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# Bypassing the union: An Employer's Right to Negotiate Directly with Striking Employees

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UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

SCHOOL OF LAW

# ***Bypassing the union: An Employer's Right to Negotiate Directly with Striking Employees***

Submitted in partial fulfillment of the requirements of the degree of Master of Laws (LLM) by course work in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg

By

**NKOSI THULANI GIFT**

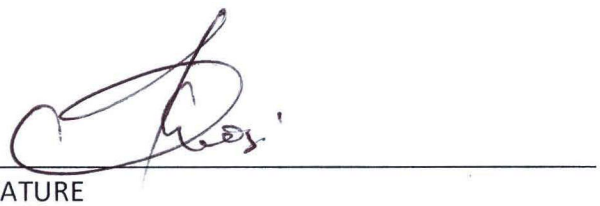
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## DECLARATION

I, THULANI GIFT MKOSI,

declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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**THULANI GIFT NKOSI** **DATE**

**ABSTRACT**

South African labour law influenced by the Constitution and notions of equity and fairness has undergone a total change and will, without doubt, continue to change to meet the ever changing nature of employment it seeks to regulate. It is after all in the nature of all laws to change with the society they seek to regulate and our labour law is no exception. Recently, focus has shifted to the institution of collective bargaining and the questions posed are whether our labour laws as they currently stand are capable of adequately regulating the process of collective bargaining in such a way that the main objective of collective bargaining which is to bring about industrial peace is promoted and maintained at all times. These questions are posed on the back of the unprecedented spates of prolonged violent strikes that have resulted in the destruction of property and loss of life as well as unimaginable financial losses not only for the employers affected but also for the economy as a whole. These unprecedented prolonged violent strikes have caused employers to engage in bargaining conduct that could erode the participation of trade unions from the collective bargaining process which bargaining conduct takes the form of employers bypassing trade unions and negotiating with striking employees directly. But do employers have a right to bypass trade unions in this way?

This paper investigates this question against the background of the case of *Amcu v Lonmin* where the Labour Court on application by a trade union had to decide whether to grant an urgent interdict restraining employers from negotiating directly with striking employees. The employers considering themselves to be acting within their rights opposed the application. The Labour Court unfortunately dismissed the application on technical grounds relating to the lack of urgency without considering or deciding this question. This paper accordingly picks up the debate; considers the historical evolution of collective bargaining in our labour law including the voluntarist argument that is said to be embodied by the Labour Relations Act (LRA), and concludes that when all things considered employers in fact do not have a right to bypass trade unions. If employers had this right certain provisions of the LRA that guarantee trade union participation would be rendered nugatory and the whole collective bargaining process would become unworkable. The LRA envisions that once parties have voluntarily embarked on collective bargaining they bargain in good faith and do not bypass each other.

**Bypassing the union: An Employer's Right to Negotiate Directly with Striking Employees**

## I INTRODUCTION

> 'In the relationship of master and servant, the role of the master is, of course, a dominant one and that of the servant is a subservient one. Even in the field of contract it has long been recognised that public policy requires that he be protected from the disadvantageous consequence of agreements which he may have felt obliged to enter into with his master, the reason being that as a servant he is not contracting on equal terms with his master.'[1]

The determination and settling of terms and conditions of employment on a collective basis through the mechanism of collective bargaining is a matter of great importance. For this reason collective bargaining, the process of negotiations between employer and employees' representatives[2] about terms and conditions of employment is now firmly entrenched in South African labour law. This is evidenced by the fact that the right to engage in collective bargaining is now constitutionally entrenched which makes collective bargaining a fundamental right.[3] The effect of constitutionally entrenching rights according to Vivier ADP is that the entrenchment enhances the protection of the entrenched right and affords that right a higher status.[4] It follows therefore that the higher status afforded to collective bargaining means that any unwarranted interference with collective bargaining amounts to a limitation of the Constitutional right.

The right to engage in collective bargaining is however, not a standalone right in that it intersects with, and it is part and parcel of many other rights like the right to freedom of association and the right to strike which all make it possible to engage in collective bargaining. Ben-Israel explains the relationship between these rights as follows:

> 'The organised and collective power of the workers within the framework of trade unions by itself is not sufficient in order to balance the labour relations system, and therefore it must be supplemented by two complementary freedoms. The first of these two freedoms is the freedom of collective bargaining. It is only by collective bargaining that the workers can make use of their combined power, which stems from the fact that they are organised within a trade union in order to improve their working conditions ... but that, too, is insufficient. The freedom to associate and to bargain collectively must be

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[1] *S v Collett* 1978 (3) SA 206 (RAD), at 209-210

[2] B H Simamba 'The International Labour Organisation and the Right to Collective Bargaining: An African Perspective'(1989) 110 *SALJ*, at 517

[3] Section 23(5) of Constitution guarantees every trade union, employer's association and employer the right to engage in collective bargaining

[4] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA), at para 12

> supplemented by an additional freedom, which is the freedom to strike. Hence, freedom to strike is a complementary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer-employee relationship on an equal basis.'[5]

Ben-Israel's argument is supported by Cheadle who argues that the right to bargain collectively is shorthand for a range of many rights and freedoms associated with the institution of collective bargaining.[6] It follows from this realisation that collective bargaining cannot be viewed or discussed in isolation from the other rights that supports its existence and realisation. Accordingly, this paper in its discussion of collective bargaining will make reference to all those rights that intersect with collective bargaining in a supplementary and complementary manner for without those rights, collective bargaining would be ineffective.[7]

With this in mind, this paper seeks to analyse the workings of collective bargaining with a view of understanding whether an employer in a strike situation has a right to bypass a trade union and negotiate directly with striking employees. Put differently, the main objective of this paper is to consider with reference to the provisions of the Labour Relations Act[8] (LRA) and applicable case law, the extent to which, if any, employers are permitted to bypass trade unions.

At the heart of the enquiry lies a determination of what constitutes acceptable and not acceptable bargaining conduct under a collective bargaining system that has been described as voluntarist as opposed to compulsory. In a voluntarist system courts generally assume a passive role and play no part in the collective bargaining process. This much was held in *National Police Services Union v National Negotiating Forum* where Van Niekerk AJ opined:

> 'The LRA adopts an unashamedly voluntarist approach – it does not prescribe to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime, the courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process.'[9]

Similar sentiments were expressed in *SAMWU v SALGA* where the Labour Court held:

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[5] Ben-Israel *International Labour Standards: The Case of the Freedom to Strike* (1987), at 93

[6] Cheadle, H 'Collective Bargaining and the LRA' (2005) *LDD*, at 147

[7] See generally Olivier 'Statutory Employment relations in South Africa' in Slabbert et al (eds) *Managing Employment Relations in South Africa* (1991), at 4 - 61

[8] Act 66 of 1995

[9] (1999) 20 *ILJ* 1081 (LC), para 52

> 'The LRA introduced a voluntarist system of collective bargaining, a system in which neither this court (nor any other court or tribunal) is empowered to scrutinise bargaining conduct or make pronouncements on the good faith or otherwise exhibited by any of the parties to collective bargaining.'[10]

The upshot of the voluntarist approach is its insistence that collective bargaining should be completely voluntary and free from governmental and judicial interference.[11] This insistence is based on an assumption that collective bargaining is only effective when conducted freely between the parties in an employment relationship. In *MAWU v Hart Ltd* Ehlers P expressed the assumption embodied in the voluntarist approach in the following terms: 'negotiations should always assume a voluntary character in order to be effective'.[12]

Although there is no enforceable duty to bargain under our current voluntarist regime of collective bargaining, this paper will argue that where parties have voluntarily embarked on collective bargaining, there is an implied duty under the LRA that such bargaining will be in good faith and bargaining agents will not bypass each other. If such a duty did not exist, so the paper will argue, then the very essence for which collective bargaining exists; which is to minimise labour disputes by facilitating the conclusion of collective agreements will be defeated as certain bargaining conduct is so harmful to collective bargaining that it makes it impossible for any collective agreement to be reached. This conduct also destroys the employment relationship which collective bargaining tries to preserve.[13] It is bargaining in good faith only that compels parties not to engage on any conduct that is harmful to collectively bargained outcomes.

