute at least 30% of employees in a sector and area.
[120] Section 39(1)(b) of the LRA defines representative employer as a registered employers' organisation, or two or more registered employers' organisations acting jointly, whose members employ at least 30% of the employees in a sector and area.

bargaining council for that sector and area does not exist.[121] The Minister of Employment and Labour may in effect force parties to become members of a statutory council and compel them to bargain with each other.[122] In terms of the provisions of the LRA, statutory councils are clothed with necessary powers and functions to resolve disputes and conclude collective agreements.[123] They may agree, in terms of their constitutions to include any functions of bargaining councils referred to in section 28 of the LRA.[124] Cooper describes statutory councils as 'counterpart' of bargaining councils.[125] The use of these structures is overshadowed by bargaining councils.

2.4.3 WORKPLACE FORUMS

Chapter 5 of the LRA is entitled 'workplace forums' and contains sections 78-94 which provide the legal framework for workplace forums. These structures are not designed to replace collective bargaining but to supplement it[126] and carry out functions that ordinarily cannot be easily achieved through collective bargaining such as joint solution for increasing productivity.[127] They 'are designed to deal largely with "non-wage" issues such as changes in the organisation of work, restructuring, the introduction of new technologies and work methods, health and safety at work'.[128] They promote interests of all employees in the workplace, irrespective of their trade union membership.[129] The entire workforce can participate in these structures[130] including non-unionised employees.

---

[121] Section 39(2) of the LRA.
[122] Steenkamp, Stelzner and Badenhorst op cit note 4 at 956-957.
[123] Section 43(1)*(a)* and *(d)* of the LRA.
[124] Section 43(2) of the LRA.
[125] Cooper op cit note 107 at 35. In terms of section 43(3) of the LRA, collective agreements concluded thereunder statutory councils have the same statutory force as bargaining council agreements. In spite of this, Godfrey et al op cit note 109 at 1 construe statutory councils as having 'more limited appeal'.
[126] MM Botha 'In search of alternatives or enhancements to collective bargaining in South Africa: are workplace forums a viable option?' (2015) 18 *PER* 1812 at 1816.
[127] Carl Mischke 'The shape of things to come - the new Labour Relations Act' (1995) 3 *Juta's Business Law* 150.
[128] Botha op cit note 126.
[129] Section 79(a) of the LRA.
[130] Botha op cit note 126 at 1819-1820.

Employers are not party to workplace forums. These structures, however, are entitled to be consulted by employers about matters listed in section 84 of the LRA including job grading unless such matters are regulated by collective agreements. They are also entitled to participate in joint decision-making about matters flagged in section 86 of the LRA including disciplinary codes and procedures unless such matters are dealt with by collective agreements.[131] These structures may be established in any workplace where an employer employs more than 100 employees. Any representative trade union may apply to the Commission for Conciliation, Mediation and Arbitration (CCMA) for the establishment of a workplace forum.[132] Schedule 2 of the LRA contains guidelines for the constitution of a workplace forum.[133] Although these structures recognise rights and interests of non-unionised employees, in practice, they are unpopular, unsuccessful and described as 'a dead duck'.[134] Their unsuccessfulness, and by extension, ineffectiveness explains why they are not suited to encourage participation of non-unionised employees in the labour market. It has been argued that one of the explanations for their ineffectiveness is that trade unions are said to be hostile to workplace forums because they may easily be co-opted by management.[135] An additional reason for their ineffectiveness rests on the presupposition that collective agreements deal with matters that were supposed to be dealt with by workplace forums, thereby increasingly rendering them into disuse.

2.5 INTERNATIONAL INSTRUMENTS DEALING WITH COLLECTIVE BARGAINING

Collective bargaining is covered by several international instruments. The most important of which are the ILO's Right to Organise and Collective Bargaining Convention 98 of 1949 and Freedom of Association and Protection of the Right to Organise Convention 87 of 1948. These conventions were ratified by South Africa on 19

[131] See also Section 79(c)-(d) of the LRA.
[132] Section 80(1)-(2) of the LRA.
[133] See also Section 82(1)(a)-(b) of the LRA.
[134] Botha op cit note 126 at 1812 and 1827.
[135] Ibid 1818.

February 1996 and are still in force.[136] The Right to Organise and Collective Bargaining Convention requires measures that are suitable to national conditions to be taken and where appropriate - to encourage and promote voluntary negotiations[137] between employers or employers' organisations and workers' organisations,[138] to regulate terms and conditions of employment by means of collective agreements.[139] The Freedom of Association and Protection of the Right to Organise Convention recognises the right of employees and employers to freely establish and join organizations of their own choosing.[140] In this convention, the term 'organisation' refers to any organisation of employees or employers that furthers and defends the interests of employees or employers.[141] These conventions form part of ILO's 'fundamental conventions' also known as 'core labour standards'.[142]

Another important convention is the Collective Bargaining Convention 154 of 1981. This convention defines the phrase 'collective bargaining' as all negotiations that occur between an employer or a group of employers or employers' organisations, on the one hand, and one or more workers' organisations, on the other, for purposes of determining working conditions and terms of employment; regulating relations between employers and workers as well as regulating relations between employers or their organisations and a workers' organisation or workers' organisations.[143] This definition highlights that

[136] ILO 'Ratifications for South Africa' available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888* accessed on 19 November 2021.
[137] ILO op cit note 1 at 2 defines negotiations as 'any form of discussion, formal or informal discussion with a view to reaching an agreement'. See also M Sewervnski 'Representation of employees within the collective bargaining within the firms' (2007) 11 *Electronic Journal of Comparative Law* 1.
[138] According to Article 10 of the ILO 'Freedom of Association and Protection of the Right to Organise Convention' (no 87 of 1948) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312232:NO* accessed on 20 November 2021, 'the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers'.
[139] Article 4 of the ILO 'Right to Organise and Collective Bargaining Convention' (no 98 of 1949) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO* accessed on 24 October 2021.
[140] Article 2.
[141] Article 10.
[142] Mpfariseni Budeli-Nemakonde 'Workers' Right to Freedom of Association and Collective Bargaining in SADC Countries' (2020) 7 *African Journal of Democracy & Governance* 91 at 92.
[143] Article 2 of the ILO 'Collective Bargaining Convention' (no 154 of 1981) available at

parties to collective bargaining are bipartite.[144] Measures taken to promote collective bargaining shall not hamper freedom of collective bargaining.[145]

A further important but not binding international instrument is Collective Bargaining Recommendation 163 of 1981. This recommendation details measures that might be taken by public authorities and the negotiating parties to promote collective bargaining.[146] While South Africa has not yet ratified this instrument, it remains an important instrument that seeks to clarify how employers and employees should bargain collectively. Another important convention that has not yet been ratified by South Africa is the Workers Representative Convention 135 of 1971. This convention requires national legislation or collective agreements to recognise 'workers' representatives'.[147] It seems to permit collective bargaining with representatives of non-unionised employees only when there are no trade unions clothed with the necessary authority. A key principle emerging from these instruments is that collective bargaining is endorsed by ILO member states through their membership of this organisation. The ILO has emphasised that:

> 'Collective bargaining with representatives of non-unionised workers should only be possible when there are no trade unions at the respective level … [and] [m]easures should be taken to prevent direct agreements with non-unionised workers being used for anti-union purposes'.[148]

---

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312299 accessed on 31 October 2021. See also Article 4 of the ILO 'Right to Organise and Collective Bargaining Convention' (no 98 of 1949) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO* accessed on 24 October 2021and Julien Hofman 'Across-the-board wage increases in extended collective agreements: fair or unfair?' (2009) 30 *Obiter* 197.

[144] ILO *Collective Bargaining: A policy guide* (2015) 2.

[145] ILO op cit note 143 Article 8.

[146] ILO op cit note 1.

[147] Article 3 read together with Article 4 of the ILO 'Workers Representatives Convention' (no 135 of 1971) available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:312280* accessed on 5 November 2021.

[148] ILO *Collective Bargaining: A policy guide* (2015) 13.

This is a clear demonstration that the ILO does recognise the fact that in various workplaces there are non-unionised employees who may need to have formal engagements with their employers regarding terms and conditions of their employment. But, it has taken a stance that such is the preserve of trade unions and non-unionised employees can only bargain with their employers where there are no trade unions in their workplaces. This is perhaps what has perpetuated the non-recognition of non-unionised employees in the official bargaining system of the ILO member states, including South Africa. None of these international instruments make provision for non-unionised employees' formal involvement in collective bargaining processes. This is despite the fact that, as reflected by Budeli-Nemakonde,[149] the ILO generally protects employees' rights. It is important for all employees within the workplace to have space to bargain with their employers. It is submitted that the ILO should assess how non-unionised employees can be incorporated into the collective bargaining process. That may include allowing them to either officially mandate trade unions that are organised in their workplaces to forward their concerns or allowing them to elect their own representatives who will advance their interests and advocate for their rights during collective bargaining meetings and processes.

2.6 COLLECTIVE BARGAINING AS A CONSTITUTIONAL RIGHT

Section 23 of the Constitution of the Republic of South Africa, 1996 (hereafter the 'Constitution') deals with labour rights in South Africa. This section is divided into four distinct but interwoven themes: freedom of association, collective bargaining, fair labour practice and union security arrangements. First, in terms of freedom of association, employees have the right to form and join trade unions of their own choosing and participate in their activities such as industrial action.[150] The express inclusion of employees' right to strike without corresponding employers' right to impose lockouts in the Constitution does not mean that employers would not have a right to lockout.[151] It is

[149] Budeli-Nemakonde op cit note 142.
[150] Section 23(2)*(a)-(c)* of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').
[151] Sachs op cit note 88.

because employers have many mechanisms and weapons within labour negotiations that they could employ including dictating contractual terms and bargaining power.[152]

It is worth noting that the freedom of association guaranteed by the Constitution[153] is not applicable to only employees but also employers.[154] Employees bargain collectively when they have freely chosen to associate with each other. Employees also have the right to collectively bargain with their employers. Section 23(5) of the Constitution guarantees the right to engage in collective bargaining. This right is guaranteed and conferred upon every trade union, employers' organisation and employer.[155] The right to engage in collective bargaining and to enforce provisions of a collective agreement is an especially important right for employees 'who are generally powerless to bargain individually over wages and conditions of employment'.[156] The right is currently regulated through national legislation.[157] The right to collective bargaining is also crucial to the achievement of fair labour practices which is also constitutionally guaranteed.[158]

The right to fair labour practice to which non-unionised employees are also entitled is entrenched in section 23(1) of the Constitution. Fair labour practice requires an employee to be consulted prior to the conclusion of important agreements that impact on their employment.[159] This is an entitlement which non-unionised employees appear to be denied in South Africa.

---

[152] Ibid.
[153] Section 18 of the Constitution. See also Article 10 of the African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' Rights (usually abbreviated as 'ACHPR' or best known as 'Banjul Charter') available at *https://www.achpr.org/legalinstruments/detail?id=49* accessed on 12 November 2021.
[154] Section 23(3) of the Constitution.
[155] See also *CUSA* supra note 2 paras 4 and 55.
[156] *CUSA* supra note 2 para 56.
[157] Section 23(5) of the Constitution read together with section 23 of the LRA.
[158] *CUSA* supra note 2 para 56.
[159] *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited* 2020 (4) BCLR 373 (CC) para 28 read with paras 44, 50, 58 and 60.

Section 23 of the Constitution also makes provision for union security arrangements, which may be regulated through collective agreements.[160] The extent to which non-unionised employees can rely on common law contractual remedies when prejudiced by these agreements is not entirely clear. According to Sachs J,[161] section 23 is one of the major sections of the Constitution with which drafters' encountered 'fierce battles' over during its drafting. Despite these constitutional guarantees, non-unionised employees are unable to effectively bargain with their employers because generally there is no duty to bargain in South Africa, as will be demonstrated in chapter three of this dissertation.

2.7 COUNTERVAILING UNEQUAL BARGAINING POWER IN THE EMPLOYMENT RELATIONSHIPS

The Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*[162] held that collective bargaining is premised on the fact that employers enjoy greater social and economic power than individual employees. Therefore, employees need to act collectively to gain sufficient power to bargain effectively with employers.[163] Employees can match the power of their employers only by acting collectively.[164] It has been argued that the primary purpose of labour law is, and will always be, 'a countervailing force to counteract the inequality of bargaining power' inherent in employment relations.[165] In *SAPU v National Commissioner of the South African Police Service*, it was held that the very purpose of collective bargaining is to bring equality to the relationship. It organises and distributes contractual power through power play inherent in the process.[166]

[160] Section 23(6) of the Constitution.
[161] Sachs op cit note 88 at 699.
[162] 1996 (4) SA 744 (CC) para 66.
[163] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 66.
[164] Du Toit op cit note 9 at 1406.
[165] Davies and Freedland op cit note 62. See also Barnard and Botha op cit note 62 at 219.
[166] *SAPU v National Commissioner of the South African Police Service*2006 (1) BLLR 42 (LC) para 53.

Vettori suggests that traditionally collective bargaining is the function of trade unions.[167] Trade unions appear to have a 'monopoly over collective bargaining'.[168] Collective bargaining in South Africa is mostly entered into by registered unions and an employer or registered employers' organisation under the LRA as bargaining agents. 'Only unions can engage in collective bargaining'.[169] The LRA[170] stresses that only registered trade unions are competent to bargain. Should an unregistered trade union conclude a collective agreement, it would '… fall outside the scope of the LRA and will not be enforceable in terms of the LRA'.[171] In 2017, there were 192 trade unions registered with the Registrar at the Department of Labour.[172]

An inferable conclusion from the above is that although non-unionised employees have the right to fair labour practices and the right to freedom of association in terms of the Constitution, they do not have a say in the conclusion of collective agreements and in other processes, which have an impact on their lives and their terms and conditions of employment. They are bound by and usually have to adhere to collective agreements even though they were not involved in the collective bargaining processes. It is submitted that inclusivity, in particular the inclusion of non-unionised employees in collective bargaining processes can add impetus in the broader efforts to countervail inherent unequal bargaining power in the employment relationships rather than advancing this.

[167] Vettori op cit note 11 at 90.
[168] MO Samuel 'The mineworkers unprocedural strike: setting the path for redefining collective bargaining practice in South Africa' (2013) 10 *Journal of Contemporary Management* 239 at 243.
[169] McGregor et al op cit note 10.
[170] In terms of Section 213 of the LRA.
[171] C Garbers et al *The New Essential Labour Law Handbook* 7 ed (2019) 427.
[172] Barnard and Botha op cit note 62.

2.8 CONCLUSION

This chapter discussed the evolution of collective bargaining in South Africa and how it was influenced by international law and the Constitution. It was demonstrated that collective bargaining is covered by several international instruments. The most important of which are the ILO's Right to Organise and Collective Bargaining Convention 98 of 1949 and Freedom of Association and Protection of the Right to Organise Convention 87 of 1948. An analysis of legislative reforms from ICA to LRA indicates that even though ICA was replaced by the LRA, the legislative changes that took place did not address the exclusion of non-unionised employees from collective bargaining. While it was shown that collective bargaining is a constitutional right, whether there is a duty to bargain remains to be seen in the chapter that follows.

CHAPTER THREE: THE DUTY TO BARGAIN

3.1 INTRODUCTION

This chapter examines the duty to bargain in South Africa. In particular, it assesses the role of both employees and employers in the bargaining system with a view to analyse divergent views that have been expressed for and against this duty in the South African context. The chapter will then evaluate how the legislature and courts have approached this duty. The importance of the concept of good faith in the bargaining process will also be discussed with a view to determine how non-unionised employees are impacted by this duty.

3.2 THE DUTY TO BARGAIN: A CONCEPTUAL ORIENTATION

The duty to bargain implies a compulsion or positive duty to bargain that is legally and judicially enforceable. It imposes a legal duty on the employer to bargain in good faith with recognised trade unions over bargaining subjects for appropriate bargaining unit.[1] The text of the Interim Constitution provided that '[w]orkers and employers shall have the right to organise and bargain collectively'.[2] In terms of the final Constitution, '[e]very trade union, employers' organisation and employer has the right to engage in collective bargaining'.[3] The difference between the two is often characterised in the form of positive and negative conceptions. This difference in wording led to three judgments by three different judges of the High Court,[4] all of which were appealed in the Supreme Court of Appeal (SCA)[5] and the Constitutional Court (CC).[6]

---

[1] Louis Krüger The creation of a general duty to bargain in view of the SANDF judgements (unpublished LLM dissertation, North-West University Potchefstroom Campus, 2013) 52.
[2] Section 27(3) of the interim Constitution of 1993.
[3] Section 23(5) of the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution').
[4] *South African National Defence Union v Minister of Defence* (2007) 9 BLLR 785 (CC) per O'Regan J para 1 (hereinafter *'SANDU V'*, to adopt and even follow the way this case was referred by courts in the litigation history).
[5] *South African National Defence Union v Minister of Defence* 2007 (1) SA 402 (SCA) per Conradie JA (hereinafter '*SANDU IV*' to follow the way the case was referred by courts in the litigation history).
[6] *SANDU V* supra note 4.

3.3 THE POSITIVE CONCEPTION

The positive conception characterises the duty to bargain as being positive. In terms of the positive conception, there is no distinction between the texts of the interim Constitution and the final Constitution. The right to collective bargaining is essentially the same as the right to engage in collective bargaining. According to this view, the provision implies a direct or positive right in that the other party has a correlative duty to bargain collectively.[7] The proponents of this view contend that trade unions would be deprived of any method of enforcing its right to engage in bargaining if no reciprocal or correlative duty is imposed and that a right without a remedy is meaningless.[8] Although disavowed in *South African National Defence Union v Minister of Defence*[9] by Van der Westhuizen J (SANDU I), the positive conception was endorsed in two subsequent separate judgments by Smit J[10] in 'SANDU II' and Bertelsman J[11] in 'SANDU III' respectively. *SANDU II* and *III*, which resemble the positive conception will be discussed first and the discussion of the negative conception demonstrated in *SANDU I* will follow thereafter.