In advancing its argument that the LRA creates an implied duty to bargain in good faith, this paper will emphasise the standing and importance of collective bargaining in our labour relations. Stemming from the sacrosanct position of collective bargaining in our labour relations, this paper will argue that the implied duty to bargain in good faith emanates from the LRA contextually and purposefully interpreted. This paper will further argue that due recognition to the role of trade unions as employees' bargaining agents and paying due regard

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[10] (2010) *ILJ* 2178 (LC) para 16

[11] *NUM v Henry Gould (Pty) ltd* (1988) 9 *ILJ* 1149 (IC), at 1154; *Dunlop Tyres (Pty) Ltd v NUMSA* (1990) 11 *ILJ* 149 (IC), at 155; *BTR Dunlop Ltd v NUMSA* (2) (1089) *ILJ* 701 (IC), at 709

[12] (1985) 6 *ILJ* 478 (IC), 489A

[13] Reports are replete with examples where employees were dismissed after a strike. See generally J Myburgh 'The Protection of Strikers from Dismissal' in P Benjamin, R Jacobus & C Albertyn (eds) *Strikes, Lockout and Arbitration in South African Law* (1989), 33-34

to the fact that fairness is now the hallmark of our labour laws all lead to a conclusion that there is in the bowels of the LRA an implied duty to bargain in good faith. The fact that the Industrial Court and in some cases the High Courts had previously flirted with the idea of a duty to bargain in good faith goes a long way, and although it is regrettable that such a duty was subsequently rejected; the current prevailing conditions are such that the duty must be revived. The revival of the duty could be by way of judicial interpretation of the LRA.

That being said, the nature of the topic under investigation calls for a consideration of the legislative framework that underpins our collective bargaining system, namely the Constitution which has been said to be an important frame of reference for labour law[14] and the LRA which gives effect to the Constitutional right to engage in collective bargaining.[15]

The legislative framework will be followed by a historical overview of collective bargaining in South Africa. This part of the paper will trace collective bargaining from its early roots under the Industrial Conciliation Act,[16] the passing of which according to Stella Vettori bore 'testimony to the recognition of the fact that industrial conflict had to be institutionalised through a system of collective bargaining in order to contain conflict and strive towards industrial peace.'[17] As part of the historical overview this paper will also consider the emergence and development of the so called duty to bargain by the Industrial Court under its unfair labour practice jurisdiction in the 1980s. The duty to bargain as put forward by the Industrial Court will be contrasted and differentiated from a duty to bargain in good faith which this paper argues is implied in the current LRA.

## II. THE LEGISLATIVE FRAMEWORK UNDERPINNING COLLECTIVE BARGAINING IN SOUTH AFRICA

The Labour Relations Act (LRA) is the enabling legislation that gives effect to the fundamental right to bargain collectively. Section 23(5) of the Constitution provides that every trade union, employer's organisation and individual employer has the right to engage in collective bargaining. The section continues to call for the enactment of the LRA by stipulating that '[n]ational legislation may be enacted to regulate collective bargaining.' Seen in its proper context the LRA exists to fulfil the constitutional right to engage in collective

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[14] See JA Slabbert & BJ Swanepoel *Introduction Employment Relations Management: A Global Perspective* 2ed (2002), at 47

[15] See generally *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC)

[16] Act 11 of 1924

[17] Stella Vettori 'A Judicially Enforceable Duty to Bargain?' (2005) *De Jure*, at 383

bargaining. To the extent that the LRA limits the right, the Constitution directs that such a limitation must accord with the limitations clause in section 36. It is on the basis of the provisions of section 23(5) that Kruger and Tshoose correctly argue that the LRA was promulgated in furtherance of section 23(5) of the Constitution and its important purpose was to provide a regulatory framework for collective bargaining in South Africa.[18]

The importance of the LRA was also underscored in *Macsteel (Pty) Ltd v National Union of Metal Workers of SA* where the court reasoned: '[i]n my view the LRA creates a machinery which makes collective bargaining not only possible but compulsory. Its aim is to avoid if possible industrial strife and to maintain peace.'[19] This dictum is also echoed by Ferreira who argues that the LRA has democratic features in that it recognises collective bargaining as the most acceptable mechanism of resolving disputes of mutual interest, and encourages and provides the means to reach collective agreements.[20] It follows therefore that collective bargaining is central to the purpose for which the LRA was promulgated.[21]

The LRA achieves its purpose by creating a framework that enables collective bargaining to take place and thrive. Part of that framework involves the recognition and the regulation of all rights associated with collective bargaining including the right to form and join trade unions[22] and the right to engage in strikes.[23] In the words of Samuel:

> 'The LRA creates a framework that promotes constructive bargaining by ... extending organisational rights to trade unions, such as a right of access to an employer's property, to conduct meetings and recruit new members, deduction of membership fees from employee members' salaries, paid leave for shop stewards to attend to union matters, workplace representativeness, and access to information that will assist unions during negotiations...'[24]

Trade unions as organisers of and as bargaining agents of employees are crucial to the process of collective bargaining. McGregor et al argue that it is only once employees are properly organised in their respective registered trade unions that the real power play of

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[18] J. Kruger & C Tshoose. 'The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective' 2013 (16) *PER*, at 286

[19] (1990) 11 *ILJ* 995 (LAC), at 1006B

[20] Ferreira, G 'Developments in Labour Relations in South Africa: Ten Years of Democracy (1994-2004)' (2005) *Politea*, at 202

[21] See Section 1 of the LRA

[22] Section 4(1) of the LRA

[23] Section 64(1) of the LRA

[24] MO Samuel 'The Mineworkers' Unprocedural strike: Setting the Path for Redefining Collective Bargaining in South Africa' (2013) *Journal of Contemporary Management*, at 242

collective bargaining between employer and employee begins.[25] But for trade unions to be effective in the power play described by McGregor et al they must have organisational rights. Without organisational rights trade unions would not be able to exercise any of the rights associated with collective bargaining. For this reason it was fitting for the LRA to regulate the acquisition, the exercise and the loss of organisational rights by trade unions in an orderly way. Mischke convincingly argues that

> 'Organisational rights for trade unions are a pivotal part in the LRA's scheme of promoting and protecting collective bargaining: they are a necessary corollary to the LRA's voluntarist collective bargaining approach, and provide trade unions with the essential elements for not only securing an organisational foothold in the employer's business, but also laying the foundations for a future collective bargaining relationship.'[26]

Organisational rights cloth trade unions with the necessary strength to make demands on the employer on behalf of employees. Mischke gives credence to this point as thus:

> 'Organisational rights make it possible for trade union to build up, consolidate and maintain a powerbase of sufficient strength among the employer's employees ... it is only once the [trade] union has attained sufficient strength, that it can exercise sufficient economic power to compel the employer to bargain on wages and other terms and conditions of employment.'[27]

It can therefore be concluded that the importance of organisational rights can never be gainsaid as they provide trade unions with a firm base from which to build bargaining relationships and also maintain a robust presence in the workplace.[28]

Although the LRA differentiates between registered and non-registered trade unions and prefer the former to the latter, Landman argues that both registered and non-registered trade unions are recognised and enjoy varying degrees of protection under the LRA.[29] Verbatim he argues: '[t]he registration of trade unions is not compulsory but is it encouraged by certain advantages available only to registered trade unions.'[30] The importance of registration by trade unions was explained by Van Dijkhorst J in *National Union of Textile Workers v Stag Packings (Pty) Ltd* as follows:

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[25] McGregor M. et al *Labour Law Rules!* (2012), at 159

[26] Mischke, C. 'Getting a Foot in the Door: Organisational Rights and Collective Bargaining in terms of the LRA' (2004) *CLL*, at 60

[27] Ibid, at 60

[28] A.C. Basson et al, *Essential Labour Law* (2005) at 36

[29] AA Landman 'The Registration of Trade unions – The Divide Narrows' (1997) 18 *ILJ*, at 1194

[30] AA Landman 'Statutory Inroads into a Trade Union's Right of Disassociation' (1997) 18 *ILJ* , at 14

'The object of the Labour Relations Act is inter alia, to give trade unions juristic personality and status by registration and regulation so that they can be conducive to the furthering of good labour relations in trade and industry.'[31]

Section 8 of the LRA confers certain general rights to both trade unions and employer's organisations. Chapter VI of the LRA contains detailed provisions that must be complied with if a trade union wishes to apply for registration. Registration is important not only for formal recognition purposes but most importantly because a registered trade union gets to enjoy and enforce certain rights relating to, amongst others, organisational rights[32], the rights to represent its members in different forums[33] and the right to conclude collective agreements with employers.[34] These rights are not available to non-registered trade unions a point which is indicative of the fact that the LRA prefers registered as opposed to non-registered trade unions.

Central to collective bargaining is the right to engage in strikes.[35] Brassey expresses the centrality of strike action to collective bargaining as follows:

'Collective bargaining, the means by which the legislature sees industrial peace being achieved, is not possible without collective action; it is the threat of collective action that makes the bargaining real, the fact of it makes the threat real.' [36]

Brassey's sentiments are in many ways supported by the dictum of Constitutional Court in *NUMSA v Bader Bop* where it held:

'[The right to strike] is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as closed employees. Secondly it is through industrial action that workers are able to assert bargaining power in industrial relations.'[37]

Although the right to engage in strikes belongs to employees, trade unions as employee representatives play a central role in a proper exercise of this right. Cassim makes the point that the right to strike is the means by which trade unions as bargaining agents of

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[31] 1982 (4) SA 151 (T), at 158G

[32] Section 22 of the LRA

[33] See Rule 25(1)(b)(3) of the CCMA Rules

[34] Sections 23 of the LRA

[35] Botha, M. 'Revisiting an Old Friend: What Constitutes "A Matter of Mutual Interest" In Relation to A strike? A Tale of Two Recent Cases' (2015) 36 (1)*Obiter*, at 194

[36] Brassey, M. 'The Dismissal of Strikers' (1990) 11 *ILJ*, at 235

[37] [2003] 2 BLLR 103 (CC), at para 13

employees equate their position with that of the employer.[38] For this reason just like in the case of the acquisition, the exercise and the loss of organisational rights by trade unions the LRA sets out provisions applicable to strikes. Strikes have been said to be an integral part of collective bargaining without which collective bargaining would be rendered nugatory and reduced to collective begging.[39] To that end the right to strike has been said to be a weapon wielded by trade unions to ensure that collective bargaining works.[40]

It can then be concluded that strikes and consequently collective bargaining would be impossible without trade unions for it is the trade unions that drive the process of collective bargaining. It has been said that it is a trade union that takes control and organises its members for purposes of engaging in a strike.[41] This is so principally because the function of trade unions is to represent their members. Landman correctly makes this point as thus:

> 'The right of representation is crucial to the concept of a union. A union represents its members in various contexts, eg as a bargaining agent or as the champion of the rights and interests of members at the workplace and in the broader society.'[42]

Despite the Constitutional entrenchment of collective bargaining and the explicit provisions of the LRA regulating all rights associated with collective bargaining employers have not always been receptive to collective bargaining and the concomitant rights that come with it. In fact employers have been known to at times act in a manner calculated to undermine collective bargaining by engaging in conduct hostile to trade unions. The reasons for this are historical and have to do with the fact that trade unions exist to correct the power imbalance that typically exists in the employer-employee relationship by acting as the countervailing force and counteracting the inequality in bargaining powers.[43] Put differently, trade unions diminish the employer's prerogative[44] to unilaterally decide the terms and conditions of employment by requiring the employer to negotiate those terms and conditions. Of this Botha correctly argues that if employees did not have the right to associate and to act

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[38] M. Yusuf Cassim, 'Freedom to Strike: The Myth of Voluntarism' (1989) *Loyola of Los Angeles International & Comperative Law Review*, at 282

[39] Finnemore, M. & Van der Merwe, R. *Introduction to Industrial Relations in South Africa*, 3rd (1992), at 191

[40] Ernest Manamela and Mpfari Budeli 'Employees' right to strike and violence in South Africa' (2013) *CILSA*, at 309

[41] Geriecke, SB 'Revisiting the liability of Trade Unions and/or their Members during Strikes: Lessons to be learnt from Case Law' (2012) 75 *THRHR*, at 570

[42] Landman, A. *Op cit*, note 29, at 1194

[43] See Ewing, K 'The Death of Labour Law' (1989) 8 *Oxford Journal of Legal Studies*, at 293; See also Kahn-Freund, O. *Labour Law* (1977) at 6

[44] Strydom, EML 'The Origin, Nature and Ambit of Employer Prerogative' (Part 1) (1999) *SA Merc LJ*, at 42

collectively then the unequal bargaining positions that is the upshot of the employment contract would remain.[45] This sentiment was echoed by the Constitutional Court in *re Certification of the Constitution of the Republic of South Africa*[46] as thus:

> 'Collective bargaining is based on the recognition of the fact that employers enjoy a greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.'

What is clear is that collective bargaining and trade unions in particular 'has led to a less unequal bargaining relationship between employer and employee.'[47] Simply put, trade unions have levelled the playing fields in the employment relationship. This levelling of the playing fields at times makes employers feel powerless.

To assert their diminishing power in a unionised workplace employers have at times employed various means and tactics calculated to undermine and destabilise trade unions. One way to undermine collective bargaining is to bypass a trade union, a bargaining agent of the employees and make offers directly to striking employees. This was seen more recently in 2014, in the case of *AMCU v Lonmin*[48](*AMCU*) where the Labour Court on application by the trade union had to decide whether to grant an urgent interdict restraining employers from bypassing the trade union and negotiating directly with striking employees who were members of the trade union. The trade union's complaint was that it had been undermined as the bargaining agent of the striking employees. Granted, the strike in question; just like many other strikes in the recent past, was prolonged for many months and was characterised by a wave of violence, death and destruction to property. Employers are said to have lost billions in capital and profits. There was also a huge level of distrust amongst the bargaining agents on both sides, but did this give the employer a right to bypass the trade union and negotiate directly with its striking employees? The LRA has no provisions that allow an employer to bypass a trade union.