3.3.1 SANDU II

Applications that underpinned *SANDU II* were launched in July 2002 in the High Court. The legal questions were, inter alia, whether SANDF as an employer was under a judicially enforceable duty to bargain with the trade union, South African National Defence Union (SANDU) on matters of mutual interest[12] or whether there is a legally enforceable duty on the employer to engage in collective bargaining with the trade

[7] Stella Vettori 'A judicially enforceable duty to bargain?' (2005) 38 *De Jure* 382 at 391.
[8] Carole Cooper 'Labour Relations' (undated) 1 at 38 available at *https://africanlii.org/sites/default/files/CLoSA%20Ch%2053%20Labour%20Relations.pdf* accessed on 8 May 2022.
[9] 2003 (3) SA 239 (T) (hereinafter '*SANDU I*', to adopt the way counsel and various courts referred to it).
[10] In *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T). Most authors and legal scholars refer to it as '*SANDU II*'. This reference is also adopted hereinafter.
[11] *South African National Defence Union v Minister of Defence* (T) unreported case no 15790/2003 (hereinafter '*SANDU III*', to adopt the way counsel and various courts referred to it).
[12] See also *SANDU V* supra note 4 para 33.

union.[13] In his judgment, Smit J held that section 23(5) of the Constitution imposed a correlative duty on an employer to bargain with a trade union because it affords a trade union a right to engage in collective bargaining with an employer.[14] He accordingly ordered that the employer was under a duty to negotiate with the trade union on all matters of mutual interest that might arise between the parties.[15] 'He also issued a mandamus directing the Minister to negotiate with SANDU within the MBC [Military Bargaining Council]'.[16] As will be shown later, the employer appealed to the Supreme Court of Appeal (SCA) which arrived at different conclusion.[17]

3.3.2 SANDU III

The application which led to *SANDU III*[18] was launched in the High Court on 10 June 2003. The central legal question was whether the employer had an obligation to bargain with the trade union over matters of mutual interests.[19] Bertelsman J who heard the application in the High Court answered this question in the affirmative, thereby concurring with Smit J that the employer did have a positive duty to bargain with the trade union in the circumstances of this case.[20] Material facts that gave rise to the dispute or cause of action was the employer's intention to unilaterally implement staffing policy, Transformation and Restructuring Policy.[21] The court in *SANDU III* then made an order interdicting the employer:

> 'from continuing with any implementation of any aspect which forms the subject of a dispute which had already been declared in terms of the dispute resolution procedures as provided… and referred for arbitration to the Military Arbitration Board pending resolution

[13] *SANDU IV* supra note 5 para 2.
[14] *SANDU II* supra note 10 paras 23H-I and 26G-27B.
[15] Ibid para 41E-G.
[16] *SANDU V* supra note 4 para 34.
[17] *SANDU IV* supra note 5 paras 1-2.
[18] *SANDU III* supra note 11.
[19] *SANDU V* supra note 4 paras 36 and 38.
[20] Ibid para 38.
[21] Nanoga Claudia Malatsi The Applicability of Procedural Fairness to Actions by Members of the South African National Defence Force (unpublished LLM dissertation, University of South Africa, 2019) 63.

of such dispute either by means of conciliation or arbitration as prescribed, and in which dispute the issue of collective bargaining is raised'.[22]

3.4 THE NEGATIVE CONCEPTION

3.4.1 INTERNATIONAL OVERVIEW

The Collective Bargaining Convention 154 of 1981 resembles a negative conception because it envisages 'voluntary' negotiations between employers or employers' organisations and workers' organisations to regulate terms and conditions of employment by means of collective agreements.[23] Central to negative conception is article 4 of International Labour Organisation (ILO)'s Right to Organise and Collective Bargaining Convention 98 of 1949 which requires measures appropriate to national conditions to be taken to promote collective bargaining. The Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee of the Governing Body of the ILO highlighted two central principles of Article 4 of the Right to Organise and Collective Bargaining Convention 98 of 1949, namely, the voluntary and autonomous nature of collective bargaining and that positive action should be taken by public authorities to promote such bargaining. These committees of the ILO rejected recourse to compulsion to ensure that bargaining occurs.[24] They argue that the role of authorities is to provide legal framework and administrative machinery for collective bargaining to which parties on a voluntary basis and by mutual agreement may have recourse.[25] Even when highlighting the importance of collective bargaining as an element of freedom of association, the ILO states that the bargaining should be 'free' and 'voluntary'.[26] According to the ILO's Committee on Freedom of Association

[22] *SANDU V* supra note 4 para 38.
[23] Item 6(1) of the 'Code of Good Practice: Collective bargaining, industrial action and picketing' (GN 1396 in *GG* 42121) (hereinafter 'Code of Good Practice: Collective bargaining, industrial action and picketing').
[24] Cooper op cit note 8 at 38-39.
[25] See Article 4 of the ILO 'Right to Organise and Collective Bargaining Convention' (no 98 of 1949) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098* accessed on 24 October 2021.
[26] See ILO Collective Bargaining: A policy guide (2015) 3.

collective bargaining must assume a voluntary character rather than compulsion if it is to be effective.[27] It has been argued that '[i]t is evident from the text of the Convention and the commentary on it that it is the negative form of the right that is internationally entrenched and not its positive form'.[28]

The case for voluntarism, on one hand and the case against a duty to bargain, on the other hand, is also based on the view that conflicts over bargaining agents, levels of bargaining, bargaining tactics, and the bargaining agenda are best determined by power play between the parties and not by the courts.[29] Voluntarism is said to have its roots in British industrial relations landscape wherefrom both labour and employers denounced government's interference in industrial relations, including a compulsion to bargain. At the theoretical level, it insists on minimal or no interference in the dealings of labour and management. 'Otto Kahn-Freund is widely credited as the proponent of the voluntarist model of industrial relations'.[30]

'Collective bargaining' as opposed to 'bargain collectively' is used in international law and foreign jurisdictions and therefore may be better understood by labour lawyers rather than the expression 'collectively bargain' which may not be labour law parlance, notwithstanding that it may bear same meaning.[31] It appears that an interpretation of the right to engage in collective bargaining which imposes a correlative duty to bargain would be dissonant with the international law requirements and also inconsistent with the LRA which studiously avoids imposing a duty to bargain.[32] The ILO committees have stated that the determination of bargaining levels as well as bargaining topics should be left to the parties and not be imposed by law or authorities.[33] This appears to be consistent with the approach in *SANDU I*.

---

[27] Halton Cheadle, Dennis Davis and Nicholas Haysom *South African Constitutional Law: The Bill of Rights* (2002) 389-390.
[28] Ibid.
[29] Cooper op cit note 8 at 41.
[30] See Mothepa E Ndumo The Duty to Bargain and Collective Bargaining in South Africa, Lesotho and Canada: Comparative Perspectives (unpublished LLM dissertation, University of Cape Town, 2005) 9-10.
[31] *SANDU IV* supra note 5 para 16.
[32] Cooper op cit note 8 at 35.
[33] Ibid 39.

3.4.2 SANDU I

The negative conception characterises the duty to bargain as being negative. Although overturned by Smit J, the negative conception approach is reflected on and espoused in *SANDU I* per Van der Westhuizen J.[34] The application leading to this case was launched in 2001 by the union. The first legal question was whether the employer bore a legal duty to bargain with the trade union. The second question was that even if it did bear such a duty, whether it was entitled to withdraw from collective bargaining in the circumstances of the case until its preconditions were met or whether the employer acted unfairly or unreasonably by refusing to bargain with the trade union.[35] Van der Westhuizen J answered both these questions in the negative.

Van der Westhuizen J commenced his analysis with the meaning of section 23(5) of the Constitution and whether it confers a justiciable duty to bargain.[36] Van der Westhuizen J was prepared to accept that the wording of the 1996 Constitution was deliberate and thus framed to differ from the wording of the Interim Constitution. The difference is not only in wording but also in the meaning. It was framed to convey a change in meaning.[37] He dismissed the union's application and concluded that section 23(5) of the Constitution does not impose an obligation upon an employer to bargain collectively with a trade union.[38] Van der Westhuizen J also found that there was no legislative duty which required the employer to bargain with the trade union. It was held that the conduct of the employer in suspending negotiations and to set preconditions for further participation are not unreasonable or at least not so unreasonable as to justify interference by a court of law to the extent of ordering the employer to return to the negotiating table.[39] In an addition, Van der Westhuizen J opined in his view that:

[34] *SANDU I* supra note 9 para 261C-E.
[35] *SANDU V* supra note 4 paras 29-31. See also *SANDU IV* supra note 5 para 2.
[36] *SANDU V* supra note 4 para 49.
[37] *SANDU IV* supra note 5 para 16.
[38] Ibid para 1.
[39] *SANDU I* supra note 9 para 261C-E.

> '… the Constitution and the relevant legislation do not impose a duty to bargain collectively, can be construed to mean that participation in a process of negotiation and bargaining by the employer is so entirely voluntary that the employer could, for no reason at all, capriciously, at its mere whim, or simply because it would be inconvenient or difficult, decide not to negotiate'.[40]

The negative conception stresses the difference in texts of the interim and final Constitutions. According to this interpretation, the difference points 'to a distinction between a freedom and a right'. Central to this view is that section 23(5) of the Constitution merely provides for freedom to bargain collectively.[41] It does not impose a correlative, positive duty to bargain. A 'freedom' as opposed to a 'right' does not entail a positive duty to act, but only an absence of interference with that freedom. Meaning that it has with it a negative duty.[42] Rights tend to impose a corresponding duty or obligation on another party to ensure the protection of the right in question, whereas 'freedoms' tend to involve simply an absence of interference or constraint.[43] The proponents of this view usually rely on the distinction between rights and freedoms. In terms of the negative conception, the decision whether to negotiate rests with the parties. Such a decision is influenced by economic power play rather than legal enforcement.[44]

3.4.3 THE APPROACH OF THE LABOUR COURT

The negative conception also commanded the support of the Labour Court in *National Police Services Union v National Negotiating Forum*[45] where it was held that '[t]he LRA adopts an unashamedly voluntarist approach'.[46] It is not prescriptive to parties. In this regime, courts have no right to intervene and influence collectively bargained outcomes.

---

[40] Ibid paras 256I-257A.
[41] Halton Cheadle 'Collective Bargaining and the LRA' (2005) *9 Law Democracy & Development* 147 at 150.
[42] Vettori op cit note 7.
[43] Cooper op cit note 8 at 34.
[44] Ibid.
[45] 1999 (20) ILJ 1081 (LC) para 52.
[46] *National Police Services Union v National Negotiating Forum* 1999 (20) ILJ 1081 (LC) para 52.

'Those outcomes must depend on the relative power of each party to the bargaining process'.[47]

3.4.4 THE SUPREME COURT OF APPEAL'S APPROACH

The legal question that saddled the SCA in *SANDU IV* was whether there is a legally enforceable duty on the employer to engage in collective bargaining with the trade union.[48] Conradie JA considered the expression 'the right to engage in collective bargaining' in section 23(5) of the Constitution. While the court concurred that the erstwhile Interim Constitution is an important part of the legislative history of the Constitution of the Republic of South Africa, 1996,[49] it opined that there was a fine line in the language used in these documents.[50] It was held that the expression 'collective bargaining' was effected merely to align with ILO's conventions and that the expression 'is more familiar to and better understood by labour lawyers than the expression "bargain collectively" which, while it may mean the same, is not labour law parlance'.[51] That said, however, the court went on to highlight that the expression 'the right to engage in collective bargaining' is open to more than one interpretation. On one hand, it may mean that the LRA must provide for employers, employers' organisations and employees or union called upon to bargain to comply with the demand on pain of being ordered to do so. On the other hand, it may mean that the LRA must provide the framework within which these parties may bargain. It may also merely mean that no legislative or other governmental act may effectively prohibit collective bargaining.[52] Conradie JA[53] was of the view that the Constitution, while recognising and protecting the central role of collective bargaining, it does not impose on employers or employees a judicially enforceable duty to bargain. This view is grounded on the appreciation that '[t]here is much in international law that is helpful in interpreting s 23(5) of the

[47] Ibid. See also judgment of van Niekerk in *TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd* 2009 (1) ZALC (LC) paras 14-15.
[48] *SANDU IV* supra note 5 para 2.
[49] Ibid para 14.
[50] Ibid para 16.
[51] Ibid para 16.
[52] Ibid para 5.
[53] Ibid para 25.

Constitution, starting with the Freedom of Association and Protection of the Right to Organise Convention, 1948… '.[54]

The voluntarist South African collective bargaining system, a system that functions without reliance on a legally enforceable right to bargain, is informed by several international instruments.[55] Conradie JA pointed to international character of the norms in the Bill of Rights and thereby appreciated that international law has greater impact on the interpretation of Bill of Rights.[56] He interpreted the right to engage in collective bargaining to merely mean compelling government or obliging legislation to provide a framework for collective bargaining and, within that framework, to promote orderly collective bargaining at sectoral level. Nowhere in the LRA suggests that collective bargaining process is or should be compulsory. It merely emphasises virtues of collective bargaining.[57] The furthest the LRA is prepared to go is to provide remedies for refusal to bargain[58] discussed later in this chapter. To the extent discussed above, Conradie JA dismissed the appeal against the order of Van der Westhuizen J with no order as to costs.[59] It is submitted that the judgment of Conradie has broad and fundamental significance because it was not overturned by the Constitutional Court in this respect.

3.4.5 THE CONSTITUTIONAL COURT'S APPROACH

The Constitutional Court in *SANDU V*[60] was required to determine whether the SANDF bears a duty to bargain with SANDU arising either from the provisions of section 23(5) of the Constitution, chapter XX of the regulations; and/or the Constitution of the Military Bargaining Council. It also had to determine whether SANDU was entitled to rely directly on section 23(5) of the Constitution when regulations have been enacted to

[54] Ibid para 7.
[55] Ibid paras 10 and 11.
[56] Ibid para 6.
[57] Ibid para 18.
[58] Ibid para 18.
[59] Ibid para 47.
[60] *SANDU V* supra note 4 para 44.

regulate the rights contained in section 23(5) of the Constitution.[61] It further also had to determine whether the employer was entitled to withdraw from collective bargaining until its preconditions were met. The Constitutional Court declined to answer the first question and stated that:

> 'it is not necessary to determine the proper interpretation of section 23(5) in this case and we accordingly refrain from doing so. Accordingly, we neither endorse nor reject the approach to section 23(5) of the Constitution adopted by the Supreme Court of Appeal … it would be inappropriate to consider the question further'.[62]

Nonetheless, Constitutional Court noted that before 1979 black employees and their trade unions were prohibited from engaging in collective bargaining and stated that '[p]reventing a recurrence of this historical injustice is one of the purposes of section 23(5)'.[63] The Constitutional Court further stated that section 23(5) expressly provides that legislation may be enacted to regulate collective bargaining. It relied on *National Professional Teachers' Organisation of South Africa v Minister of Education, Western Cape*,[64] to infer that a litigant may not bypass the provisions of the LRA and rely directly on the Constitution without challenging the provisions of the LRA on constitutional grounds. This is also referred to as the principle of 'subsidiarity'. This general rule is deemed to be undermined also when one bypasses lower courts and directly goes to higher courts. The correctness of the principle of 'subsidiarity' was also accentuated as follows:

> 'In my view, this approach is correct: where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'. Accordingly, a litigant who seeks to assert his or her right to engage in

[61] Ibid.
[62] Ibid para 56.
[63] Ibid para 50.
[64] 2001 (2) SA 112 (C) at 123I-J. See also *SANDU IV* supra note 5 para 44 wherein it was held that the union is not entitled to rely on 'a violation of a constitutional right without first attacking the relevant statutory labour provisions as unconstitutional or demonstrating that they are inadequate to ensure fair labour practices'

> collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.[65]

In this case, it was held that legislation existed in the form of the regulations and there was no constitutional challenge to these regulations.[66] This led to the Constitutional Court dismissing the matter and declining to answer the broader legal question whether the SANDF bears a duty to bargain with SANDU arising from the provisions of section 23(5) of the Constitution.

That said, however, the case of *Pretorius v Transport Pension Fund*,[67] shows that there is an exception to general principle of subsidiarity. It was held that it is not a hard and fast rule because there are instances where the principle of constitutional subsidiarity may not apply. For example, pensioners who are fair labour practice claimants are entitled to rely directly on the Constitution 'without having to show that the LRA (or patchwork of other statutes) is deficient'.[68] The constitutional guarantee against unfair labour practices extends to pension funds acting in concert with employers.[69] This dissertation proposes to clear the air and impugn the claim that purports to assert that constitutional duty to bargain collectively that is enforceable by the judiciary 'is still unclear' and 'far from settled'. It is submitted that a decline by the Constitutional Court to adjudicate on whether the Constitution created a justiciable duty to bargain thus leaving

[65] Ibid paras 51-52.
[66] Ibid para 53
[67] 2019 (2) SA 37 (CC) paras 51-55 (hereinafter '*Pretorius'* case).
[68] Ibid.
[69] In *Pretorius* case supra note 67 para 47, Froneman J held that it is unnecessarily restrictive to disavow pensioners' rights to fair labour practices guaranteed in section 23(1) of the Constitution because the section refers to 'everyone' having this right i.e., '… its purpose is to protect persons from unfair labour practices that originated in an employer-employee relationship'. Labour law jurisprudence under the Labour Relations Act (LRA) recognises that unfair labour practices under the Act may extend beyond the termination of employment'.

the question open[70] does not imply that the matter is not yet settled. It implies that the law is now governed by the Supreme Court of Appeal's judgment.

The Constitutional Court also turned to the relief sought in *SANDU II* in respect of the duty to bargain wherein the union sought an order that the employer was under a duty to bargain with it on the contents of the regulations. Although it may be apposite for a public-sector employer to consult unions about the regulations that will affect collective bargaining relationship, 'it cannot be said that the lawmaker is obliged to bargain over the content of the law with the union. Nor is there any provision in the regulations to suggest otherwise'.[71] The union pointed to no authority to buttress its contention on this score other than section 23(5) of the Constitution. 'No matter how broadly the terms "collective bargaining" is construed in section 23(5), it cannot include the right of a union to bargain with a legislator on the content of law'.[72] It was held that the proposition that the employer had a duty to bargain with unions on the subject matter of the regulations must fail. 'To the extent that Smit J held otherwise, his order must be set aside'.[73]

3.5 AVOIDING COMPULSORY BARGAINING

Available research[74] indicates that the mischief that the LRA sought to avoid or prevent was compulsory collective bargaining. During the drafting of the LRA, trade unions campaigned hard for a compulsory system of centralised collective bargaining. But this did not command the support of the drafters of the LRA. The proposed draft LRA retained a predominantly voluntarist collective bargaining system. This accorded with what business wanted and probably government as well. The issue of the collective bargaining 'model' therefore proved to be one of the most contentious in the (National Economic Development and Labour Council (NEDLAC) negotiations. NEDLAC is a

[70] *SANDU V* supra note 4 para 56.
[71] Ibid para 68.
[72] Ibid.
[73] Ibid para 69.
[74] Shane Godfrey 'Contested terrain: The extension of multi-employer collective agreements in South Africa' in Hayter and Visser (eds) *Collective agreements: extending labour protection* (2018) 142.

statutory organ or lawful body[75] established as a result of the merger of the National Manpower Commission and the National Economic Forum. Ultimately a voluntarist system of collective bargaining was retained.[76] While critics argue that negative conception of collective bargaining is less helpful to vulnerable workers such as farmworkers who are difficult to organise, the Explanatory Memorandum on the Labour Relations Bill highlighted that positive conceptions whereby judiciary determines levels of bargaining, bargaining partners and bargaining topics could lead to rigidities in the labour market, with adverse consequences for South Africa's ability to compete internationally and may be unsuitable in the light of changing economic circumstances.[77]

'[T]he judicially imposed duty to bargain was abolished'.[78] It is now a thing of the past. 'The inclusion of the right to engage in collective bargaining in the Constitution does not create a duty for either of the parties to bargain with the other'.[79] Neither does the current statutory regime compel parties to bargain with each other.[80] Since '[t]here is no constitutional or statutory duty to bargain' collective bargaining under the LRA is voluntary.[81] Employers with the exception of the State, are permitted to determine their collective bargaining relationships in the institutional form of bargaining councils at sectoral level as promoted by the LRA or by way of a recognition agreement at multi-employer or workplace level.[82] Currently, there exists no positive duty to bargain in South Africa.

[75] Created in terms of the National Economic Development and Labour Council Act 35 of 1994.
[76] Godfrey op cit note 74.
[77] Explanatory Memorandum on the Labour Relations Bill *Government Gazette* 16259 of 10 February 1995. See also *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC) at para 13.
[78] Vettori op cit note 7 at 388.
[79] M McGregor et al *Labour law rules* 3 ed (2017) 256.
[80] Ibid.
[81] Item 4(4) of the Code of Good Practice: Collective bargaining, industrial action and picketing. See also *SANDU IV* supra note 5 para 18.
[82] Item 4(4) of the Code of Good Practice: Collective bargaining, industrial action and picketing.

The LRA does not create a duty to collective bargaining.[83] However, it is submitted that a holistic reading of the LRA suggests that there might be an exception to this general rule. The exception pertains to a circumstance where a bargaining council does not exist. In this circumstance, the Minister of Employment and Labour may in effect force parties to become members of a statutory council and in so doing, compel them to bargain with each other.[84] In Part E of Chapter III of the LRA, trade unions are said to have contributed to compulsory establishment of statutory councils in certain circumstance.[85] 'Statutory councils are therefore the one and only exception to the general rule that the LRA imposes no duty to bargain collectively'.[86] It has been stated that no absolute voluntarism or pure voluntarism exists in the world in practice. Even in the so-called voluntary systems, there are mandatory elements of which the degree may vary from one country to another or from one government to another.[87]

In 2005, Vettori sought to instance another circumstance where a failure to bargain collectively may be construed as an unfair labour practice in terms of section 23(1) of the Constitution. In particular, where the employee party is not entitled to take part in a strike.[88] In effect, Vettori endorses the general rule fortified in the negative conception to collective bargaining with the above mentioned qualification or conditionality. However, the SCA in *SANDU IV*[89] made it clear that the Constitution does not contemplate that where the right to strike is removed or restricted, but replaced by another mechanism, a duty to bargain arises.

[83] Shane Godfrey et al *Collective Bargaining in South Africa past, present and future* (2010) 21.
[84] Anton Steenkamp, Suzan Stelzner and Nadene Badenhorst 'The Right to Bargain Collectively' (2004) 25 *Industrial Law Journal* 943 at 956-957. See also Van Jaarsveld RS, Fourie JD and Olivier MP *Principles and Practice of Labour Law* (2007) 543.
[85] Le Roux PAK 'Statutory Councils: Their Powers and Functions' (1996) 5 *Contemporary Labour Law* 61.
[86] Steenkamp, Stelzner and Badenhorst op cit note 84.
[87] S Bendix *Industrial Relations in South Africa* (1996) 39.
[88] Vettori op cit note 7 at 394. See also Ndumo op cit note 30 at 63.
[89] *SANDU IV* supra note 5 para 25.

3.6 REFUSAL TO BARGAIN

Where bargaining councils exist, the fact that there is no judicial enforcement of a duty to bargain does not mean that the law does not provide remedies in circumstances where an employer refuses to bargain. In such circumstances, the LRA allows for a strike action subject to compliance with the procedural requirements.[90] Strike is a potent tool[91] and remedy to compel acceptance of demands. Every employee has the right to strike[92] including non-unionised employees. 'This right was given to workers as a means of enforcing the right to "bargain collectively" in ss(3)'.[93] It was directly tied to collective bargaining in the interim Constitution of 1993 which stated that '[w]orkers shall have the right to strike for the purpose of collective bargaining'.[94] Disagreements about collective bargaining were historically considered as interest rather than right disputes. In the classic dispute of interest case, the parties have no right to enforce but to attempt to establish a right by means of coercive economic power.[95]

The LRA enumerates five (5) circumstances or conducts that could amount to the employer's refusal to bargain. First, where the employer refuses to recognise a trade union as a bargaining agent. Secondly, where the employer refuses to establish a bargaining council. Thirdly, where the employer withdraws recognition of a collective bargaining agent. Fourthly, where the employer resigns as a party to a bargaining council; and fifthly, where the employer disputes appropriate bargaining units, levels and topics.[96]

Disputes about refusal to bargain are referred to Commission for Conciliation Mediation and Arbitration (CCMA) for an advisory award prior to issuance of notice in terms of section 64(1)*(b)* or *(c)* of the LRA. Advisory arbitration is a compulsory pre-strike

[90] Section 64 of the LRA.
[91] Tamsanqa Mila Collective Bargaining and Section 197 Transfers (unpublished LLM Labour Law dissertation, University of Kwazulu-Natal, 2015) 20.
[92] Section 23(2)(c) of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
[93] *SANDU IV* supra note 5 para 15.
[94] Section 27(4) of the interim Constitution of 1993.
[95] *SANDU IV* supra note 5 para 15.
[96] Section 64(2) of the LRA. See also McGregor et al op cit note 79.

procedure in disputes concerning the 'duty' to bargain. This arbitration is not determinative of the dispute. 'It binds neither party. It merely helps them find a solution. This is the clearest indication that the LRA does not recognize a duty to bargain enforceable by the courts'.[97] Although advisory awards are not peremptory upon parties, it is a value adding alternative dispute resolution mechanism because the process allows parties to ventilate their dispute without fear of a final award.[98] 'Voluntarism does not mean that employers and employees necessarily negotiate voluntarily. Often they negotiate in order to avert the economic pressures brought about by a strike or a lock-out'.[99] The consequences and/or remedies provided in law for refusal to bargain highlight importance with which collective bargaining must be considered and understood. It is submitted that the lack of duty to bargain strengthens the position of employers over non-unionised employees. In general, employers do not recognise non-unionised employees as bargaining agents. As a corollary, they usually refuse to bargain with them. This prejudices non-unionised employees from using collective bargaining as a means of protecting their interests. Furthermore, the remedy available to trade unions in terms of 64 of the LRA relating to advisory arbitration award where employers refuse to bargain is unavailable for non-unionised employees because they are not recognised as bargaining agents.

3.7 GOOD FAITH BARGAINING

Bearing in mind that the centerpiece of collective bargaining is negotiation, it is important that parties should negotiate in 'good faith'[100] to strike better deals for their constituencies. The principles of good faith bargaining are entrenched in the subordinate legislation.[101] Chief among these is rationality. Negotiations should be

[97] *SANDU IV* supra note 5 para 18.
[98] McGregor et al op cit note 79.
[99] *SANDU IV* supra note 5 para 11.
[100] MO Samuel 'The mineworkers unprocedural strike: setting the path for redefining collective bargaining practice in South Africa' (2013) 10 *Journal of Contemporary Management* 239 at 242. See also Item 7(1) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[101] Item 7(1-16) of the Code of Good Practice: Collective bargaining, industrial action and picketing.

undertaken in a rational[102] and courteous manner,[103] with mutual respect. Disruptive and abusive behaviour should be avoided.[104] Parties should display sincere intention towards resolution rather than fixed predetermined positions.[105]

Another principle worth particular mentioning is disclosure of all relevant essential information subject to confidentiality limitations.[106] It is imperative that false information should not be provided by bargaining agents including the employer.[107] The negotiators must be properly mandated and be prepared to modify demands and responses.[108] Consistency of negotiators throughout negotiation proceedings cannot be over-emphasised.[109] Parties should attend agreed negotiation meetings without failure to avoid wasteful expenditure and inconvenience unless on good cause shown.[110] In particular, all demands and responses thereto should be in writing.[111] Asserting a position that is contrary to public policy or industrial relations legislation is a violation of duty to good faith bargaining in Canada[112] and it is submitted that this is also so in South Africa.

Good faith bargaining is also embraced by the ILO. Its committees have held that when bargaining occurs, it must take place in good faith.[113] The committees envisage that a lack of good faith bargaining is a matter for negotiation between the parties rather than a matter that requires compulsion.[114] Previously, the Industrial Court made good faith

[102] Alan Rycroft 'Duty to Bargain in Good Faith' (1988) 9 *Industrial Law Journal (Juta)* 202 at 204 and 209. See also Item 7(6) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[103] Item 7(6) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[104] See Carol Louw 'The duty to bargain in good faith' (1989) 1 *South African Mercantile Law Journal* 261 at 265 and Item 7(6) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[105] Sonia Bendix *Industrial relations in South Africa* 5 ed (2010) 307. See also Louw op cit note 104.
[106] See Clive Thompson 'Collective bargaining' (1990) 1 *South African Human Rights and Labour Law Yearbook* 281 at 288, Rycroft op cit note 102 at 204 and 210 and Item 7(2) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[107] Rycroft op cit note 102 at 213.
[108] Item 7(9) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[109] Item 7(10) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[110] Item 7(7) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[111] Item 7(3) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[112] Rycroft op cit note 102 at 214.
[113] Cooper op cit note 8 at 39.
[114] Ibid.

bargaining a matter that required compulsion.[115] The position has now changed. In *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd* it was held that there is no legal duty, implied by the LRA or any other law, to the effect that there is a duty to bargain in good faith.[116] In spite of the fact that this judgement came before the Code of Good Practice: Collective bargaining, industrial action and picketing of 19 December 2018, codes of good practice are generally traditionally said to be soft law and therefore non-binding.[117] It is also not within court's powers to declare demands fair or unfair.[118] According to Du Toit:

> 'The drafters of the Act were satisfied that the constitutional right [did] not require Parliament to create a legally enforceable right to bargain in the statute. At the same time the Act set out to "unashamedly [promote] collective bargaining", *inter alia* by providing trade unions with a series of organisational rights and regulating the right to strike'.[119]

It is therefore, submitted that the regime as portrayed by the legislature in the LRA does not impose a good faith bargaining duty on the employer or on the parties. As correctly observed by Du Toit, the LRA 'did away with the ''duty to bargain'' which the Industrial Court had placed on employers in certain circumstances and adopted an essentially voluntarist framework'[120] or unashamedly voluntarist approach. The union can no longer go to court to oblige an employer to bargain with it. It can rely on its own strength if needs be, through industrial action to compel a reluctant employer to do so.[121]

---

[115] Thompson op cit note 106 at 282.
[116] *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd* 2000 21 ILJ 1090 (LC) paras 25-28 (hereinafter '*Entertainment Commercial Catering & Allied Workers Union*' case).
[117] Ndumo op cit note 30 at 77.
[118] *Entertainment Commercial Catering & Allied Workers Union* supra note 116 para 32
[119] Darcy Du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa?' (2007) 28 Industrial Law Journal (Juta) 1405 at 1418. See also Explanatory Memorandum on the Labour Relations Bill Government Gazette 16259 of 10 February 1995.
[120] Ibid.
[121] Ibid 1419. See also Sandrine Anne Vauthier Collective Agreements: A comparative study between Belgium and South Africa (unpublished LLM dissertation, University of South Africa, 1998) 91 who corroborates that the LRA 'is characterised by the absence of a statutory duty to bargain'.

3.8 CONCLUSION

This chapter demonstrated that collective bargaining is a voluntary process in South Africa. The voluntarist principle is enacted. Parties are free to negotiate and determine terms and conditions of employment, remuneration as well as issues of mutual interest. The free and voluntary nature of collective bargaining indicates that bargaining outcomes contained in collective agreements are generated by the parties themselves rather than imposed on them.[122] This is in line with the negative conception which is supported by several labour law authors such as Cheadle, Davis and Haysom,[123] Van Der Westhuizen J,[124] Vettori,[125] Cooper,[126] Molusi,[127] Godfrey et al,[128] Du Toit,[129] Mokofe,[130] Mila[131] and most importantly endorsed by the Supreme Court of Appeal per Conradie JA.[132] The supporters of negative conception by far quantitatively outweigh those of positive conception. It was found that there is a striking similarity between the LRA and its predecessor (ICA) because both excluded non-unionised employees from taking part in collective bargaining. The old industrial court jurisprudence did not oblige employers to bargain with non-unionised employees. Although collective bargaining is constitutionally recognised, the Constitution does not create a duty for either of the parties to bargain with the other.[133] Neither does the current statutory regime compel parties to bargain with each other. It was shown also that the LRA does not impose a good faith bargaining duty on the employer or on the parties. The union cannot approach the court to oblige an employer to bargain with it.

---

[122] ILO *Collective Bargaining: A policy guide* (2015) 3.
[123] Cheadle, Davis and Haysom op cit note 27 at 389-390.
[124] *SANDU I* supra note 9.
[125] Vettori op cit note 7 at 393-394.
[126] Cooper op cit note 8 at 41-42.
[127] Angela Patricia Molusi 'Critical evaluation of the Constitutional duty to engage in collective bargaining' (2010) 31 *Obiter* 156-166.
[128] Godfrey et al op cit note 83 at 21.
[129] Du Toit op cit note 119. See also Explanatory Memorandum on the Labour Relations Bill *Government Gazette* 16259 of 10 February 1995.
[130] William Manga Mokofe 'The changing world of work and further marginalisation of workers in South Africa: an evaluation of the relevance of trade unions and collective bargaining' (2021) 54 *Comparative and International Law Journal of Southern Africa* 1 at 17.
[131] Mila op cit note 91 at 16 and 19.
[132] *SANDU IV* supra note 5 para 25.
[133] McGregor et al op cit note 79.

CHAPTER FOUR: THE IMPACT OF COLLECTIVE AGREEMENTS ON NON-UNIONISED EMPLOYEES

4.1 INTRODUCTION

The process of collective bargaining may lead to the conclusion of collective agreements between employees' representatives and employers' representatives. Collective agreements are recorded results of the resolutions reached during a collective bargaining process.[1] This chapter discusses collective agreements with a view to demonstrate their status and significance within the South African labour market. The discussion will include the impact of these agreements on non-unionised employees in South Africa, particularly where not all employees within the workplace are trade union members. It further assesses whether automatic coverage of these agreements of non-unionised employees comply with the International Labour Organisation (ILO)'s values and goals regarding freedom of association and collective bargaining. Furthermore, this chapter reflects on non-unionised employees as non-parties to these agreements, and the extent to which they can benefit therefrom as free riders.

4.2 GENERAL ORIENTATION OF COLLECTIVE AGREEMENTS

4.2.1 DEFINING COLLECTIVE AGREEMENTS

Collective agreements are written documents where terms and conditions of service of employment or matters of mutual interests between employers and employees'

[1] Susan Hayter and Jelle Visser 'The application and extension of collective agreements: enhancing inclusiveness of labour protection' in Hayter and Visser (eds) *Collective agreements: extending labour protection* (2018) 1. See also *Free Market Foundation v The Minister of Labour* 2016 (37) ILJ 1638 (GP) para 13 (hereinafter *'Free Market Foundation*') and Bongani Khumalo 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa CCT87/16 [2017]' (2018) 51 *De Jure* 328.

representatives are recorded.[2] These agreements are entered into by one or more registered unions and one or more employers or registered employers' organisations.[3] This description mirrors that of the ILO, where these agreements are defined to mean:

> '[A]ll agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other'.[4]

From this definition, it appears that there is some consultation between employers and employees or their respective representatives. It is also clear that the consultation is aimed at negotiations regarding conditions of employment. Collective agreements regulate employees' terms and conditions of employment.[5] They serve as minimum wage and working conditions instruments.[6] They include 'any basic condition of employment which in terms of section 49(1) of the Basic Conditions of Employment Act constitutes a term of employment of any employee covered by the collective agreement'.[7] Further, these agreements are 'inclined to be time-bound, with a life span that is by and large determined by the parties' bargaining cycles'.[8] They may be concluded within or outside bargaining councils. Collective agreements concluded outside bargaining councils are usually described as workplace or plant level collective agreements. Those concluded within bargaining councils are simply referred to as

---

[2] Section 213 of the Labour Relations Act 66 of 1995 (hereinafter 'the LRA'). 'Terms and conditions' of employment as constructed by A van Niekerk et al *Law@work* 2 ed (2012) 384 means only express and tacit terms of contract of employment and not necessarily 'work practices'.