Although the Labour Court in *AMCU* dismissed the application on technical grounds relating to the lack of urgency and said nothing about whether an employer has a right to bypass the trade union, the case did raise important questions about the stability of the

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[45] Botha, MM. 'The Different Worlds of Labour and Company Law: Truth or Myth?' (2014) 17 *PELJ*, at 2064

[46] (1996) 17 *ILJ* 821 (CC), at para 66

[47] Pretorius P. 'Status Quo Relief and the Industrial Court: Sacred Cow Tethered' (1983) 3 *ILJ*, at 172

[48] *Association of Mineworkers and Construction Union v Lonmin (Comprising Eastern Platinum and Western Platinum Ltd)* [2014] ZALC JHB 196 (2 June 2014)

foundations of our collective bargaining under the LRA. Chief amongst the questions raised by the case was whether a time has not arrived to revisit the voluntarist philosophy of our collective bargaining with a view of regulating bargaining conduct in such a way that parties do not negotiate past each other. An answer to this question is important because it spells the future of collective bargaining going forward.

## III. HISTORICAL OVERVIEW OF COLLECTIVE BARGAINING IN SOUTH AFRICA

Godfrey et al have on occasion correctly argued that

> '... the developments of the last century continue to critically inform the collective bargaining system we have today. The roots of many of the tensions in the current system, and the motives driving participants in the system, can frequently be found in its history. The history of collective bargaining therefore sheds valuable light on the functioning of the system today and its capacity to adapt to future challenges, as well as on some of its limitations.'[49]

Collective bargaining plays a pivotal role in our labour relations. So pivotal is collective bargaining it has been described as a cornerstone of our system of labour relations.[50] In *National Union of Mineworkers v East Rand Gold & Uranium Co. Ltd* the then Appellate Division held that collective bargaining was the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes.[51] According to Kahn-Freund the importance of collective bargaining is explained best by the fact that it is beneficial to both employers and employees. He comprehensively expressed the benefits to both parties as thus:

> '[B]y bargaining collectively with organised labour management seeks to give effect to its legitimate expectations that the planning of production, distribution, etc, should not be frustrated through interruptions of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and has to be compatible with the physical integrity and moral dignity of the individual and also that jobs should be reasonably secure.'[52]

Kahn-Freund's views on the importance of collective bargaining are supported by Darcy du Toit who submits that collective bargaining has value for both employers as well as

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[49] Godfrey, S.; Maree, J.; du Toit, D & Theron, J *Collective Bargaining in South Africa: Past, Present and Future* (2010) at 41

[50] *National Union of Mineworkers v Buffelsfontein Gold Mining Co.* (1991) 12 *ILJ* 346 (IC), at 351

[51] (1991) 12 *ILJ* 1221 (A), at 1237

[52] Kahn-Freund, O. *Labour and the Law* 2ed (1977), at 51

employees.[53] For employers, du Toit argues, collective bargaining is a means of maintaining industrial peace and for workers it guarantees certain standards of distribution of work, of rewards and of stability of employment.[54] The point was forcefully expressed in *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*[55] as follows:

> 'What the employer bargains for is the flexibility to make decisions in a dynamic work environment in order to meet the needs of the labour process. What the employee extracts in return is not only a wage, but a continuing obligation of fairness ... on the part of the employer when he makes decisions affecting the employee in his work.'[56]

As important as collective bargaining is to both parties in an employment relationship it was not always recognised as such in South Africa labour law. To begin with collective bargaining was unknown under the South African common law contract of employment which is said to be the basis of the employment relationship.[57] Kahn-Freund properly makes the point:

> '[T]he common law knows nothing of a balance of collective forces. It is (and this is its strength and weakness) inspired by the belief in the equality (real of fictitious) of individuals; it operates between individuals and not otherwise.'[58]

Although Kahn-Freund was specifically commenting on the common law of Britain his arguments apply with equal force to the common law of South Africa. Kahn-Freund's view is supported by Anderman who argues that

> 'The common law viewed employer and employee as free and equal contracting parties, ignoring the obvious discrepancy in their bargaining power and the fact that the employment relationship provided income to a family unit for one party and constituted a cost of production or service for the other.'[59]

The simple point made by both Kahn-Freund and Anderman is that the reason collective bargaining was unknown at common law is because common was totally blind to the inequalities of bargaining power that characterised the employment relationship. Both

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[53] Du Toit, D 'What is the Future of Collective Bargaining (and Labour Law) in South Africa' (2007)28 *ILJ*, at 1405

[54] Ibid, at 1405

[55] (1997) *ILJ* 361 (LAC)

[56] Ibid, at366A

[57] See amongst others *MEC for the Department of Health, Eastern Cape v Odendaal* (2009) 30 *ILJ* 2093 (LC) para 52

[58] Davies, P & Freedland, M (eds) *Kahn-Freund's Labour and the Law*, 3rd ed (1983) at 12

[59] Anderman, S D *The Law of Unfair Dismissal* (1978), at 2-3

views were echoed in *R v Smit*[60] a case that confirms beyond doubt that at common law employees did not have the right to strike as any refusal to render services was seen as a breach of the contract of employment which entitled an employer to terminate the contract of employment. The court expressed the common law position as follows:

> 'Now, as I have already stated, where an employee refuses to do the work which under his contract with the employer he is obliged to do, he is, in my view, liable to summary dismissal by his employer. On the above evidence the appellant would appear to have been lawfully dismissed.'[61]

It appears that collective bargaining and its associated rights was a statutory invention. It was first introduced in South African labour law in 1924 with the passing of the Industrial Conciliation Act of 1924 (ICA).[62] Maree argues that the ICA is the centrepiece of collective bargaining in South Africa.[63] According to Steenkamp et al what the ICA did was to provide for the creation of industrial councils and conciliation boards that mediated and arbitrated collective bargaining disputes and could impose criminal sanctions on strikes that occurred before the negotiations took place in those bodies.[64] In so doing, simply put, the ICA established a system of centralised collective bargaining something that was unknown at common law.

The ICA as it will be seen below became the forerunner of the Labour Relations Act of 1956[65] which was later repealed by the current Labour Relations Act of 1995. Much of what the ICA had established in the sphere of collective bargaining remains albeit under different names and labels. According to Maree the ICA did not only introduce collective bargaining but it also made provision for the establishment of industrial councils as the core centralised collective bargaining institution.[66] In the current dispensation the industrial councils have transformed themselves into being bargaining councils and statutory councils which goes to show that the institutions created by the ICA continue to influence and provide a bedrock on which our current collective bargaining system rests.