[3] Section 213 of the LRA. According to van Niekerk et al op cit note 2, '[t]erms and conditions' of employment mean only express and tacit terms of contract of employment and not necessarily 'work practices'.

[4] Article 2 of ILO 'Collective Agreements Recommendation' (no 91 of 1951) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312429* accessed on 31 July 2022.

[5] M McGregor et al *Labour law rules* 3 ed (2017) 260-261.

[6] Urmila Bhoola 'National Labour Law Profile: South Africa' (2022) 16 available at *https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm* accessed on 1 May 2022.

[7] Section 33A(2)*(a)* of the LRA.

[8] Bhoola op cit note 6.

bargaining council agreements.[9] South African '… law has never compelled the formation of centralised bargaining structures at industry level, nor has it prohibited bargaining outside the statutory framework'.[10] Collective agreements also incorporate issues that employees and employers have mutual interest. It is thus clear that, among others, these agreements record employees and employers' consensus regarding the manner in which they will co-exist within the workplace.

4.2.2 MATTERS OF MUTUAL INTEREST

It is concerning that the LRA appears not to be adequately articulating what constitutes matters of mutual interest in the collective bargaining process. This is despite the fact that matters of mutual interests serve an important role of crafting the scope of issues that may be dealt with through collective bargaining. To understand what this phrase means, one has to review judicial and academic opinions. According to Manamela,[11] the phrase 'matters of mutual interest' originates from the Industrial Conciliation Act (ICA)[12] which listed matters that may be included in collective agreements. Interpreted literally, 'matters of mutual interest' refers to any issue that triggers similar interests of employers and employees or affecting or connected with other terms and conditions of employment of employees or class of employees.[13] These are issues that employees and employers have common or conflicting interests and capable of joint regulation or inclusion in a collective agreement.[14] These may be issues concerning employment generally.[15]

---

[9] See sections 31 and 32 of the LRA. In local government, section 71 of the Local Government: Municipal Systems Act 32 of 2000 requires municipalities to comply with any collective agreements concluded in the bargaining council.

[10] *Free Market Foundation* supra note 1 para 11. See also ME Manamela '"Matters of mutual interest" for purposes of a strike Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa [2014] 9 BLLR 923 (LC)' (2015) 36 *Obiter* 791 at 797 wherein it is noted that in spite of the LRA promoting collective bargaining at sectoral level, bargaining can still take place at the plant level and '[i]t is upon the parties to decide at which level they would like to bargain'.

[11] Manamela op cit note 10 at 794.

[12] Section 24(1) of the Industrial Conciliation Act 11 of 1924 (hereinafter 'the ICA').

[13] Section 24(1) of the ICA.

[14] Manamela op cit note 10 at 794-795.

[15] *De Beers Consolidated Mines Ltd v CCMA* 2000 (5) BLLR 578 (LC) para 16 per Pillay AJ ('*De Beers*').

In order to meet the definitional criteria of matters of mutual interest, a matter must: concern employment[16] or relate to employment relationship;[17] be attainable by the employer i.e., the employer must be the target of the dispute;[18] be of mutual advantage and benefit to both employees and employers;[19] and attract employees and employers' material and simultaneous interests in the demand.[20] It has been held that the term 'mutual' refers to a situation experienced by each of two or more parties towards the other or others; where two or more parties have specified relationship to each other; and the relationship is reciprocal.[21] The phrase 'mutual interest' implies industrial or economic relationship between employers and employees.[22] In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa*,[23] it was held that the expression 'matter of mutual interest' must be interpreted widely. It was held that it includes a matter that may form part of collective agreements or strike or lock-out.[24] The concept of 'matters of mutual interest' is also used in the context of dispute resolution mechanisms or that which may be referred to statutory dispute resolution forums.[25]

It has also been argued that the concept of matters of mutual interest includes collective-bargaining issues such as wages for employees, working hours, leave, physical working conditions, discipline, matters of direct relevance to the workplace such as job security of employees, retrenchment procedures,[26] health and safety issues including alcohol testing through a breathalyser device,[27] work practices,[28] shift

[16] *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* 2014 (9) BLLR 923 (LC) para 17 (hereinafter '*Vanachem Vanadium*').
[17] *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA* 2009 (30) *ILJ* 1099 (LC) para 38.
[18] Manamela op cit note 10 at 799.
[19] Ibid.
[20] Ibid 796.
[21] *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA* 2009 (30) *ILJ* 1099 (LC) paras 31 (hereinafter '*Itumele'* case).
[22] Manamela op cit note 10 at 796.
[23] 2014 (9) BLLR 923 (LC) at para 17 per van Niekerk J. See also van Niekerk et al op cit note 2.
[24] *Vanachem Vanadium* supra note 16.
[25] Section 134 of the LRA.
[26] Manamela op cit note 10 at 795.
[27] *Pikitup (Soc) Ltd v SAMWU* 2014 3 BLLR 217 (LAC) paras 58- 67 wherein it was held that '[i]t is counter-intuitive to say that an employee has no interest in his/her own health and safety' and that breathalyser testing effects a significant inroad on the rights to privacy, human dignity, bodily integrity and freedom of movement.

arrangements, service benefits, allowances,[29] equity shareholding,[30] equal treatment and training.[31] It is submitted that matters of mutual interests that may also be subject to collective agreements may include working conditions, procedure for grievances (dispute resolution mechanisms), disciplinary codes and industrial relations. These agreements can also include matters of mutual interest that '… address the rights and responsibilities of the parties thus ensuring harmonious and productive industries and workplaces'.[32] '"Interest" and "rights" disputes are both matters of mutual interest'.[33] Van Niekerk J held that:

> '[A]ll interest disputes (broadly, disputes about the creation of new rights) and rights disputes (broadly, disputes about the interpretation and application of existing rights) are subsets in the broader category of disputes about matters of mutual interest. In other words, all interest disputes constitute disputes about matters of mutual interest, but not all disputes about matters of mutual interest are interest disputes'.[34]

---

[28] *Department of Home Affairs v Public Servants Association* 2017 (38) ILJ 1555 (CC) para 10 (hereinafter '*Home Affairs'* case).
[29] *SADTU v Minister of Education* 2001 ILJ 2325 (LC) para 43.7 (hereinafter '*SADTU'* case)
[30] *Itumele* supra note 21 para 32.
[31] ILO 'Freedom of Association and Collective Bargaining' available at *https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang--en/index.htm* accessed on 21 August 2022.
[32] ILO 'Collective bargaining and labour relations' available at *https://www.ilo.org/global/topics/collective-bargaining-labour-relations/lang--en/index.htm* accessed on 17 October 2021. See also Fiona Leppan, Avinash Govindjee and Ben Cripps 'Bargaining in bad faith in South African labour law: anantidote?' (2016) 37 *Obiter* 474 who argue that '[t]he only sound approach to collective bargaining is to work out an agreement that clarifies the rights and responsibilities of the parties, establishes principles and operates to the advantage of all concerned'.
[33] *Home Affairs* supra note 28 para 7. See also *De Beers* supra note 15 para 17 where it was held that some disputes about matters of mutual interest may be referred to arbitration or Labour Court whilst others may be resolved through industrial action. See also sections 51(1) and 51(2)*(b)* of the LRA.
[34] *Vanachem Vanadium* supra note 16 para 16. See also *Gauteng Provinsiale Administrasie v Scheepers* (ZALAC) unreported case no JA44/99 of 1 January 1999 paras 6-8. According to Rochelle Le Roux 'The tentacles of majoritarianism: how far can they reach into retrenchment?' (2020) (2018) 41 *Obiter* 483 at 489, '[t]he LRA is said to be premised on a division between rights disputes (in respect of which strike action is impermissible and which are to be resolved by way of arbitration or adjudication) and interest disputes (which are to be resolved by way of power-play). In other words, rights disputes are typically resolved by settlement agreements and interest disputes by collective agreements and strikes. However, the term "matter of mutual interest" should not be conflated with these colloquial terms which are used as shorthand explanations for the basic structure of the LRA'.

Disputes of interest are proposals for the creation of new rights such as higher wages. They are also known as 'economic disputes'.[35] These disputes are dealt with through negotiation, collective bargaining or industrial action[36] and therefore not arbitrable because collective bargaining would be undermined and/or subverted.[37] Disputes of right involve content and existence of legal rights and deal with the interpretation and application of existing rights.[38] They arise from violation of rights contained in statutes, collective agreements and contracts of employment.[39]

The concept of matters of mutual interest has been defined broadly in South Africa.[40] This often brings confusion and makes it difficult to determine which matter falls within or outside the class of 'matters of mutual interest'.[41] Each case will be dealt with on its own merits to establish what constitutes matters of mutual interest. The internal dispute that was observed between the National Union of Mineworkers of South Africa (NUMSA) and its members[42] is said to be excluded from the class of matters of mutual interest.[43] This indicates that employees are allowed only to make demands on

[35] *HOSPERSA v Northern Cape Provincial Administration* 2000 (21) ILJ 1066 (LAC) at 1070-1071 (hereinafter '*HOSPERSA*' case). According to item 17(2)(b) of the 'Code of Good Practice: Collective bargaining, industrial action and picketing' (GN 1396 in *GG* 42121) (hereinafter 'Code of Good Practice: Collective bargaining, industrial action and picketing') such disputes include an increase in wages, change in hours of work, disputes of new collective agreements, renewal of expired collective agreements, introduction of a new shift system, higher overtime rates and the list is not exhaustive.
[36] See also Manamela op cit note 10.
[37] See *HOSPERSA* supra note 35.
[38] *SADTU* supra note *29* para 43.5. Item 17(1)(a) of the Code of Good Practice: Collective bargaining, industrial action and picketing enumerates examples of disputes of right such as unfair dismissal, unfair discrimination, and the list is not exhaustive. Essentially, they are disputes about an existing right including disputes arising from violation of collective agreements or other employment laws. They may arise statutorily or contractually or from violation of policy which may bestow or entitle an employee to a benefit. In *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* 2013 (34) ILJ 1120 (LAC) para 50 Musi AJA held that '[i]n my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu or ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion'. See also *Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others* 2016 (37) ILJ 1851 (LAC) para 20 per Murphy AJA.
[39] See also Manamela op cit 10.
[40] 66 of 1995.
[41] Manamela op cit note 10 at 797 and 800.
[42] *Xinwa v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC) paras 1 and 3.
[43] See also Manamela op cit note 10 at 796.

legitimate labour issues because the constitutional right to engage in collective bargaining does not entitle a trade union to engage in collective bargaining on any issue at large.[44]

It is submitted that non-unionised employees have material and simultaneous interest on the above listed matters of mutual interest. Their exclusion from collective bargaining, which usually considers matters of mutual interest, has profound consequences for them. More so because 'the LRA uses the concept of ''matters of mutual interest'' to define the scope of collective bargaining, dispute resolution and industrial action'.[45] It is important that non-unionised employees are allowed to take part in advancing the purpose of the LRA, particularly in relation to collective bargaining to determine their wages, terms and conditions of their employment and other matters of mutual interest that they may have with their employers.[46]

4.2.3 COMMON TYPES OF COLLECTIVE AGREEMENTS

The most common collective agreements are agency shop agreements and closed shop agreements.[47] An agency shop agreement requires an employer to deduct an agreed agency fee from the wages of non-unionised employees identified in the collective agreement who are eligible for trade union membership.[48] The fact that non-unionised employees benefit from the bargaining process without paying union subscription fees led to some trade unions to advocate for conclusion of Agency Shop Agreements.[49] 'Agency shop agreements require the so-called free riders among the employees who benefit from efforts of the bargaining agents to pay prescribed fees for the fruits of collective bargaining'.[50] Section 25 of the LRA was inserted into the LRA '…

[44] *South African National Defence Union v Minister of Defence* 2007 (1) SA 402 (SCA) para 11 (hereinafter '*SANDU IV*').
[45] Manamela op cit 10 at 798.
[46] *Itumele Bus* supra note 21 para 37.
[47] McGregor et al op cit note 5 at 261.
[48] Section 25(1) of the LRA.
[49] *Municipal and Allied Trade Union of South Africa (MATUSA) v Central Karoo District Municipality* 2020 (9) BLLR 896 (LAC) paras 2-5 and 8 ('*MATUSA*' case).
[50] Ibid para 8.

to address the problem of free riders, employees who choose not to join the trade union… but who benefit from the fruits of the collective bargain struck by that trade union'.[51] The agency fee pays for resultant efforts, time and costs incurred by trade unions during collective bargaining. Although trade unions are getting non-unionised employees' money, this arrangement has not changed the position of non-unionised employees. They remain excluded in the collective bargaining processes because they are not consulted to submit their representations and demands through unions which collect their agency fees. In *MATUSA*, it was held that the pre-existing agency shop agreement concluded in terms of the LRA[52] bound employees who did not participate in producing it, including employees who did not belong to any union.[53] This highlights adverse impact collective agreements have or may have on non-unionised employees. These agreements bind them even though they did not participate in the processes that led to their conclusion.

A closed shop agreement obliges all employees covered by the collective agreement to be members of the trade union.[54] It is submitted that this provision is incompatible with the ILO's principle of freedom of association. This principle is at the heart of democracy and the rule of law. It states that '[n]o one may be compelled to belong to an association'.[55] Closed shop agreements further vitiate employees' right to fair labour practices[56] to which non-unionised employees are also entitled. Compelling employees to belong to a trade union against their will is undemocratic. As products of the collective bargaining process,[57] one of the main purposes of concluding collective

[51] Ibid para 24.
[52] Section 25 of the LRA.
[53] *MATUSA* supra note 49 paras 24 and 25. See also Sandrine Anne Vauthier Collective Agreements: A comparative study between Belgium and South Africa (unpublished LLM dissertation, University of South Africa, 1998) 87-88. She observes that it has become a common practice for employers to apply collective agreements concluded with majority unions to non-parties or throughout the bargaining unit.
[54] Section 26(1) of the LRA.
[55] ILO 'Freedom of Association and Collective Bargaining' available at *https://www.ilo.org/global/topics/dw4sd/themes/freedom-of-association/lang--en/index.htm* accessed on 21 August 2022. In terms of section 18 of the Constitution, '[e]veryone has a right to freedom of association'.
[56] Guaranteed in section 23(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution').
[57] Hayter and Visser op cit note 1 and Khumalo op cit note 1.

agreements is to civilise the workplace, ensure fair working conditions[58] and establish uniformity and consistency of conditions of employment.[59] The impact of these agreements on non-unionised employees will be considered below.

4.2.4 CONCLUSION OF COLLECTIVE AGREEMENTS

The present statutory regime provides that collective agreements may only be concluded if certain requirements are met.[60] According to Bhoola, the major formality in respect of collective agreements is that they must be reduced to writing.[61] They should not be concluded with unauthorised or unrecognised bargaining agents.[62] Another important requirement is that collective agreements must yield towards the rule of law.[63] Compliance with the statute is essential in order for collective agreements to have legal force.[64] There are additional requirements for conclusion of collective agreements by State employers, including written commitment from Treasury to provide additional funds to meet the costs of collective agreements.[65]

In terms of the Regulation 79 of Public Service Regulations of 29 July 2016, non-compliance with this requirement by the bargaining council collective agreement on the salary adjustments and improvements on conditions of service in the public service[66] rendered the process and the collective agreement itself invalid and unlawful. In

---

[58] Leppan, Govindjee and Cripps op cit note 32 at 477.
[59] *South African Municipal Workers Union (SAMWU) v City of Johannesburg* 2018 (39) ILJ 894 (LC) paras 15 and 19 (hereinafter '*SAMWU'* case).
[60] *National Education Health and Allied Workers Union and Others v Minister of Public Service and Administration and Others* (ZACC) unreported case no 21/21 of 28 February 2022 para 76 ('*NEHAWU*').
[61] Bhoola op cit note 6.
[62] MO Samuel 'The mineworkers unprocedural strike: setting the path for redefining collective bargaining practice in South Africa' (2013) 10 *Journal of Contemporary Management* 239 at 242-243. According to Vauthier op cit note 53 at 92 collective agreements concluded with unregistered trade unions cannot be enforced under the LRA. They may be enforced in the civil courts as if they were common-law contracts.
[63] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 56.
[64] *South African Association of Municipal Employees (Pretoria Branch v Pretoria City Council)* 1948 (1) SA 11 (T) para 17.
[65] Regulation 79 of Public Service Regulations (GN R877 in GG 40167) of 29 July 2016.
[66] Public Service Co-ordinating Bargaining Council 'Agreement on the Salary Adjustments and Improvements on Conditions of Service in the Public Service for the period 2018/19 to 2019/20 and 2020/21' available at *http://www.phsdsbc.org.za/wp-content/uploads/2018/06/PSCBC-Resolution-1-of-2018-Agreement-on-the-salary-adjsutments-and-improvements-in-conditions-of-service-for-the-period-2018-to-2021.pdf* accessed on 6 November 2021.

particular, clause 3.3 of bargaining council collective agreement on the salary adjustments and improvements on conditions of service in the public service[67] which regulated wage increases for 2020/2021 was invalidated. The effect was that the allocated budget would be exceeded by R30.2 billion, an excess not approved by the Treasury or by the law.[68] It was held that this agreement had no legal force because it was concluded in contravention of regulations 78 and 79 of the Public Service Regulations read with sections 213, 215 and 216 of the Constitution.[69] The State was said to have been justified to resile from it. It is important that collective agreements are lawful and take into account the current prevailing economic conditions.