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[60] 1955 (1) SA (CPD)

[61] Ibid, at 242H

[62] Act 11 of 1924

[63] Maree, J. 'Trends in the South African Collective Bargaining System in Comparative Perspective' (2011) *SA Journal of Labour Relations*, at 13

[64] Anton SteenKamp; Susan Stelzner, & Nadene Badenhorst 'The Right to Bargain Collectively' (2004) 25 *ILJ*, at 947

[65] Act 28 of 1956

[66] Maree, J. *Op cit*, note 63, at 13

The passing of the ICA was necessitated by the Rand Revolt of 1922 where some 25000 white miners are said to have gone on a strike to express their dissatisfaction with the contemplated retrenchments which they viewed was an attempt by mine owners to replace them with a cheaper black labour force.[67] Smith argues that following the Rand Revolt which was bloody, its associated strike that lasted three months and the granting of more semi-skilled jobs to black African workers, the ICA aimed to prevent any similar protest from ever arising again.[68] It sought to achieve its purpose 'by allowing employees to bargain collectively with their employers through registered trade unions.'[69] This marked the birth of collective bargaining as we know it today as subsequent pieces of legislation had only been modifications of the ICA. Myburgh fortifies this point in the following terms: '[t]he basic framework of the 1924 Act thereafter remained in place in the 1937 Act and in the 1956 Act, save with one major change in the latter Act, namely, the introduction of the requirement of a strike ballot.'[70]

Although the ICA is credited as the first piece of legislation of note to have introduced collective bargaining by expressly recognising it and creating a framework for its recognition; Jeff Lever correctly argues that the ICA was to a considerable extent the outcome of the play of forces which had arisen around the Rand Revolt of 1922.[71] By the same token the ICA was also an outcome of the political power play of the time. It reflected the government policy of the day by excluding or failing to recognise black trade unions. This then meant that the collective bargaining machinery created by the ICA did not extend to black trade unions.

As important as the ICA was in sowing the first seeds for collective bargaining, the ICA was however widely criticised for its exclusion of black workers and black trade unions from the collective bargaining process it created. The way in which the ICA excluded black workers and black trade unions was by excluding black workers in its definition of employee and by calling for trade unions to be registered before they could embark on collective bargaining. The registration requirement was exclusionary of black trade unions because they were not allowed to register. The process is neatly summed up by Steven Friedman who

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[67] Anton SteenKamp; Susan Stelzner, & Nadene Badenhorst *Op cit*, note 64, at 947

[68] Mathew Smith. 'The Right of Revolution: Black Trade Unions, Workplace Forums, And The Struggle for Democracy in South Africa' (2000) 28 *Georgia Journal of International and Comparative Law*, at 596

[69] Ibid, at 596

[70] J F Myburgh, '100 Years of Strike Law' (2004) 25 *ILJ* ,at 964

[71] Lever, F. 'Capital and Labour in South Africa: The Passage of the Industrial Conciliation, Act' in Webster, E. (ed) *Essays in Southern African Labour History* (1977), at 82

argues that the collective bargaining system created by the ICA was available 'only [to] unions who registered with the government ... and the law prevented most African workers from joining registered trade unions.'[72]

Rob Davies in critiquing the ICA for excluding black trade unions argued that the provisions of the ICA that excluded African workers were designed to impede the development of a vigorous and effective African labour movement which could struggle and end the exploitation of African workers.[73] This is the historical backdrop against which collective bargaining is to be understood in South Africa. A backdrop characterised by a non recognition of collective bargaining initially, and when the common law was altered to recognise collective bargaining certain bargaining agents, namely black trade unions were excluded from that collective bargaining process. The latter was of course as a result of apartheid permeating all spheres of the South African society including its labour law.

## IV. THE EMERGENCE AND DEVELOPMENT OF THE JURISPRUDENTIAL DUTY TO BARGAIN AND ITS CONCOMITANT DUTY TO BARGAIN IN GOOD FAITH

The exclusion of black workers and black trade unions from the collective bargaining machinery created by the ICA meant that there existed a dualistic racially segregated system of labour relations in South Africa in which trade unions representing white employees could partake in a statutory centralised system of collective bargaining whilst trade unions representing black workers could not.[74] Owing to their exclusion, black trade unions resorted to negotiating with employers at plant or organisational level, a situation that was not ideal, nor wholly acceptable to them.[75]

This dualistic racially segregated system of labour relations created by the ICA lasted until the mid to late 1970s when, following mounting industrial actions by emerging black trade unions, the violent political environment of the time and the international pressures against the apartheid government; Professor Nic Wiehahn persuaded the government of the day to establish a commission of enquiry to investigate labour legislation.[76] The terms of reference of the investigation related to investigating "the methods and means by which a

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[72] Friedman, S. *Building Tomorrow Today: African Workers in Trade Unions, 1970-1984* (1987), 13

[73] Davies, R. 'The Class Character of South Africa's Industrial Conciliation Legislation' in Webster, E. (ed) *Essays in Southern African Labour History* (1977), at 69

[74] Stella Vettori, *Op cit*, note 17, at 383

[75] Ibid, at 383

[76] AA Landman, 'Fair Labour Practices – The Wiehahn Legacy' (2004) 25 *ILJ*, at 805

foundation for the creation and expansion of sound labour relations may be laid for the future of South Africa.'[77] The commission was aptly called the Wiehahn Commision after its founder and chairperson Professor Nic Wiehahn. As part of its investigation the Wiehahn Commission produced six reports which according to Clive Thompson captured the six labour rights, namely, the right to work; the right to associate; the right to bargain collectively; the right to withhold labour; the right to protection (presumably against unfair dismissal), and the right to development.[78]

In addition to the six labour rights, the Wiehahn Commission also recommended that the statutory system of collective bargaining that had existed until then be changed completely and black workers and their trade unions be allowed to participate in it.[79] This recommendation was revolutionary and a game changer as it meant that for the first time in the history of labour relations in South Africa there will be one unitary system that was available to all workers irrespective of their race. This point is supported by O'Regan who argues that

> 'Without doubt, the most important element of the Wiehahn Commission's proposal was its recommendation that the racist principle underlying South African labour legislation be abolished. In future, black and white workers would be governed by the same labour legislation.'[80]

As important as this recommendation was, it was not the only recommendation of importance to have come out of the Wiehahn Commission. The Wiehahn Commission also recommended that 'an Industrial Court with a broad and flexible unfair labour practice jurisdiction'[81] which was 'to be manned by labour lawyers'[82] be created. This latter recommendation was to have the most and long lasting influence on the development of our labour law.

In 1979 the Wiehahn recommendations were accepted by the government and led to the enactment of the Industrial Conciliation Amendment Act[83] under which the Industrial

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[77] Ibid, at 805

[78] Thompson, C. 'Twenty-five Years After Wiehahn – A story of the Unexpected and the Not Quite Intended' (2004) 25 *ILJ*, at iii

[79] Stella Vettori *Op cit*, note 17, at 383

[80] Catherine O'Regan, '1979-1997: Reflecting on 18 Years of Labour Law in South Africa' (1997) 18 *ILJ*, at 891

[81] Stella Vettori, *Op cit*, note 17, at 383

[82] Ehlers, D. 'The Approach of the Industrial Court to the Law of Strikes and Lock-outs' in *Strikes, Lock-Outs & Arbitration in South African Labour Law*, Benjamin, Jacobus & Albertyn (eds), (1989) at 3

[83] Act 94 of 1979

Court was established initially with two important powers: the power to make status quo orders[84] and the power to make unfair labour practice determinations.[85] It was only in 1988 that the Industrial Court was granted additional powers to order urgent interim relief.[86] Of all the powers granted to the Industrial Court it used the power to make unfair labour practice determinations to influence the development of our law for many years to come. Johan Roos explains that

> 'It was the establishment and functioning of this Industrial Court which ... proved to be the crucial factor in changing the face of labour relations altogether and with it the legal nature of the labour relationship.'[87]

Roos is supported by Le Roux who accurately captures the position as thus: "[d]uring a relatively short period of some two years the Industrial Court (IC) utilized the concept of the unfair labour practice to introduce fundamental changes to South African labour law."[88]Part of the fundamental changes introduced by the Industrial Court under its unfair labour practice jurisdiction was to impose a duty to bargain.[89] It should be noted that the ICA had previously imposed no duty to bargain whatsoever.

It is said that the concept of unfair labour practice as adopted by the Industrial Court emanated from the United States of America where it served as a 'handy description for a clutch of statutory torts designed to curb employer action against trade unions organizing'.[90] However, the version of unfair labour practice implemented in our law was completely different from that found in the United States of America. For starters in the United States the concept was narrowly circumscribed in that it was a statutory tort available to trade unions who have been subjected to unfair detrimental action by employers; whereas in our law it was not that narrowly circumscribed. In fact the scope of the concept was widened in our law as an unfair labour practice was defined as 'any practice which in the opinion of the Industrial Court is an unfair labour practice'.[91] This definition was extremely wide and effectively gave the Industrial Court extensive discretion to decide for itself what conduct amounted to unfair

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[84] See Section 17(11)(f) read with Section 43 of Act 94 of 1979

[85] See Section 46(9) of Act 94 of 1979

[86] See Section 17(11)(a), Introduced by the Labour Relations Amendment Act 83 of 1988

[87] Johan Roos 'Labour Law in South Africa 1976-1986: The Birth of a Legal Discipline' (1987) *Acta Juridica*, at 98

[88] PAK Le Roux 'Dismissals for Misconduct: Some Reflections' (2004) 25 *ILJ*, at 868

[89] Stella Vettori, *Op cit*, note 17, at 383

[90] AA Landman, *Op cit*, note 76, at 805

[91] See section 1(f) of Act 94 of 1979

labour practice and which did not.[92] It was the opinion of the Industrial Court that mattered in deciding the question. For this reason commentators argued that the wide definition of unfair labour practice gave the Industrial Court a licence to legislate,[93] and legislate, particularly in the context of collective bargaining, it did.

The legislative prowess of the Industrial Court in the realm of collective bargaining under its unfair labour practice jurisdiction were seen in cases like *Bleazard v Argus Printing & publishing Co Ltd* where on application the Industrial Court granted a status quo order under section 43 against an employer who wanted to withdraw from a statutory collective bargaining forum created by agreement. In granting the order the Court remarked:

> 'The respondents are by the order required to remain parties to the Board in order to enable the achievement of the Board's object by way of negotiation. **It can however be inferred that the indirect object of the order is that negotiations should ensue.'**[94] (My emphasis)

It was the inferred indirect object of the order that spoke to the existence of an imposed duty to bargain. For this reason commentators argued that:

> 'The *Bleazard* decision [became] influential in the development of South African labour law dealing with the duty to [bargain] and is regarded as one of the important early decisions in which the existence of such a duty was accepted.'[95]

The *Bleazard* decision was of course followed by other decisions in cases like *UAMAWU v Fodens (SA) (Pty) Ltd*[96]; *East Rand Gold and Uranium Co Ltd v NUM*[97]; *MAWU v Hart*[98] and *FAWU v Spekenham Supreme*[99] where the Industrial court once again imposed a duty on employers to bargain collectively with trade unions. Alongside the duty to bargain the Industrial Court also used its unfair labour practice jurisdiction to introduce into our law the notion that parties ought to bargain in good faith. In the *East Rand Gold and Uranium Co. v National Union of Mine Workers* case for example in addition to confirming the existence of a duty to bargain the court went on to comment as follows: '[i]n our view, it is clear that an important element of the obligation to bargain [and to bargain in] good faith,

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[92] Van Staden, M. 'The Role of the Judiciary in Balancing Flexibility and Security' (2013) *De Jure*, at474
[93] Thompson & Benjamin *South African Labour Law* (1997) A-60
[94] (1983) ILJ 60 (IC), at 77
[95] Le Roux, P A K. 'Levels of Bargaining and the Duty to Negotiate' (1993) 5 *SA Merc LJ*, at 327
[96] (1983) 4 *ILJ* 212 (IC)
[97] (1989) 10 *ILJ* 683 (LAC)
[98] (1985) 6 *ILJ* 478 (IC)
[99] (1988) 9 *ILJ* 628 (IC)

is to meet and to negotiate with an honest intention of reaching agreement, if this is possible.[100]

In imposing a duty to bargain and the duty to bargain in good faith in these cases, the Industrial Court had simply reasoned that an employers' refusal to bargain or an employer's refusal to engage in genuine bona fide negotiations could not be anything else other than unfair labour practices within the meaning of unfair labour practice under the Act. Thompson argues that given the fact that the definition of unfair labour practice was open textured in the extreme and that it was the function of the Industrial Court to grant appropriate redress, the court was wholly justified in imposing such duties.[101] The imposition of these duties however also meant that the Industrial Court had begun to develop its duty to bargain and bargain in good faith jurisprudence.

Having established the duty to bargain and bargain in good faith jurisprudence in these cases which was arguably one of the Industrial Court's most profound contributions to the development of collective bargaining in our law, the Industrial Court was not spared from criticisms. Cameron for example argued that during its existence

> '... the industrial court ... remained an institution of anomalies. Successes [were] matched by failures. Consistency [was] followed by inconsistency. Courage in the assumption and exercise of jurisdiction [was] met on other occasions with failure of nerve. And the overall impression one ... [got] of industrial court jurisprudence from the judgments of its more sophisticated members [was] often matched by the bleak reality of appearance before uninformed and evasive-or perhaps simply incompetent-presiding officers.'[102]

The criticisms against the Industrial Court appeared to be on two fronts. One, there were those who questioned if the legislature in granting the Industrial Court the powers it did intended for the Industrial Court to invent a duty to bargain which previously had not existed under the ICA. This view is best captured by O'Regan who argues that:

> 'From a historical perspective one of the most interesting aspects of [the] ... unfair labour practice jurisprudence was the fact that the Wiehahn Commission had never contemplated that the unfair labour practice jurisdiction would harbour a duty to bargain. This view was also expressed in the white papers that were published following the commission report.'[103]

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[100] (1989) *ILJ* 683 (LAC), at 697F, See also *SAEWA v Goedenhoop Colliery* (1991) *ILJ* 856 (IC)

[101] Clive Thompson 'On Bargaining and Legal Intervention' (1987) 8 *ILJ*, at 2

[102] Cameron, E. 'Overview of the Industrial Court' in Benjamin, Jacobus & Alberty (eds) *Strikes, Lock-Outs & Arbitration in South African Labour Law*, (1989) at 11

[103] Catherine O'Regan *Op cit*, note 80, at 895

The second criticism levelled against the Industrial Court pertained to the lack of consistency in its judgments. In the first place the Industrial Court did not consistently follow its own precedents. This is seen particularly in cases dealing with the position of trade unions vis-a-vis their members in the context of collective bargaining as seen in cases like *Buthelezi v Labour for Africa* where initially the Industrial Court had held: '[t]he duty of an employer to recognise and commence negotiations with his employees' authorised and representative bargaining agent must now be taken to be incontrovertible.'[104] The *Buthelezi* precedent was however not followed nor mentioned in *Natal Baking & Allied Workers union v BB Cereals* where now the Industrial Court held: [t]here can be no question that the employee is entitled to insist on direct dealings with his employer. Representation cannot be forced on him in the name of majoritarianism.'[105]A comparison of both these cases does not show any discernible pattern or common thread. It is the lack of the common pattern in decisions like these that landed the Industrial Court to criticism.