The mere fact that collective agreements are results of negotiations between trade unions and employer/s neither imply that they will necessarily survive constitutional scrutiny nor does it mean that they are fair.[70] Terms that are unfairly discriminatory would not be tolerated merely because they are contained in a collective agreement.[71]

Negotiations may not subsume matters that are in conflict with any statutory provision or matters that are not within the band of reasonableness or legally and physically impossible to execute.[72] The constitutional right to engage in collective bargaining has been explained as merely guaranteeing the right to engage in bargaining on 'legitimate labour issues'. It therefore does not entitle trade unions to engage on any issue at large in collective bargaining.[73] Manamela accentuates that collective agreements can only deal with matters that are lawful and, by extension employment-related.[74]

[67] Ibid.
[68] *NEHAWU* supra note 60 para 18.
[69] Ibid para 108.
[70] L*arbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) para 28.
[71] See also *South African Airways (Pty) Ltd v Jansen van Vuuren* 2014 (35) ILJ 2774 (LAC) para 59.
[72] Manamela 'op cit note 10 at 795.
[73] *SANDU IV* supra note 44 para 11.
[74] Manamela 'op cit note 10 at 795.

4.2.5 STATUS OF COLLECTIVE AGREEMENTS

According to Christie,[75] whose view was endorsed by Hofman,[76] collective agreements should be seen as 'contracts'. However, this view was rejected in *Platinum Mile Investment (Pty) Ltd) t/a Transition Transport v SATAWU*,[77] where it was held that collective bargaining agreement 'is not a contract but rather a piece of subordinate legislation'. In *SAMWU* case,[78] it was also held that the bargaining council agreements such as Main Collective Agreements, enjoy the status of subordinate legislation and ought to apply above the agreements concluded at plant level.[79] Bargaining council collective agreements are also akin to subordinate legislation because the LRA provides that contracts of employment may not disregard or waive collective agreements.[80] Most often, they supersede similar provisions in the Basic Conditions of Employment Act (the 'BCEA')[81] because of statutory injunction of chapter seven which is entitled 'variation of basic conditions of employment'. This chapter provides that bargaining council agreements may alter, replace or exclude any basic condition of employment provided the agreement is consistent with the purposes of the BCEA, does not reduce protection and entitlements afforded to employees or any regulation made in terms of section 13 of the BCEA and is not in conflict with the provisions of chapter six of the BCEA.[82]

Once concluded, collective agreements bind parties that signed them and their respective members for the period they are operative.[83] They are also binding on those who become members after collective agreements became binding irrespective of whether such persons continued being members of a trade union or employers'

[75] RH Christie *The law of contract in South Africa* 5 ed (2006) 81.
[76] Julien Hofman 'Across-the-board wage increases in extended collective agreements: fair or unfair?' (2009) 30 *Obiter* 204.
[77] 2010 (31) ILJ 2037 (LAC) paras 46.
[78] *SAMWU* supra note 59 para 35.
[79] Ibid .
[80] Section 199 of the LRA. See also Karin Calitz 2019 'May an employer dismiss an employee if the disciplinary chair imposed a lesser sanction? South African Revenue Service v Commission For Conciliation Mediation And Arbitration 2017 38 ILJ 97 (CC)' (2019) 30 *Stellenbosch Law Review* 166 at 175.
[81] 75 of 1997.
[82] Section 49(1) of the LRA.
[83] Section 23(1)*(a)-(c)* and section 31 of the LRA.

organisation for the whole period of collective agreements.[84] Most importantly, non-member employees are also bound and may forfeit their right to strike if such agreements prevent strikes for a certain period over an agreed issue.[85] However, collective agreements that are devoid of timeframes i.e., concluded for an indefinite period can be terminated on reasonable notice by either party[86] '[u]nless the collective agreement provides otherwise'.[87]

Collective agreements are also extendable.[88] They can also bind non-unionised employees if they have been extended to them in terms of section 23(1)*(d)* or section 32 of the LRA.[89] Section 23(1)*(d)* which binds non-parties to collective agreements operates at workplace level whereas section 32 regulates collective agreements concluded in the bargaining councils.[90] According to Khumalo, collective agreements are capable of being made binding to all employees of an employer including non-unionised employees, future employees, those who may have resigned or 'other parties who are not signatories thereto'.[91] These parties, however, will not automatically be bound by collective agreements unless certain requirements are met,[92] such as extension of collective agreements to non-parties as discussed below. It has been argued that 'failure to extend the agreement would threaten bargaining at the sector level'.[93]

[84] Section 23(2) of the LRA.
[85] *Association of Mineworkers and Construction Union v Chamber of Mines* 2017 (3) SA 242 (CC) para 78 (hereinafter '*Chamber of Mines*').
[86] Bhoola op cit note 6.
[87] Section 23(4) of the LRA.
[88] Le Roux op cit note 34 at 484.
[89] See also Maria-Stella Vettori Alternative Means to Regulate the Employment Relationship in the Changing World of Work (unpublished LLD thesis, University of Pretoria, 2005) 90.
[90] *Free Market Foundation* supra note 1 paras 13 and 14.
[91] Bongani Khumalo op cit note 1 at 239 and *Mzeku v Volkswagen SA (Pty) Ltd* 2001 (8) BLLR 857 (LAC) paras 55 and 67.
[92] Karin Calitz 'The extension of bargaining council agreements to non-parties' (2015) 27 *SA Mercantile Law Journal* 1 at 2. See also *Free Market Foundation* supra note 1 para 14.
[93] Shane Godfrey, Jan Theron and Margareet Visser 'The state of collective bargaining in South Africa: an empirical and conceptual study of collective bargaining'(2007) 2 *University of Cape Town Development Policy Research Unit*. Also available at *http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP07-130.pdf* accessed on 26 August 2022.

Collective agreements are legally enforceable instruments.[94] A fine may be imposed for failure to comply with bargaining council agreements. A compliance order may also be issued for non-compliance including charging a party an arbitration fee or paying arbitration costs.[95] It appears, however, that an extension of collective agreements has adverse impact on non-unionised employees who are bound by extended collective agreements even though they were not involved in the negotiations precedent to their drafting.

4.2.6 NON-PARTIES TO COLLECTIVE AGREEMENTS

Those who are not signatories to collective agreements are usually referred to as non-parties.[96] In terms of section 32 of the LRA, non-parties comprise two categories: parties to bargaining council who are not party to bargaining council collective agreements and non-parties to the bargaining council.[97] 'Such employers and employees are referred to in the LRA as non-parties to distinguish them from, on the one hand, employers or employer's organisations, and, on the other, trade unions and employees who are parties to the collective agreement'.[98] Non-unionised employees are usually non-party employees to collective agreements. These employees are not members of trade unions and are not paying union subscription fees. They usually do not participate in collective bargaining process in South Africa. Notwithstanding their non-participation, it is submitted that they are impacted upon by extended collective agreements.

[94] Bhoola op cit note 6.
[95] See section 33A(8) of the LRA which deals with enforcement of bargaining council agreements. Furthermore, section 14(4) of the LRA empowers trade union representatives to monitor employers' compliance with collective agreements and report any alleged contravention thereof to employers and any responsible authority or forum.
[96] Khumalo op cit note 1 at 239.
[97] *Free Market Foundation* supra note *1* para 14.
[98] *Kem-Lin Fashions CC v Brunton* 2001 (22) ILJ 109 (LAC) para 15 (hereinafter '*Kem-Lin Fashions*').

In most instances, '[a] difficulty arises where an extended collective agreement limits certain rights enshrined in the Constitution'.[99] In *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited*,[100] a retrenchment collective agreement that identified employees to be dismissed and the severance package they will receive was extended across the workplace without prior consultation with all potentially affected employees. The agreement impacted upon non-unionised employees who were not consulted. A total of 103 employees were affected.[101] The right of non-unionised employees to fair labour practices was limited. This development also limited their right to dignity as a result of loss of employment by being subjected to retrenchment without the required consultation. This right is closely associated with the right to fair labour practices.[102] In *Affordable Medicines Trust v Minister of Health*, it was held that 'one's work is part of one's identity and is constitutive of one's dignity', and 'there is a relationship between work and the human personality as a whole'.[103] Notwithstanding the above, the LRA contains several provisions[104] that seek to safeguard the interests of non-parties including non-unionised employees.

[99] Khumalo op cit note 1 at 329.

[100] 2020 (4) BCLR 373 (CC) ('*Royal Bafokeng*') paras 5-6 where it was also remarked that courts and the LRA have unfortunately allowed majority unions to enjoy exclusive right to be consulted with during retrenchment process.

[101] Ibid paras 1 and 121.

[102] *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) para 5.

[103] 2006 (3) SA 247 (CC) para 59 per Ngcobo J. See also *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 27 per Nugent JA where it was stated that the freedom to engage in productive work is indeed an important component of human dignity. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful

[104] Section 32(3)(g) of the LRA proscribes bargaining council collective agreements to unfairly discriminate against non-parties. In terms of section 32(3)(dA) of the LRA, bargaining council collective agreements are also required to provide for an exemption clause (procedure) to deal with applications for exemptions by non-parties. Such applications must be considered within 30 days of being lodged. In terms of section 32(3)(e) of the LRA, these agreements must also provide for an effective appeal procedure against bargaining council's decision to refuse to grant a non-party an exemption from the terms of a collective agreement. The appeal must be heard and decided by an independent body by no later than 30 days after an appeal has been lodged against bargaining council's decision to refuse to grant a non-party an exemption. Section 185(a) states that every employee has the right not to be unfairly dismissed.

4.3 THE IMPACT OF COLLECTIVE AGREEMENTS ON NON-UNIONISED EMPLOYEES

Collective agreements impact on non-unionised employees in two ways. First by operation of section 23(1)*(d)* and secondly, through section 32 read together with section 31 of the LRA. Section 31 of the LRA regulates the legal effect of collective agreements concluded in bargaining councils for the sector or industry.[105] This provision altered legislative dispensation that existed in the old dispensation[106] which permitted industrial councils to make collective agreements binding on non-unionised employees. In the present legislative dispensation, bargaining council agreements 'must' be extended by the Minister of Labour to non-unionised employees for these agreements to be made binding on these employees.[107]

Section 23(1)*(d)* of the LRA only applies to collective agreements concluded outside the bargaining council,[108] whereas section 32 extension applies to collective agreements concluded in bargaining councils that require endorsement of the Minister of Labour for them to be wholly extended to a sector.[109] Khumalo argues that section 31 is an equivalent proviso to section 23(1) because '[t]he provisions of section 31(a)-(c) are similar to those in section 23(1)(a)-(c)'.[110] The ramifications of these provisions read with section 32 means that non-unionised employees are subjected to rules they have not consented and for which they were not consulted. If they want to have a say in such rules, it is open to them to take steps to partake in bargaining councils and influence the rules from within. In this context, if non-unionised employees do not become part of bargaining councils, they run the risk of being subjected to rules decided upon by others

[105] *Free Market Foundation* supra note 1 para 14.
[106] Section 27(7) read concurrently with section 48 of the LRA 28 of 1956.
[107] *Free Market Foundation* supra note 1 para 14.
[108] C Garbers et al *The New Essential Labour Law Handbook* 7 ed (2019) 433.
[109] Khumalo op cit note 1 at 329.
[110] Ibid 334.

without their input.[111] The enquiry that follows demonstrates how sections 23(1)*(d)* and 32 of the LRA impact non-unionised employees.

4.3.1 SECTION 23(1)*(d)* OF THE LRA

Section 23(1)*(d)* of the LRA allows the majority union(s) to extend a plant level collective agreement to 'bind non-unionised employees'.[112] It applies to workplace or plant level collective agreements and operates at workplace level.[113] It deals with legal effect of collective agreements concluded outside bargaining councils. It has been correctly argued that the dominant purpose of this provision is to ensure that 'the absence of a bargaining council does not preclude the exercise of the right to collective bargaining enshrined in the Constitution'.[114] In terms of this section, collective agreements can also bind non-unionised employees even though they did not participate in the process that produced them provided certain jurisdictional factors are present or certain requirements are complied with.

First, if non-unionised employees are identified in the relevant collective agreement, they can be bound by collective agreements.[115] Secondly, these employees will also be bound if the collective agreement expressly states that it binds them.[116] To be bound, non-unionised employees must be appropriately identified in the agreement because they 'cannot be bound as contemplated in s 23(1)(d) by implication, association or subjective interpretation of the agreement'.[117] Thirdly, if trade union(s) that participated in collective bargaining process that produced the relevant collective agreement represent the majority of employees in the workplace, the resulting collective agreement

---

[111] Compare *Kem-Lin Fashions* supra note 98 para 22 where the ramifications of collective agreements on non-parties are explained.
[112] Khumalo op cit note 1 at 333. See also Le Roux op cit note 34 at 484.
[113] *Free Market Foundation* supra note 1.
[114] Khumalo op cit note 1'at 334.
[115] Section 23(1)*(d)(i)* of the LRA.
[116] Section 23(1)*(d)(ii)* of the LRA.
[117] *Sasol Mining (Pty) Ltd v Association of Mineworkers & Construction Union* 2017 (38) ILJ 969 (LC) para 48. See also *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration* 2014 (35) ILJ 1959 (LAC) paras 26–27.

can bind non-unionised employees.[118] 'Where the agreement was entered into by a majority union at plant level even non-members are bound'.[119]

Lastly, the Constitutional Court in *Chamber of Mines*[120] added another requirement that an extension must be rational and complies with the principle of legality or Promotion of Administrative Justice Act (PAJA)[121] if it is an administrative action. A successful attack on the legality of an extension would require evidence that the decision to extend the agreement was mala fide, capricious or arbitrary. Several previous litigants, for example, AMCU did not focus on the irrationality of extensions but of section 23(1)*(d)*.[122] This section allows private actors to exercise public power provided that it is exercised in a manner that is not capricious.[123]

4.3.2 SECTION 32 OF THE LRA

Section 32 of the LRA is headed '[e]xtension of collective agreement concluded in bargaining council'. It expressly applies to collective agreements concluded in bargaining councils by permitting their extension 'to persons not directly involved in the collective negotiations and not party to the agreement concluded in the bargaining forum, being the relevant bargaining council'.[124] These agreements can 'be extended to bind non-union members if the party union has majority membership within the workplace'.[125] The effect in law of an extension is that non-unionised employees are turned into a party and placed on the same level as a signatory to the agreement. This makes bargaining council agreements binding on employers and employees who otherwise would not be bound by them.[126] Murphy J held that this extension promotes

[118] Section 23(1)*(d)(iii)* of the LRA.
[119] Vettori op cit note 89.
[120] *Chamber of Mines* supra note 85 paras 67 and 73.
[121] 3 of 2000.
[122] Le Roux op cit note 34 at 492.
[123] *Chamber of Mines* supra note 85 paras 68-69.
[124] *Free Market Foundation* supra note 1 para 8.
[125] Bhoola op cit note 6.
[126] *Kem-Lin Fashions* supra note 98 para 25.

collective bargaining at sectoral level and further; promotes majoritarianism.[127] He further held that it prevents unfair competition posed by employers who are not parties to bargaining council agreements, particularly those who may be inclined to pay employees lower rates contrary to minimum wages.[128] He was further convinced that the extension benefits employees who have no bargaining strength to negotiate wages and terms and conditions of employment and advances 'pluralist system of industrial relations based on voluntarism rather than state interference in the collective bargaining relationship'.[129] The problem with this approach is that it under-recognises and excludes non-unionised employees who may well be capable of supplementing the collective bargaining system. Murphy places heavy reliance on the principle of majoritarianism to support his presupposition which rests on observation that it is a valid instrument of orderly collective bargaining.

Two possibilities or mechanisms of extension are envisaged,[130] to make collective agreements concluded in bargaining councils applicable to and binding on non-parties to achieve industry-wide uniformity.[131] The first mechanism is mandatory extension. It applies when one or more trade unions and one or more employers' organisations, both of whose members are in majority support such an extension. They would direct an application for extension to the Minister of Employment and Labour.[132] When all the prerequisites are complied with, the Minister of Employment and Labour has no option but to extend the collective agreement.[133]

The second mechanism for extension is discretionary. It applies when parties to a bargaining council are sufficiently representative within the registered scope of the bargaining council. The Minister of Employment and Labour must also be satisfied that

[127] See also ibid paras 20-22 where it was held that the mischief which the legislature sought to prevent by section 32 is the unfair competition.
[128] Ibid.
[129] *Free Market Foundation* supra note 1 para 8.
[130] Khumalo op cit note 1 at 329.
[131] Mynie Elizabeth Kriek An appraisal of the extension of bargaining council agreements to minority stakeholders in South Africa (unpublished LLM dissertation, University of Pretoria, 2018) 4.
[132] See section 32(1) of the LRA.
[133] Kriek op cit note 131 at 5.

failure to extend a collective agreement could undermine collective bargaining at sectoral level or in the public service as a whole.[134] This discretionary extension only occurs once the Minister of Employment and Labour has received a request to extend a bargaining council agreement, but later realises that the bargaining council does not meet the numerical targets set for majority. In these circumstances, the Minister of Employment and Labour does exercise discretion whether to extend the bargaining council agreement.[135]

The ILO also supports the principle of extension of collective agreements to non-unionised employees within the industrial and territorial scope of the agreement.[136] However, it prescribes certain requirements prior to extension including that potentially affected parties such as non-unionised employees should be given an opportunity to submit comments, representations and observations before collective agreements are extended to them.[137] This requirement is not sanctioned in the current South African labour dispensation. Non-unionised employees as potentially affected parties are not given an opportunity to make representations prior to collective agreements being extended to them. They often learn of collective agreements that apply to them after the fact. It is thus, submitted that the LRA is not in synch with ILO's Collective Agreements Recommendation and Digest of Decisions because it does not provide room for potentially affected parties such as non-unionised employees to submit comments, representations and observations before collective agreements are extended to them. This is incompatible with section 3 of the LRA which directs that its provisions must be interpreted in compliance with South Africa's public international law obligations because one of its primary objects is to give effect to obligations incurred by the country as a member state of the ILO.[138]

[134] Section 32(5) of the LRA. See also Kriek op cit note 131 at 5.
[135] Kriek op cit note 131.
[136] ILO op cit note 4 Article 5(1).
[137] Ibid Article 5(2).
[138] See section 1(b) of the LRA.