Going further, the Industrial Court appeared to change its mind at will and in the process produced not only inconsistent jurisprudence but also confusing outcomes. O'Regan notes:

> 'Having set out, therefore, on what appeared a fairly firm course that employers who refused to bargain with representative [trade] unions were committing an unfair labour practice – the court faltered and appeared to change its mind. The early jurisprudence reflecting this retreat is to be found in the judgments of an acting member of the court, Advocate Erasmus SC.'[106]

As inconsistent as the Industrial Court was in its unfair labour practice jurisprudence and in its judgments pertaining to collective bargaining, it should never be forgotten that it operated in less than ideal conditions. For starters the Industrial Court had to operate in a legal milieu whose collective bargaining law was underdeveloped. It has already been pointed out elsewhere in this paper that the common law which is the foundation of our law did not recognise collective bargaining. This meant that the Industrial Court had no point of reference to which it could refer to when it was called upon to adjudicate on collective bargaining disputes. In addition to this the legislation from which it sourced its powers conferred on it vast discretionary powers with no guidance on how to exercise those powers.

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[104] (1989) *ILJ* 867 (IC), at

[105] (1989) *ILJ* 870 (IC), at

[106] Catherine O'Regan *Op cit*, note 80, at 896

These conditions under which the Industrial Court had to operate were bemoaned by Daan Ehlers who argued that:

> 'The probably inadequately developed common law on employment relationship, the perhaps unsatisfactory prescriptions in our [the Industrial Conciliation Amendment Act 94 of 1979], and the absence of local authorities on the specific topic, did not assist the court in performing its functions. ... The court was consequently obliged to develop its own jurisprudence.'[107]

Develop its own jurisprudence the Industrial Court did and that jurisprudence in addition to establishing and imposing a duty to bargain on employers also extended to establishing a duty to bargain in good faith. The duty to bargain in good faith jurisprudence took root and grew to such an extent that the legislature itself took notice and in its draft legislation to amend the 1956 LRA gave recognition to the duty to bargain in good faith by including such a duty in the definition of a reworked unfair labour practices.[108] Commentators argued that the legislative recognition of the duty as proposed in the draft bill would have been a welcome confirmation of an international norm of collective bargaining.[109] But, alas, this welcomed confirmation was rejected in the bill that came out from that draft, namely the 1987 LRA Amendment Bill. Subsequent legislation including the current LRA totally abandoned any reference to a duty to bargain in good faith in favour of a voluntarist approach to collective bargaining.

## V. IMPLYING A DUTY TO BARGAIN IN GOOD FAITH IN THE CURRENT LRA

> 'There is nothing so subversive of collective bargaining, however, as to refuse to bargain entirely or to pretend to bargain without doing so, going through the motions with no intention of reaching agreement.'[110]

Collective bargaining is at the epicentre of our labour relations. This much is clear from Section 1 of the LRA which provides that the purpose of the LRA is to, amongst others, advance labour peace and to provide a framework within which parties to an employment relationship can collectively bargain. This should be contrasted with the finding of the Labour Court in *SA Airways (Pty) Ltd v SA Transport & Allied Workers Union* where, by way of interpretation the court concluded that the resolution of disputes through the mechanism of

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[107] Ehlers, D. 'The Approach of the Industrial Court to the Law of Strikes and Lock-outs (1989) in *Strikes, Lock-Outs & Arbitration in South African Labour Law*, Benjamin, Jacobus & Albertyn (eds), at 4

[108] Alan Rycroft 'Settlement and the Law' (2013) 130 *SALJ*, at 194

[109] Ibid, at 194; see also generally Alan Rycroft 'The Duty to Bargain in Good Faith' (1988) 9 *ILJ*, at 202

[110] M Brassey et al *The New Labour Law* (1987) at 151

collective bargaining is also the ultimate objective of the LRA.[111] As pointed out earlier, the LRA also exists to give effect to the constitutional right to fair labour practices generally. With all this in mind; is it then tenable to conclude, as courts currently do, that the LRA does not give them the power to enquire and possibly root out bargaining conduct which is inimical to collective bargaining? This paper argues that for a number of reasons to follow, such a position is completely untenable.

At the surface level, if our labour law accepts and all indications are that it does accept that 'collective bargaining constitutes the legislative cornerstone for the promotion of labour peace,' then it must logically follow that any conduct subversive to that process should invite judicial reproach.[112] If it does not then the whole objective of the LRA including the Constitutional rights it is mandated to give effect to will be defeated. Collective agreements which is the ultimate aim of collective bargaining will not be concluded and the labour force itself will be divided between those employees who are now suddenly willing to accept the offers made directly to them by employers and those who will be looking up to the unions. Chaos, which is inimical to orderly collective bargaining, will soon follow. It is for these reasons that this paper argues that purposefully interpreted the LRA does in fact imply a duty to bargain in good faith which duty roots out all bargaining conduct that is harmful to orderly collective bargaining. This point is fortified by Rycroft who argues that the real value of the duty to bargain in good faith is found in its potential to minimise unnecessary industrial conflict because it fosters rational and informed negotiations amongst the parties.[113]

It may be asked but where or how is this duty implied in the LRA? The first answer to this question is that the duty is implied from the proper reading of the LRA as a whole in its contextual setting and determining its purpose. The purpose for which legislation was enacted is very important because all legislation is enacted to serve a particular purpose which must be determined from the proper interpretation of the Act as a whole. In *S v Looij* the court underscored the importance of looking at the Act as a whole in determining its purpose. The court held:

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[111] (2010) 31 *ILJ* 1219 (LC), at para 22

[112] Clive Thompson *Op cit*, note 101, at 9

[113] Alan Rycroft *Op cit*, note 108, at 194

> 'To determine the purpose of the [statute], it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the exclusion of all others. To treat a single provision as decisive ... might obviously result in a wholly wrong conclusion.'[114]

It is regrettable that to date courts when adjudicating on collective bargaining disputes have tended to focus only on those sections of the LRA that provide an immediate answer to the dispute at hand. For example, a majority of the cases have centred on the interpretation of section 64 of the LRA. Although this is understandable seeing that in those cases courts will be dealing with strikes and strike related disputes, but it was this very approach that has given rise to the argument that the voluntarist leanings of the LRA prohibit courts from looking into bargaining conducts.