Although ILO recommendations are non-binding guidelines and do not have the same binding effect as conventions, they should not be ignored because they supplement conventions and provide policy direction to member states.[139] They also not only guide drafting of social policy but also implementation of labour law and should be seen to be morally binding.[140] Both binding and non-binding instruments have been used in interpreting South African law.[141] In *NEHAWU v University of Cape Town*, it was held that the LRA must be interpreted with guidance from domestic and international experiences.[142] These include recommendations and rulings of the ILO which have been and continue to be generally relevant to development of South African labour law.

4.3.3 LEGAL EFFECT OF COLLECTIVE AGREEMENTS ON INDIVIDUAL CONTRACTS OF EMPLOYMENT

Usually, collective agreements entered into in the workplace bind non-unionised employees despite these employees not being party to the process that produced them. Where collective agreement applies, any contract of employment that is inconsistent with its provisions would be invalid.[143] Collective agreements override the provisions of any inconsistent individual contracts of employment.[144] '[T]he provisions of the collective agreement will be incorporated into the contract of employment and the contract of employment will be amended accordingly'.[145] After collective agreements expire, their obligations subsist under contract of employment unless it was expressly stated that

[139] Candice Aletter and Stefan Van Eck 'Employment agencies: are South Africa's recent legislative amendments compliant with the international labour organisation's standards?' (2016) 28 *South African Mercantile Law Journal* 285 at 300.
[140] Ibid.
[141] See *State v Makwanyane* 1995 (3) SA 391 (CC) para 35.
[142] *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) para 34.
[143] Section 199(2) of the LRA. See also Garbers et al op cit note 108 at 436.
[144] Bhoola op cit note 6. See also McGregor et al op cit note 5 at 261 wherein it is stated that '[a] collective agreement varies any contract of employment between an employee and employer if they are both bound by the collective agreement'. Van Niekerk et al op cit note 2 at 386 adds that '[t]his variation takes place by operation of law'.
[145] Garbers et al op cit note 108 at 434.

their termination would also terminate contractual obligations that arouse as a sequel to those collective agreements.[146] It has been argued that:

> '[t]he mere fact that the collective agreement has come to an end does not mean that the contracts of employment are terminated. The obligations in these contracts… still exist and must be complied with… [t]he contracts of employment could also be varied by another collective agreement'.[147]

The LRA[148] accords primacy of collective agreements over individual contracts of employment because these agreements are the primary instruments for the determination of terms and conditions of employment.[149] The rights acquired through collective agreements cannot be contracted out of or waived by contracts of employment[150] which play a subordinate role. The '[t]erms of collective agreements take precedence over those in individual contracts of employment'.[151] 'Any provision in a contract of employment in breach of these [terms] is invalid'.[152] In *South African Municipal Workers Union (SAMWU) v City of Johannesburg*, it was held that the original terms and conditions of employment of the transferred employees became varied once they fell within the scope of the SALGBC's Main Collective Agreement and SALGBC.[153] This indicates that non-unionised employees may not contract out of the provisions of collective agreements by relying on their individual contracts of employment where collective agreements are of application. This legislation places prominent emphases on collective labour law as opposed to individual labour law.[154] There are about five (5) ways in which terms and conditions of employment contract can be changed. This can be through collective agreements; by an agreement between employer and employee;

---

[146] Ibid 435. See also *Nel v Gariep Local Municipality* (ZAECGHC) unreported case no 2512/2013 (13 June 2014) paras 20, 22 and 23.
[147] Garbers et al op cit note 108 at 435.
[148] Section 23(3) read concurrently with section 199.
[149] *Coetzee and Others v Elias Motsoaledi Local Municipality* (South African Local Government Bargaining Council) unreported arbitration award case no LPD102002 of 25 March 2021 para 6 per Commissioner Mokwena. In this case, Matumane appeared for the respondent employer and Stemmett of Stemmett & Osman Attorneys for applicant employees of whom majority were non-unionised.
[150] Van Niekerk et al op cit note 2 at 386.
[151] Vettori op cit note 89 at 89-90.
[152] Van Niekerk et al op cit note 2 at 386.
[153] *SAMWU* supra note 59 paras 34 and 35.
[154] Vettori op cit note 89 at 57 and 62.

through sectoral determination issued by the Minister of Labour;[155] by operation of law;[156] or by the method prescribed in the contract of employment.[157]

4.4 COLLECTIVE AGREEMENTS AND NON-UNIONISED EMPLOYEES

There are a number of provisions in the LRA that indicates that collective bargaining is supported in South Africa. The long title of this Act proclaims, among others, to regulate the organisational rights of trade unions, to promote and facilitate collective bargaining at the workplace and at sectoral levels and to give effect to the public international law obligations of the Republic relating to labour relations. Section 1 of the LRA provides a framework within which employees and their trade unions, employers and employer's organisations could collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and formulate industrial policy.[158] In particular to promote, orderly collective bargaining and collective bargaining at sectoral level.[159] Chapter III of the LRA is entitled collective bargaining, part B of which deals with collective agreements. This indicates the significance of collective agreements in the South African labour law.

It cannot be doubted, as observed by Vettori that in South Africa there is a demonstrable support for trade unions and collective bargaining, especially at sectoral level. Some have argued that there has been a 'linear progression from repression to support of trade unions'.[160] The problem is that non-unionised employees are not part of the bargaining agents[161] in the system of collective bargaining which is construed 'as an

[155] As per the proviso of section 50 of the Basic Conditions of Employment Act 75 of 1997.
[156] Tukishi Manamela 'Failure to obey employer's lawful and reasonable instruction: operational perspective in the case of a dismissal: Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd' (2013) 25 *South African Mercantile Law Journal* 418 at 427.
[157] McGregor et al op cit note 5 at 53.
[158] Section 1(c) of the LRA.
[159] Section 1(d) of the LRA.
[160] Vettori op cit note 89 at 94.
[161] According to McGregor et al op cit note 5 at 256 bargaining agents are restricted only to 'unions and an employer or employers' organisation'.

instrument for regulating the antagonistic relationship between capital and labour'.[162] There appears to be no logical reason why non-unionised employees should not be allowed to take part in collective bargaining in one form or the other to influence collective agreements that will ultimately affect them. These agreements 'may establish a substantive rule' or create a process for resolving a matter of mutual interest or dispute.[163]

It is submitted that non-unionised employees should not free ride on the efforts of trade unions. They should be involved on decisions that impact their employment and workplaces including collective agreements. It is clear that there is no legislative framework that encourages non-unionised employees to participate in collective barraging processes and the LRA is restrictive and proscribes non-unionised employees from participating in collective bargaining. The LRA does not comply with the Collective Agreements Recommendation of the ILO insofar as non-unionised employees are not granted an opportunity to submit representations prior to extension of collective agreements on them.

4.5 CONCLUSION

This chapter highlighted the importance of collective agreements in South Africa. It demonstrated how these agreements can be extended to non-unionised employees. It was argued that these agreements may impact adversely on the non-unionised employees' right to fair labour practices including the right to their dignity. These employees may be retrenched without consultation where a collective agreement was concluded to this effect and extended to them. It follows that that would limit their rights to engage in productive work or the right to choose their trade, occupation or profession

[162] Darcy du Toit 'Democratising the employment relationship' (1993) 4 *Stellenbosch Law Review* 325 at 347. See also Manamela op cit note 10 at 795 wherein collective bargaining is construed as an instrument to reconcile conflicting interests and goals of employers and employees through mutual accommodation.
[163] D Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 353.

freely guaranteed in the Constitution.[164] Their material terms and conditions of employment such as medical aid benefits may be changed or adversely impacted upon without having their side heard as was the case in *Coetzee and Others v Elias Motsoaledi Local Municipality* (South African Local Government Bargaining Council).[165] This chapter further demonstrated that the LRA does not comply with the Collective Agreements Recommendation of the ILO insofar as non-unionised employees are not made aware of extensions of collective agreements applications. They are not granted an opportunity to submit representations prior to extension of collective agreements. They usually get to know about extensions after the fact.

[164] Section 22 of the Constitution is titled '[f]reedom of trade, occupation and profession' and guarantees every citizen the right to choose their trade, occupation or profession freely.
[165] Unreported arbitration award case no LPD102002 of 25 March 2021.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

Collective bargaining has significant impact on employer-employee relations in South Africa.[1] Issues discussed and agreed upon by bargaining parties are also of concern to non-unionised employees. Such issues include employment benefits that may not be provided by legislation such as medical aid and retirement funding coverage. Collective agreements also institutionalise grievance procedures and dispute resolution methods that are ordinarily utilised by non-unionised employees. Most importantly, dismissals can be regulated by collective agreements in South Africa.[2] 'Historically, legal protection against unfair dismissal has been achieved mainly through collective bargaining'.[3]

Given the importance of collective bargaining and the scope of issues discussed by bargaining partners, there is a case to be made to incorporate non-unionised employees in collective bargaining processes. This will advance the objectives of the LRA, in particular industrial peace, and by extension democratisation of workplaces.[4] Such incorporation would enable these employees to also play an important role in the determination of their wages as well as terms and conditions of their employment, including other matters of mutual interest that they may have with their employers. It is

[1] See also ILO 'Report of the Director-General: Freedom of association in practice: Lessons learned' (Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: International Labour Conference 97th Session (2008) xi available at *http://www.oit.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf* accessed on 27 September 2022.

[2] J Grogan *Dismissal* 3 ed (2017) 4-5.

[3] Ibid 3.

[4] Section 1 of the LRA codifies building of labour peace and democratisation of workplace as part of its overarching purpose. In *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Limited* 2020 (4) BCLR 373 (CC) para 80 (hereinafter '*Royal Bafokeng*' case), the minority opinion per Ledwaba AJ expressly disagreed that 'labour peace is promoted by the exclusion of… non-unionised employees from consulting process' where retrenchments are contemplated because they are at risk of losing their jobs through no fault of their own. He held that this can threaten labour peace and have serious consequences. It is submitted that the exclusion of non-unionised employees from retrenchment consultation processes can create adversarial relations. Darcy du Toit 'Democratising the employment relationship' (1993) 4 *Stellenbosch Law Review* 325 at 347 suggests that adversarial relations and labour peace are 'polar opposites'.

submitted that non-unionised employees have material interest on matters of mutual interest and/or collective-bargaining issues such as job security, retrenchment procedures, discipline, allowances, training, career development, leave, equal treatment, health and safety issues, working hours, shift arrangements and work practices. Their exclusion from collective bargaining processes, which usually considers these matters, cannot be justified. This chapter recommends how these employees can be included in the collective bargaining system. Before this, it states salient findings of the study upon which recommendations would largely rely.

5.2 SALIENT RESEARCH FINDINGS OF THE STUDY

This dissertation highlighted issues and challenges facing non-unionised employees in the workplace, including how they are impacted by collective agreements. Non-unionised employees are expected to adhere to collective agreements even though they were not involved in the collective bargaining processes. Although they have the right to fair labour practices and the right to freedom of association in terms of the Constitution, they do not have a say in the conclusion of collective agreements and in other processes, which have an impact on their lives and their terms and conditions of employment. Recent case law that corroborated this problem is Constitutional Court in *Royal Bafokeng*,[5] wherein it was held that '[t]he exclusion of those who are not party to a collective agreement or are not members of a majority union is drastic'.[6]

In this dissertation, collective agreements were defined as written documents where the terms and conditions of service of employment or matters of mutual interests between employers and employees' representatives are recorded.[7] These agreements are concluded and entered into by and between one or more registered unions and one or

[5] *Royal Bafokeng* supra note 4 paras 61, 80 and 83. See also *Association of Mineworkers and Construction Union v Chamber of Mines* 2017 (3) SA 242 (CC) paras 47, 61 and 78 and Stefan van Eck & Kamalesh Newaj 'The Constitutional Court on the rights of minority trade unions in a majoritarian collective bargaining system' (2020) 10 *Constitutional Court Review* 331 at 334.
[6] The minority opinion in *Royal Bafokeng* supra note 4 para 61.
[7] Section 213 of the Labour Relations Act 66 of 1995 (hereinafter 'the LRA').

more employers or registered employers' organisations[8] and they are products of the collective bargaining process. In terms of soft law,[9] collective bargaining is a voluntary process in which organised labour and employers negotiate terms and conditions of employment, remuneration and matters of mutual interest.[10] It can also be reconstrued as an instrument for regulating antagonistic relationship between labour and capital[11] or as an alternative to dictatorship of capital.[12]

It was found that the right to engage in collective bargaining is enshrined in several instruments both in South Africa and abroad. Chief amongst the international instruments are the International Labour Organisation (ILO)'s Right to Organise and Collective Bargaining Convention 98 of 1949 and Freedom of Association and Protection of the Right to Organise Convention 87 of 1948. These conventions were ratified by South Africa on 19 February 1996 and they remain in force and in operation.

The South African legislature embraces the right to engage in collective bargaining which the cornerstone of workplace democracy in the country.[13] It was demonstrated that the right to collective bargaining is crucial to the achievement of fair labour practices which is also constitutionally guaranteed,[14] to which non-unionised employees

[8] Section 213 of the LRA.
[9] Item 4(1) of the tem 4(1) of the 'Code of Good Practice: Collective bargaining, industrial action and picketing' (GN 1396 in *GG* 42121) (hereinafter 'Code of Good Practice: Collective bargaining, industrial action and picketing').
[10] This definition is inspired by Article 2 of the International Labour Organisation (ILO) 'Collective Bargaining Convention' (no 154 of 1981) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312299* accessed on 31 October 2021. See also Article 4 of the ILO 'Right to Organise and Collective Bargaining Convention' (no 98 of 1949) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312243:NO* accessed on 24 October 2021 and Julien Hofman 'Across-the-board wage increases in extended collective agreements: fair or unfair?' (2009) 30 *Obiter* 197.
[11] Du Toit op cit note 4. See also ME Manamela '"Matters of mutual interest" for purposes of a strike Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa [2014] 9 BLLR 923 (LC)' (2015) 36 *Obiter* 791 at 795 wherein collective bargaining is construed as an instrument to reconcile conflicting interests and goals of employers and employees through mutual accommodation.
[12] Darcy du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa?' (2007) 28 *Industrial Law Journal* (Juta) 1405 at 1409.
[13] Section 7(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter 'the Constitution'). 'It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.
[14] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 56.

are also entitled. Fair labour practices entails individual right of every employee to be consulted prior to conclusion of important agreements that impact on their employment.[15] This is an entitlement which non-unionised employees appear to be denied in South Africa. It was shown that the right to engage in collective bargaining is also intimately connected with and underpins other rights in the Constitution such as the rights to engage in productive work, human dignity and freedom of association alike. This right is currently regulated through national legislation,[16] thereby effectuating section 23 of the Constitution which deals with labour rights in South Africa.

The dissertation dealt with the development of collective bargaining and how it influenced the labour market in South Africa. It was found that, collective bargaining is intrinsically linked to evolution of trade unions and their role. There is a symbiotic relationship between collective bargaining and the evolution of the role of trade union. This relationship is axiomatically reflected in the main purpose of collective bargaining i.e., to regulate terms and conditions of employment i.e., job security, stability of employment, maintain industrial peace, institutionalise industrial conflict, serve as a dispute resolution method, protect physical integrity and dignity of employees, advance industrial democracy, social justice and international law, consistent with the rule of law.

It was found that trade unions have a 'monopoly over collective bargaining'.[17] Collective bargaining in South Africa remains largely performed by bargaining agents (also known as 'bipartite') namely, registered unions and an employer or registered employers' organisation under the LRA. It is exclusive preserve of trade unions because '[o]nly unions can engage in collective bargaining'.[18] The LRA[19] stresses that only registered trade unions are competent to bargain. Should an unregistered trade union conclude a collective agreement, it would '… fall outside the scope of the LRA and will not be

[15] *Royal Bafokeng* supra note 4 para 28 read with paras 44, 50, 58 and 60.
[16] Section 23 read together with sections 31 and 32 of the LRA.
[17] MO Samuel 'The mineworkers unprocedural strike: setting the path for redefining collective bargaining practice in South Africa' (2013) 10 *Journal of Contemporary Management* 239 at 243.
[18] M McGregor et al *Labour law rules* 3 ed (2017) 256.
[19] In terms of section 213 of the LRA.

enforceable in terms of the LRA'.[20] In 2017, there were 192 trade unions registered with the Register at the Department of Labour.[21] Although ICA was repealed and eventually replaced by the LRA, the legislative changes that took place did not address the exclusion of non-unionised employees from collective bargaining.