We should not forget that the LRA expressly aims to ensure that orderly collective bargaining takes place. To that end all mischievous conduct that goes against the stated aim of the LRA must receive judicial reprimand. The LRA would not have stated that it aims to promote orderly collective bargaining yet prohibit courts from judicially reprimanding conduct that is harmful to collective bargaining. This could not have been the position taking into account that our labour relations were in the past unorderly and chaotic. It is for this reason that this paper argues that courts ought to interpret the LRA contextually by invoking a contextual process of interpretation, which according to Devenish 'requires that there should be uninhibited recourse to the full internal anatomy of the statute'.[115] If this is not done and employers are allowed to disrupt the process of collective bargaining by engaging in divisive bargaining conduct as they did in the *AMCU* case whilst courts look on under the voluntarist guise and do nothing, then collective bargaining is permitted only in form to the extent that the constitution and the LRA speaks about it, but denied in substance as such conduct destroys it. Olivier JA in *Betha v BTR Sarmcol, A Division of BTR Dunlop Ltd* must have been referring to this very argument when he said:

> It is true that deadlines for the acceptance of offers, threats of industrial action and the like are typical 'tactics' adopted in the bargaining process contemplated by the Act. **But surely a court cannot turn a blind eye if illegitimate, unreasonable or *mala fide* tactics are employed. For a court to sit idly by**

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[114] 1975 (4) SA 703 (RA), at 705C-D

[115] George Devenish 'Interpretation 'From the Bowels of the Act' – An Essential Methodology for Unqualified Contextual Interpretation" (1989) 106 *SALJ*, at 69

**when tactics of the latter kind are used would be to make a mockery of the law, of justice and of the administration of justice.**[116] (My emphasis)

Going further, another ground from which the duty to bargain in good faith could be inferred emanates from the fact that the LRA specifically recognises trade unions as bargaining agents of employees. This is so because 'recognition of the trade union as the bargaining agent of the employees in any undertaking is the prelude to collective bargaining'.[117] Put differently, collective bargaining relationship properly begins once the employer recognises the trade union as the rightful bargaining agent of the employees. Okpaluba emphasise the point as thus,

> '...[trade union] recognition is so fundamental to the very essence of collective bargaining that in contemporary labour relations, it invariably translates into a right though not originating from the common law but by virtue of modern labour relations legislation.'[118]

The point is also supported by Cohen who aptly argues that '[t]rade union are the vehicles for effective collective bargaining.'[119] Section 200 of the LRA specifically cloths trade unions with the power to represent and act on behalf of employees. It would then be absurd if the very same LRA would go to such extremes as to protect the centrality of trade unions by conferring so much power on them, and yet by the same token also allow employers to, without sanction, bypass trade unions and negotiate directly with the very same people whom the trade unions represent.

In the present scheme of the LRA individual worker-employer bargaining is the antithesis of a system which places collective bargaining at the heart of good labour relations.[120] Accordingly, an employer who after having recognised a trade union instead of negotiation with it, chooses to negotiate directly with individual employees, acts in subversion of the basic tenet of the Act.[121] This is also true of an employer who negotiates with a trade union for a while and later break away to negotiate with employees directly. Courts have an obligation to correct such behaviour by declaring the conduct in question unlawful. Such a power is implied in the general scheme of the LRA as well as section 158(1)

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[116] 1998 (3) SA 349 (SCA), at 360F-G

[117] Chuks Okpaluba 'Recognition as Collective Employee Representation in Swazi Law' (1998) 19 *ILJ*, at1331

[118] Ibid, at 1331

[119] T Cohen 'Limiting Organisational rights of Minority Unions: POPCRU v Ledwaba 2013 11 BLLR (LC)' (2014) 17 *PELJ*, at 2210

[120] Chuks Okpaluba, *Op cit*, note 117, at 1332

[121] Ibid, at 1332

of the LRA.[122]

When interpreting and applying the LRA the impact of the Conventions promulgated by the International Labour Organisation (ILO) should never be ignored or forgotten.[123] For purposes of the present discussion Convention 87[124] and Convention 98[125] are of particular importance. These Conventions collectively protect the institution of collective bargaining and the rights associated with it. Convention 98 in particular 'prohibits anti-union discrimination at the workplace and protects against employers' interference in the affairs of employees' organisations'.[126] There could be no better example of employer interference in the affairs of employee's organisations then an employer who deliberates bypasses a trade union. When an employer bypasses a trade union the message sent out is not only one of anti-union bargaining conduct on the part of that employer, but it is also one of interference, albeit indirect with the affairs of the trade union. Such conduct calls for judicial sanction and the LRA ought to be interpreted in a way that gives effect to the ILO Conventions. [127]

The final argument pointing to the implied duty to negotiate in good faith is derived from the fact that '[f]airness has become the hallmark or essence of [our] labour law and practice.'[128] The constitution itself guarantees everyone a right to fair labour practices. If the LRA was enacted to give effect to the constitutional right to fair labour practices by making fairness the yardstick against which all employer-employee conduct is to be tested[129] then; in the argument of this paper it must follow that the very same LRA gives effect to the other constitutional labour rights including the right to engage in collective bargaining which is also subjected to the fairness yardstick. It would be strange if this was not the case.

Although the concept of fairness has been said to be incapable of a precise definition,[130] this paper argues that the concept is broad enough to encompass implying a duty to negotiate in good faith where parties have voluntarily embarked on collective bargaining. For this reason considerations of fairness which embody the whole body of our

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[122] This section gives the Labour Court a litany of powers to make appropriate orders

[123] South Africa is a signatory to the ILO and section 3(c) of the LRA specifically provides that the LRA must be interpreted in compliance with public international law obligations

[124] Convention on Freedom of Association and Protection of the Right to Organise 87 of 1948

[125] Convention on the Right to Organise and Collective Bargaining 98 of 1949

[126] T Cohen & L Matee 'Public Servants' Right to Strike in Lesotho, Botswana and South Africa – A Comparative Study' *PELJ* 2014 (17), at 1631

[127] South Africa ratified both Conventions on 18 February 1996

[128] See *SA Chemical Workers Union v Afrox Ltd* (1999) 20 *ILJ* 1718 (LC), at para 22

[129] *BMW (SA) (Pty) Ltd v Van der Walt* (2000) *21 ILJ* 113(LAC), at 1171

[130] *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC), at para 13

labour law[131] make it necessary to ask if it was ever in the contemplation of the LRA that employers could engage in collective bargaining with trade unions and at the same time, whilst the negotiations are ongoing, bypass a trade union at will whilst courts look on totally powerless under the guise of voluntarism in collective bargaining. An obvious answer to this question has to be in the negative. Accordingly, this paper argues that considerations of fairness make it necessary to conclude that the LRA implies a duty to negotiate in good faith once employers and trade unions have voluntarily commenced negotiations.

## VI. CONCLUSION

Collective bargaining is without doubt the preferred means of determining and settling terms and conditions of employment. This paper has argued that the importance of collective bargaining is evidenced by the fact that collective bargaining is constitutionally entrenched. The LRA was not only enacted to give effect to the constitutionally enshrined right to collective bargaining, but the LRA was also enacted to safeguard collective bargaining for the important role it plays in labour relations is worth safeguarding. The safeguard comes from the way in which trade union rights are guaranteed and protected.

The LRA recognises that trade unions are the instruments through which workers engage in the bargaining process.[132] Without trade unions, as argued elsewhere in this paper, collective bargaining will be impossible. Accordingly, when all things are considered, it is the argument of this paper that the LRA ought to be construed purposively taking into account the reason for which it exists which is to give effect to the constitutional right to engage in collective bargaining.

A purposive construction of the LRA lends itself to a conclusion that the LRA and its voluntarist approach to collective bargaining does not sanction the bypassing of any of the bargaining agents to the collective bargaining process, more so, the trade unions. It flows logically from the purpose of the existence of the LRA read in light of the ILO Conventions that it implies that once negotiations have begun all parties to the bargaining process will bargain in good faith so as to reach collective agreements.

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[131] See *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA), at para 2; see also Tamara Cohen 'Jurisdiction over Employment Disputes – Light at the End of the Tunnel?' (2010) 22 *SA Merc LJ*, at 418

[132] John Grogan *Collective Labour Law* (2010), at 54

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