The dissertation examined development of the duty to bargain in South Africa. More particularly, it examined the role played by judiciary including the old industrial court jurisprudence in regard to the duty to bargain. It was found that the law that regulates collective bargaining endorses voluntarist school of thought. Collective bargaining is said to be a voluntarist rather than compulsory process in which parties freely and on their own volition negotiate to determine terms and conditions of employment, remuneration as well as issues of mutual interest. The free and voluntary nature of collective bargaining indicates that bargaining outcomes contained in collective agreements are generated by the parties themselves rather than imposed on them.. There is no compulsion whatsoever. There exists no duty to bargain in the South African labour law i.e, such duty does not arise constitutionally or statutorily. 'There is no constitutional or statutory duty to bargain'.[22]

It was found in this dissertation that the LRA does not impose a good faith bargaining duty on the employer or on the parties. Du Toit correctly observed that the LRA 'did away with the ''duty to bargain'' which the Industrial Court had placed on employers in certain circumstances and adopted an essentially voluntarist framework'[23] or unashamedly voluntarist approach. The current statutory regime does not compel parties to bargain with each other. The union can no longer go to court to force an employer to bargain with it. It can rely on its own strength, if needs be, through industrial action to compel a reluctant employer to do so.[24]

[20] C Garbers et al *The New Essential Labour Law Handbook* 7 ed (2019) 427.
[21] Jacolien Barnard & Monray Marsellus Botha 'Trade Unions as Suppliers of Goods and Services' (2018) 30 SA Mercantile Law Journal 216 at 217.
[22] Item 4(4) of the Code of Good Practice: Collective bargaining, industrial action and picketing.
[23] Du Toit op cit note 12 at 1418. See also Explanatory Memorandum on the Labour Relations Bill *Government Gazette* 16259 of 10 February 1995.
[24] Ibid 1419.

This dissertation established that there is a striking similarity between the LRA and its predecessor (ICA) because both excluded and ostracised non-unionised employees from taking part in collective bargaining. The old industrial court jurisprudence did not oblige employers to bargain with non-unionised employees.

The dissertation discussed the significance of collective agreements in the South African constitutional democracy and found that bargaining council agreements enjoy the status of subordinate legislation. There are several provisions in the LRA that indicates that government supports collective agreements or collective issues. It was found that about 67% i.e., six (6) out of nine (9) chapters of the LRA deal with collective issues and matters connected therewith. Chapter III is the longest chapter in the LRA and titled collective bargaining. Part B of this chapter has the heading 'collective agreements'. The long title proclaims, among other things, to regulate the organisational rights of trade unions, to promote and facilitate collective bargaining at the workplace and at sectoral levels and to give effect to the public international law obligations of the Republic relating to labour relations. Section 1 of the LRA provides '…a framework within which employees and their trade unions, employers and employer's organisations could collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and formulate industrial policy. It also promotes orderly collective bargaining and collective bargaining at sectoral level. This indicates fundamental significance of collective agreements in the South African labour law.

The dissertation examined how collective agreements impact non-unionised employees in South Africa. It assessed how these agreements can be extended to non-unionised employees through sections 23(1)*(d)* and 32 of the LRA. It was found that collective agreements override and vary the provisions of any inconsistent individual contracts of employment where these agreements are of application. A conflict, if any, between individual contracts of employment and collective agreements is resolved with the latter prevailing. It was found that employees were retrenched without consultation where a

collective agreement was concluded to this effect and extended to them.[25] This limited their rights to engage in productive work, i.e., the right to choose their trade, occupation or profession freely guaranteed in the Constitution.[26]

This dissertation further contrasted the LRA against the ILO's Collective Agreements Recommendation. The result is that the LRA does not comply with the Collective Agreements Recommendation of the ILO insofar as non-unionised employees are not made aware of extensions of collective agreements applications. They are not granted an opportunity to submit representations prior to extension of collective agreements. They usually get to know about extensions after the fact. This is inconsistent with the provision of section 1(b) of the LRA which re-asserts the country's commitment to give effect to obligations incurred by the Republic of South Africa as a member state of the ILO. It is to these findings that the recommendations below now largely turn.

5.3 INTERNATIONAL LABOUR ORGANISATION (ILO)

It is recommended that the role of non-unionised employees in the collective bargaining processes should first be considered by the ILO, which should assess how non-unionised employees can effectively be incorporated into the collective bargaining process. That may include requiring employers and public authorities to consult non-unionised employees and attempt to reach consensus with them before collective agreements are extended to bind them. Employers and public authorities must allow non-unionised employees an opportunity during collective bargaining consultations to make representations and to advance alternative proposals. They must consider and respond to the representations or alternative proposals made by non-unionised employees. If they do not agree with them, they must state reasons for their disagreements. If they do not reach consensus, employers and public authorities must

[25] In *Royal Bafokeng* supra note 4 para 1, the employer retrenched 103 employees, majority of whom were not members of majority union.
[26] Section 22 of the Constitution is titled '[f]reedom of trade, occupation and profession' and guarantees every citizen the right to choose their trade, occupation or profession freely.

invoke any agreed procedure to resolve any differences before making collective agreement binding on non-unionised employees.

Allowing non-unionised employees to officially mandate trade unions' representatives that are organised in their workplaces to forward their concerns, only for the purposes of meetings that will negotiate conditions of employment with their employers where they pay agency fees as a result of an agency shop agreement is an initiative that can be explored. This would not be free-riding because they pay agency fees. Trade unions receiving these fees should be compelled to consult them to forward their demands.'[Employees'] and employers' organizations must … also use their convening power to bring diverse interests to the table'.[27] This may remedy the problem of exclusion in collective bargaining systems. The ILO has also recognised that '[s]everal countries continue to exclude important categories of workers, such as public servants, agricultural workers, domestic workers and seafarers, from the right to bargain collectively'.[28]

5.4 THE RIGHT TO ENGAGE IN COLLECTIVE BARGAINING

The right to engage in collective bargaining should be construed broadly enough to provide protection for and include participation of non-unionised employees. It should not be the exclusive preserve of trade unions. It should be inclusive and exercisable by all categories of employees. 'All workers and employers must enjoy freedom of association and the right to collective bargaining, with the State as the guarantor of those rights'. It is submitted that the phrase '[a]ll workers' does and should include non-unionised employees. Mokofe and van Eck observe that collective bargaining taken together with freedom of association forms 'part of the DNA of the ILO'.[29] The role of the state as the guarantor of collective bargaining rights is below considered.

[27] ILO op cit note 1 at 12.
[28] Ibid x.
[29] William Manga Mokofe and Stefan van Eck 'Reflections on marginalised workers and the role of trade unions in the changing world of work' (2021) 42 *ILJ* 1365 at 1735.

5.5 POLICY OR LAW REFORMS

The solution for problems of exclusion of non-unionised employees in collective bargaining may not lie solely in the bargaining power of trade unions and employers. It is recommended that government should take steps to fill the gap in order to protect non-unionised employees' involvement in collective bargaining because collective bargaining 'has in the past played an important role in protecting workers' rights'[30]. It is desirable to rethink, and by extension, overhaul the present policy or statutory regime. In particular, to adopt changes that would encourage and improve participation of non-unionised employees in collective bargaining processes. These employees can make meaningful contribution in the arena of collective bargaining through policy or law reform that encourages them to partake in collective bargaining system.

The envisaged long term solution calls for policy or law reform relating to the participation of non-unionised employees in collective bargaining processes to ensure their inclusion. In particular, it is recommended that section 23(1)*(d)* of the LRA, which allows the majority union(s) to extend a plant level collective agreement to 'bind non-unionised employees',[31] be amended. It is recommended that before the collective agreement is extended to bind non-unionised employees, the employer(s) must consult non-unionised employees and attempt to reach consensus with them. The employer(s) must allow non-unionised employees an opportunity during consultation to make representations and to advance alternative proposals. The employer(s) must consider and respond to the representations or alternative proposals made by non-unionised employees. If they do not agree with them, they must state reasons for disagreeing. If the employer(s) and non-unionised employees do not reach consensus, the employer(s) must invoke any agreed procedure to resolve any differences before making collective agreement binding on non-unionised employees.

[30] Ibid 1365.
[31] Bongani Khumalo 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: AMCU v Chamber of Mines of South Africa CCT87/16 [2017]' (2018) 51 *De Jure* 328 at 333. See also Rochelle Le Roux 'The tentacles of majoritarianism: how far can they reach into retrenchment?' (2020) (2018) 41 *Obiter* 483 at 484.

Similar provisions should be made to amend section 32 of the LRA which is headed '[e]xtension of collective agreement concluded in bargaining council'. This section permits extension of bargaining council collective agreement 'to persons not directly involved in the collective negotiations and not party to the agreement concluded in the bargaining forum…'.[32] These agreements can 'be extended to bind non-union members if the party union has majority membership within the workplace'.[33] It is recommended further that before the Minister of Employment and Labour extend collective agreement to bind non-unionised employees, the Minister must consult non-unionised employees by issuing a call for these employees to make representations with a view to advance their proposals. The Minister of Employment and Labour must consider and respond to the representations or alternative proposals made by non-unionised employees. If the Minister of Employment and Labour does not agree with them, he / she must state reasons for disagreeing. If the Minister of Employment and Labour and non-unionised employees do not reach consensus, the Minister of Employment and Labour must invoke any agreed procedure to resolve any differences before making collective agreement concluded in the bargaining council binding on non-unionised employees.

It is further suggested that the LRA be amended to comply with the Collective Agreements Recommendation of the ILO to make non-unionised employees aware of applications for extensions of collective agreements. These applications are made by bargaining councils to the Minister in writing to bind non-parties including non-unionised employees to collective agreements that are within their registered scope provided 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 at a meeting of the bargaining council.[34] Most importantly, non-unionised employees should be granted an opportunity to submit representations prior to extension of collective agreements on them. Policy or law reforms should ensure

[32] *Free Market Foundation v The Minister of Labour* 2016 (37) ILJ 1638 (GP) para 8.
[33] Urmila Bhoola 'National Labour Law Profile: South Africa' (2022) 16 available at *https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm* accessed on 1 May 2022.
[34] Section 32(1)(a) of the LRA.

protection of the fundamental rights of vulnerable groups such non-unionised employees.

It is further submitted that where non-unionised employees pay agency fees as a result of an agency shop agreement, trade unions receiving these fees should be compelled to consult them to forward their demands. This submission requires policy or law reform. It invites high-level policy makers to rethink public policy by introducing proposed reforms.

5.6 PROPOSED EXCEPTION TO PRINCIPLE OF MAJORITARIANISM

Part of the recommended reforms should include the legislature imposing an exception and/or limitation on the general rule of majoritarianism. The exception and/or limitation should apply to instances such as retrenchments which have profound consequences on individual employees' right to human dignity. This recommendation is made to countervail convictions of Murphy J who held that extension of collective agreements promotes majoritarianism[35] and benefits employees who have no bargaining strength to negotiate wages, terms and conditions of employment.[36] Murphy's convictions rest on presupposition that majoritarianism advances orderly collective bargaining. The problem with this approach is that it effectively excludes non-unionised employees who may well be capable of supplementing the collective bargaining system.

5.7 INVOKING EXEMPTION CLAUSE

In the short term, one of the immediate remedies available to non-unionised employees is to invoke exemption clause required to be built-in collective agreements where they are aggrieved. Notwithstanding this remedy, it is also imperative that non-unionised employees be permitted at large to lodge disputes about interpretation or application of

[35] See also *Kem-Lin Fashions CC v Brunton* 2001 (22) ILJ 109 (LAC) paras 20-22 where it was held that the mischief which the legislature sought to prevent by section 32 is the unfair competition.
[36] *Free Market Foundation v The Minister of Labour* 2016 (37) ILJ 1638 (GP) para 8.

collective agreements where these agreements apply to them in terms of section 24 of the LRA. This section deals with disputes about collective agreements. It stipulates that every collective agreement except for closed-shop and agency-shop agreements must have built-in procedure to resolve disputes about their interpretation or application including conciliation and if unsuccessful arbitration.[37] This implies that a dispute about interpretation or application of collective agreements cannot be resolved through industrial action i.e., strike or lock-out.[38]

5.8 THE NEED TO COMBAT EXCLUSION

Allowing non-unionised employees to participate in collective bargaining system would be tantamount to allowing them to advance and fully enjoy their rights to fair labour practices, dignity and to engage in productive work or the right to choose their trade, occupation or profession freely guaranteed in the Constitution. These employees are clearly impacted upon by resultant, extended collective agreements. The LRA is unnecessarily restrictive or exclusive because the right to bargain and conclude collective agreements within its meaning 'belongs exclusively to registered trade unions, employers and registered employers' organisations'.[39] The requirement or condition to be a registered organisation clearly excludes non-unionised employees. In practice, this often results in only trade unions and employers' organisations enjoying a certain level of representativity concluding collective agreements impacting non-unionised employees without their say. To the extent that this dissertation concentrated on South Africa as a study area, it is recommended that future research consider

[37] Section 24(1) of the LRA.
[38] McGregor et al op cit note 18 at 263.
[39] Sandrine Anne Vauthier Collective Agreements: A comparative study between Belgium and South Africa (unpublished LLM dissertation, University of South Africa, 1998) 91. See also Shane Godfrey, Jan Theron and Margaret Visser 'The state of collective bargaining in South Africa: an empirical and conceptual study of collective bargaining' (2007) 5 University of Cape Town Development Policy Research Unit. Also available at *http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP07-130.pdf* accessed on 26 August 2022.These authors add that even during the dual system of labour relations under Apartheid 'collective bargaining was almost exclusively the preserve of unions representing White, Coloured and Indian workers'. These unions bargained to improve conditions of employment of their members to the prejudice of Black employees with whom collective bargaining was non-existent. Not surprisingly, wages and conditions of employment of Black employees were extremely poor relative to White employees who were entitled to collective bargaining.

looking at possible legislations in other countries that have attempted to encourage and protect the rights of non-unionised employees in their collective bargaining systems.

5.10 CONCLUSION

While non-unionised employees certainly have a choice to either join an existing trade union or form their own trade union or similar structure, it must be appreciated that they opted not to be members of organised employment structures. They are entitled to disassociate themselves with any structure in their workplace, but such decision should not lead to their rights being infringed upon. Their decision to disassociate themselves should not be used to disadvantage them regarding negotiations and decisions that impact their employment. There should be nothing that legitimately prevents them from meaningfully participating in bargaining processes in their workplaces. Collective bargaining is and should be construed as a vehicle to improve terms and conditions of employment of not only unionised employees but also of non-unionised employees.

Having regard to Budeli's view that '[u]nion representatives acting on behalf of employees are able to secure better terms and conditions of employment than individuals negotiating on their own behalf',[40] this dissertation takes issue with the exclusion of non-unionised employees. To suggest that non-unionised employees be consulted in collective bargaining system in South Africa does not and would not thwart constitutional democracy. It would rather enrich and advance it because 'if everyone is included and works together to find solutions, there is a brighter future to our world of work'.[41] Furthermore, it has been correctly argued that the right to engage in collective bargaining is a fundamental human right in the workplace that forms an integral part of

[40] Mpfariseni Budeli Freedom of Association and trade unionism in South Africa: from apartheid to the democratic constitutional order (unpublished LLD thesis, University of Cape Town, 2007) 55.
[41] Cyril Ramaphosa and Stefan Löfven 'Preface' in ILO 'Work for a brighter future' (Global Commission on the Future of Work) (2019) 6 available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf* accessed on 18 December 2022.

democracy.[42] 'Freedom of association and collective bargaining form part of the DNA of the ILO'.[43]

[42] Budeli op cit note 40 at 31.
[43] Mokofe and van Eck op cit note 29.

BIBLIOGRAPHY

Books

Bendix S *Industrial Relations in South Africa* (1996).

Cheadle H, Davis D and Haysom N *South African Constitutional Law: The Bill of Rights* (2002).

Christie RH *The law of contract in South Africa* 5 ed (2006).

Corfe S *4IR in the workplace: ensuring employers and employees benefit* (2018).

Davies PL & Freedland MR *Kahn-Freund's Labour and the Law* 3 ed (1983).

Du Toit D *Labour Relations Law: A Comprehensive Guide* 3rd ed (2000).

Du Toit D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B and Steenkamp A *Labour Relations Law: A Comprehensive Guide* 6 ed (2015).

Garbers C, le Roux PAK, Strydom EML (eds), Basson AC, Christianson MA and Germishuys-Burchell W *The New Essential Labour Law Handbook* 7 ed (2019).

Grogan J *Dismissal* 3 ed (2017).

Godfrey S 'Contested terrain: The extension of multi-employer collective agreements in South Africa' in Hayter S & Visser J (eds) *Collective agreements: extending labour protection* (2018) 137-156.

Godfrey S, Maree J, du Toit D & Theron J *Collective Bargaining in South Africa past, present and future* (2010).

Hayter S & Visser J 'The application and extension of collective agreements: enhancing inclusiveness of labour protection' in Hayter S & Visser J (eds) *Collective agreements: extending labour protection* (2018) 1-27.

International Labour Organisation *Collective Bargaining: A policy guide* (2015).

McGregor M, Dekker A (eds), Budeli-Nemakonde M, Germishuys-Burchel W, Manamela ME, Manamela TE & Tshoose CI *Labour law rules* 3 ed (2017).

Nel PS, Kirsten M, Swanepoel BJ, Erasmus BJ & Poisat P *South African employment relations: theory and practice* 7 ed (2012).

Nel PS & van Rooyen PH *South African industrial relations: theory and practice* (1991).

Oumarou M & Tomei M 'Foreword' in ILO *Collective Bargaining: A policy guide* (2015) unpaged.

Raday F 'The Decline of Union Power – Structural Inevitability or Policy Choice?' in Conaghan J, Fischl RM and Klare K (eds) *Labour law in an era of globalisation: transformative practices and possibilities* (2002) 353-377.

Salamon M *Industrial relations: theory & practice* 3 ed (1998).

Sonia B *Industrial relations in South Africa* 5 ed (2010).

Stone L, Mooki M & Mailula D *Constitutional law: Only study guide for CSL2601* (2016 University of South Africa).

Van Jaarsveld RS, Fourie JD & Olivier MP *Principles and Practice of Labour Law* (2007).

Van Niekerk A (me), Christianson MA, McGregor M, Smit N & van Eck BPS *Law@work* 2 ed (2012).

Journal Articles

Adams RJ ‘Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences’ (1993) 14 *Comparative Labour Law Journal* 272-301.

Aletter C & Van Eck S ‘Employment agencies: are South Africa's recent legislative amendments compliant with the international labour organisation's standards?’ (2016) 28 *South African Mercantile Law Journal* 285-310.

Barnard J & Botha MM ‘Trade Unions as Suppliers of Goods and Services’ (2018) 30 *SA Mercantile Law Journal* 216-250.

Botha MM ‘In search of alternatives or enhancements to collective bargaining in South Africa: are workplace forums a viable option?’ (2015) 18 *PER* 1812-1838.

Budeli-Nemakonde M ‘Workers’ Right to Freedom of Association and Collective Bargaining in SADC Countries’ (2020) 7 *African Journal of Democracy & Governance* 91-114.

Calitz K ‘May an employer dismiss an employee if the disciplinary chair imposed a lesser sanction? South African Revenue Service v Commission for Conciliation Mediation and Arbitration 2017 38 ILJ 97 (CC)’ (2019) 30 *Stellenbosch Law Review* 166-185.

Calitz K ‘The extension of bargaining council agreements to non-parties’ (2015) 27 *SA Mercantile Law Journal* 1-37.

Cheadle H ‘Collective Bargaining and the LRA’ (2005) 9 *Law Democracy & Development* 147-155.

Cooper L ‘The trade union as a ‘learning organisation’? A case study of informal learning in a collective, social-action organisational context’ (2006) 39 Journal of Education 27-46.

David L ‘A principled approach to the positive/negative rights debate in Canadian constitutional adjudication’ (2014) 23 *Constitutional Forum* 41-46.

Du Toit D ‘Democratising the employment relationship’ (1993) 4 *Stellenbosch Law Review* 325-355.

Du Toit D ‘What is the Future of Collective Bargaining (and Labour Law) in South Africa?’ (2007) 28 *Industrial Law Journal (Juta)* 1405-1435.

Ewing K & Hendy J ‘New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining’ (2017) 46 *Industrial Law Journal* 23-51.

Gernigon B, Odero A & Guido H ‘ILO principles concerning collective bargaining’ (2000) 139 *International Labour Review* 33-55.

Godfrey S, Theron J & Visser M ‘The state of collective bargaining in South Africa: an empirical and conceptual study of collective bargaining’ (2007) *University of Cape Town Development Policy Research Unit* (unpaged).

Guliwe T ‘The Fourth Industrial Revolution and the future of the labour Intensive sectors in the developing countries: “The Hailstorm in a Cup of Tea”’ (2019) 16 *Africagrowth Agenda* 14-18.

Hofman J ‘Across-the-board wage increases in extended collective agreements: fair or unfair?’ (2009) 30 *Obiter* 197-210.

Key AC ‘The Strike in the Gold Mines of South Africa’ (1922) 6 *International Labour Review* 893-916.

Khumalo B ‘Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the “knock on effect” on the right to strike: AMCU v Chamber of Mines of South Africa CCT87/16 [2017]’ 2018 (51) *De Jure* 328-338.

Leppan F, Govindjee A & Cripps B ‘Bargaining in bad faith in South African labour law: anantidote?’ (2016) 37 *Obiter* 474-486.

Le Roux PAK 'Statutory Councils: Their Powers and Functions' (1996) 5 *Contemporary Labour Law* 61-67.

Le Roux R ‘The tentacles of majoritarianism: how far can they reach into retrenchment?’ (2020) 41 *Obiter* 483-503.

Louw C ‘The duty to bargain in good faith’ (1989) 1 *South African Mercantile Law Journal* 261- 269.

Manamela ME ‘“Matters of mutual interest” for purposes of a strike *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* [2014] 9 BLLR 923 (LC)’ (2015) 36 *Obiter* 791-800.

Manamela T ‘Failure to obey employer's lawful and reasonable instruction: operational perspective in the case of a dismissal: Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd’ (2013) 25 *South African Mercantile Law Journal* 418-435.

Maree J ‘Trends in the South African collective bargaining system in comparative perspective’ (2011) 35 *South African Journal of Labour Relations* 7-37.

Mathebula NE ‘Public administration in the Fourth Industrial Revolution: implications for the Practice’ (2021) 19 *Gender and Behaviour* 18199-18205.

Mischke C ‘The shape of things to come - the new Labour Relations Act’ (1995) 3 *Juta's Business Law* 150-153.

Mokofe WM ‘The changing world of work and further marginalisation of workers in South Africa: an evaluation of the relevance of trade unions and collective bargaining’ (2021) 54 *Comparative and International Law Journal of Southern Africa* 1 - 40.

Mokofe MW & van Eck S ‘Reflections on marginalised workers and the role of trade unions in the changing world of work’ (2021) 42 *ILJ* 1365-1389.

Molusi AP ‘Critical evaluation of the constitutional duty to engage in collective bargaining’ (2010) 31 *Obiter* 156-166.

Pietersen JM ‘Possible implications of COVID-19 for the conditions of service in the public sector’ (2020) 55 *Journal of Public Administration* 435-449.

Rust B ‘So, you think being a trade union is plain sailing?’ 2001 *South African Journal of Labour Relations* 58-69.

Rycroft A ‘Duty to Bargain in Good Faith’ (1988) 9 *Industrial Law Journal (Juta)* 202-220.

Sachs A ‘Constitutional Developments in South Africa’ (1996) 28 *New York University Journal of International Law and Politics* 695-709.

Samuel MO ‘The mineworkers unprocedural strike: setting the path for redefining collective bargaining practice in South Africa’ (2013) 10 *Journal of Contemporary Management* 239-258.

Sewervnski M ‘Representation of employees within the collective bargaining within the firms’ (2007) 11 *Electronic Journal of Comparative Law* 1-20.

Steenkamp A, Stelzner S & Badenhorst N ‘The Right to Bargain Collectively’ (2004) 25 *Industrial Law Journal* 943-951.

Jacobson SH ‘Collective Bargaining in Undemocratic Regimes: Francoist Spain and Contemporary South Africa’ (1991) 12 *Comparative Labour Law Journal* 214-233.

Thompson C ‘Collective bargaining’ (1990) 1 *South African Human Rights and Labour Law Yearbook* 281-288.

Van Eck S & Newaj K ‘The Constitutional Court on the rights of minority trade unions in a majoritarian collective bargaining system’ (2020) 10 *Constitutional Court Review* 331-35.

Van Rensburg EJ ‘The interaction between section 233 of the South African Constitution and the commentaries to the OECD Model Tax Convention on Income and on Capital’ (2020) 53 *Comparative and International Law Journal of Southern Africa* 1-33.

Vettori S ‘A judicially enforceable duty to bargain?’ (2005) 38 *De Jure* 382-394.

Theses

Budeli M Freedom of Association and trade unionism in South Africa: from apartheid to the democratic constitutional order (unpublished LLD thesis, University of Cape Town, 2007).

Jantjie MZ An evaluation of certain limitations to the right of freedom of association (unpublished LLM dissertation, University Pretoria, 2018).

Kriek ME An appraisal of the extension of bargaining council agreements to minority stakeholders in South Africa (unpublished LLM dissertation, University of Pretoria, 2018).

Krüger L The creation of a general duty to bargain in view of the SANDF judgements (unpublished LLM dissertation, North-West University Potchefstroom Campus, 2013).

Mila T Collective Bargaining and Section 197 Transfers (unpublished LLM dissertation, University of Kwazulu-Natal, 2015).

Ndumo ME The Duty to Bargain and Collective Bargaining in South Africa, Lesotho and Canada: Comparative Perspectives (unpublished LLM dissertation, University of Cape Town, 2005).

Vauthier SA Collective Agreements: A comparative study between Belgium and South Africa (unpublished LLM dissertation, University of South Africa, 1998).

Vettori MS Alternative Means to Regulate the Employment Relationship in the Changing World of Work (unpublished LLD thesis, University of Pretoria, 2005).

Legislation

Bantu Labour Regulations Act 70 of 1973.

Constitution of the Republic of South Africa, 1996.

Interim Constitution of 1993.

Labour Relations Act 66 of 1995.

Local Government: Municipal Systems Act 32 of 2000.

National Economic Development and Labour Council Act 35 of 1994.

Native Labour Settlement of Disputes Act 48 of 1953.

Public Service Regulations (GN R877 in GG 40167) of 29 July 2016.

Regulation of Gatherings Act 205 of 1993.

Union Native Labour Regulation Act 15 of 1911.

Case law

Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC).

Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others 2013 (34) ILJ 1120.

Association of Mineworkers and Construction Union v Chamber of Mines 2017 (3) SA 242 (CC).

Association of Mineworkers and Construction Union v Royal Bafokeng Platinum Limited 2020 (4) BCLR 373 (CC).

Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration 2014 (35) ILJ 1959 (LAC).

CUSA v Tao Ying Metal Industries 2009 (2) SA 204 (CC).

De Beers Consolidated Mines Ltd v CCMA 2000 (5) BLLR 578 (LC).

Department of Home Affairs v Public Servants Association 2017 (38) ILJ 1555 (CC).

East Rand Gold and Uranium Co Ltd v NUM 1989 ILJ 683 (LAC).

Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd 2000 (21) ILJ 1090 (LC).

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

FAWU v Spekenham Supreme 1988 ILJ 627 (IC).

Fawu obo Kapesi v Premier Foods Ltd t/a Ribbon Salt River 2010 (9) BLLR 903 (LC).

Food and Allied Workers Union v South African Breweries (Pty) Ltd 2020 (41) ILJ 2652 (LC).

Free Market Foundation v The Minister of Labour 2016 (37) ILJ 1638 (GP).

Gauteng Provinsiale Administrasie v Scheepers (ZALAC) unreported case no JA44/99 of 1 January 1999.

Goldfields Logistics (Pty) Ltd v Smith (LAC) unreported case no JA42/08 of 24 August 2010.

HOSPERSA v Northern Cape Provincial Administration 2000 (21) ILJ 1066 (LAC).
Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA 2009 (30) ILJ 1099 (LC).

Kem-Lin Fashions CC v Brunton 2001 (22) ILJ 109 (LAC).

King Sabata Dalindyebo Municipality vs CCMA (LC) unreported case no P437/03 of 1 February 2005.

Larbi-Odam v Member of the Executive Council for Education (North-West Province) 1998 (1) SA 745 (CC).

Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others 2016 (37) ILJ 1851 (LAC).

Mawu v Hart 1985 ILJ 478 (IC).

Murray v Minister of Defence 2009 (3) SA 130 (SCA).

Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA).

Municipal and Allied Trade Union of South Africa (MATUSA) v Central Karoo District Municipality 2020 (9) BLLR 896 (LAC).

National Manufactured Fibres Employers Association v Bikwani 1999 (20) ILJ 2637 (LC).

National Education Health and Allied Workers Union and Others v Minister of Public Service and Administration and Others (ZACC) unreported case no 21/21 of 28 February 2022.

National Police Services Union v National Negotiating Forum 1999 (20) ILJ 1081 (LC).

National Professional Teachers' Organisation of South Africa v Minister of Education, Western Cape 2001 (2) SA 112 (C).

National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd 2003 (3) SA 513 (CC).

National Union of Metal Workers of South Africa v Lufil Packaging 2020 (7) BLLR 645 (CC).

National Union of Public Service & Allied Workers v National Lotteries Board 2014 (35) ILJ 1929 (CC).

Nel v Gariep Local Municipality (ZAECGHC) unreported case no 2512/2013 (13 June 2014).

NEHAWU v University of Cape Town 2003 (3) SA 1 (CC).

New Nation Movement NPC v President of the Republic of South Africa 2020 (6) SA 257 (CC).

NUM v East Rand Gold and Uranium Co Ltd 1991 ILJ 1221 (A) 1221 (A).

Platinum Mile Investment (Pty) Ltd) t/a Transition Transport v SATAWU 2010 (31) ILJ 2037 (LAC).

Pretorius v Transport Pension Fund 2019 (2) SA 37 (CC).

Public Servants Association & others v Minister of Public Service & others 2021 (3) BLLR 255 (LAC).

Rand Tyres & Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal) 1941 TPD 108.

Reference re Public Service Employees Relations Act (Alta) 1987 (1) SCR 313.

SADTU v Minister of Education 2001 ILJ 2325 (LC).

SAPU v National Commissioner of the South African Police Service 2006 (1) BLLR 42 (LC).

SASBO v Standard Bank 1993 (14) ILJ 706 (IC).

Sasol Mining (Pty) Ltd v Association of Mineworkers & Construction Union 2017 (38) ILJ 969 (LC).

Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC).

South African Airways (Pty) Ltd v Jansen van Vuuren 2014 (35) ILJ 2774 (LAC).

South African Association of Municipal Employees (Pretoria Branch v Pretoria City Council) 1948 (1) SA 11 (T).

South African Airways (Pty) Ltd v Jansen van Vuuren 2014 (35) ILJ 2774 (LAC).

South African Municipal Workers Union (SAMWU) v City of Johannesburg 2018 (39) ILJ 894 (LC).

South African National Defence Union v Minister of Defence 2003 (3) SA 239 (T) (SANDU I).

South African National Defence Union v Minister of Defence 2004 (4) SA 10 (T) (SANDU II).

South African National Defence Union v Minister of Defence (T) unreported case no 15790/2003 (SANDU III).

South African National Defence Union v Minister of Defence 2007 (1) SA 402 (SCA) (SANDU IV).

South African National Defence Union v Minister of Defence (2007) 9 BLLR 785 (CC) (SANDU V).

South African Transport and Allied Workers Union v Garvas 2013 (1) SA 83 (CC).

State v Makwanyane 1995 (3) SA 391(CC).

TAWUSA & Alliance comprising of STEMCWU v Anglo Platinum Ltd 2009 (1) ZALC (LC).

UAMAWU v Fodens (SA) (Pty) Ltd 1983 ILJ 212 (IC).

Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa 2014 (9) BLLR 923 (LC).

Xinwa v Volkswagen of South Africa (Pty) Ltd 2003 (4) SA 390 (CC).

International instruments

‘African ‘African Charter on Human and Peoples’ Rights’ Rights (27 June 1981).

‘Collective Agreements Recommendation’ (91 of 1951).

‘Collective Bargaining Convention’ (154 of 1981).

‘Convention for the Protection of Human Rights and Fundamental Freedoms’ which is now entitled European Convention on Human Rights (ECHR) (4 November 1950).

‘Declaration on Fundamental Principles and Rights at Work’ (adopted in 1998 and amended in 2022).

‘Freedom of Association and Protection of the Right to Organise Convention’ (87 of 1948).

‘Right to Organise and Collective Bargaining Convention’ (98 of 1949).

United Nations ‘Universal Declaration of Human Rights’ (10 December 1948).

‘Workers Representatives Convention’ (135 of 1971).

Internet sources

Cooper C 'Labour Relations' (undated) available at *https://africanlii.org/sites/default/files/CLoSA%20Ch%2053%20Labour%20Relations.pdf* accessed on 8 May 2022.

International Labour Organisation 'Collective bargaining and labour relations' last accessed from *https://www.ilo.org/global/topics/collective-bargaining-labour-relations/lang--en/index.htm* on 17 October 2021.

International Labour Organisation Committee on Freedom of Association available at *https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm* accessed on 26 September 2022.

International Labour Organisation 'Constitution' available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO* accessed on 1 October 2022.

International Labour Organisation 'Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia)' (1944) available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration* accessed on 1 October 2022.

International Labour Organisation 'Ratifications for South Africa' available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888* accessed on 19 November 2021.

International Labour Organisation 'Report of the Director-General: freedom of association in practice: lessons learned' (Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: International Labour

Conference 97th Session 2008) available at *http://www.oit.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf* accessed on 27 September 2022.

International Labour Organisation 'Social Dialogue Report: Collective bargaining for an inclusive, sustainable and resilient recovery' (2022) available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf* accessed on 8 October 2022.

International Labour Organisation 'Up-to-date conventions and protocols not ratified by South Africa' available at *https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102888* accessed on 19 November 2021.

International Labour Organisation 'Work for a brighter future' (Global Commission on the Future of Work) (2019) available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf* accessed on 18 December 2022.

Public Service Co-ordinating Bargaining Council 'Agreement on the Salary Adjustments and Improvements on Conditions of Service in the Public Service for the period 2018/19 to 2019/20 and 2020/21' available at *http://www.phsdsbc.org.za/wp-content/uploads/2018/06/PSCBC-Resolution-1-of-2018-Agreement-on-the-salary-adjsutments-and-improvements-in-conditions-of-service-for-the-period-2018-to-2021.pdf* accessed on 6 November 2021.

Ramaphosa C and Löfven S 'Preface' in International Labour Organisation 'Work for a brighter future' (Global Commission on the Future of Work) (2019) available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf* accessed on 18 December 2022.

Urmila Bhoola 'National Labour Law Profile: South Africa' (2022) 1-22 available at *https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm* accessed on 1 May 2022.

World Health Organisation 'Coronavirus disease' available at *https://www.who.int/health-topics/coronavirus#tab=tab_1* accessed on 8 January 2023.

Government papers and policies

'Code of Good Practice: Collective bargaining, industrial action and picketing' (GN 1396 in GG 42121) available at *https://www.gov.za/sites/default/files/gcis_document/201812/42121rg10899gon1396s.pdf* accessed on 31 October 2021.

Other documents

Coetzee and Others v Elias Motsoaledi Local Municipality (South African Local Government Bargaining Council) unreported arbitration award case no LPD102002 of 25 March 2021.