Collective bargaining and the LRA

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1 INTRODUCTION

This paper seeks to explore three areas – all of which are pertinent to a 10 year review of collective bargaining under the Labour Relations Act ["LRA"].[1] These areas are:

- The right to bargain collectively;
- The constitutional attack on the extension of collective agreements;
- The current state of sector level bargaining.

2 THE RIGHT TO BARGAIN COLLECTIVELY IN THE LRA

The right to bargain collectively is shorthand for a range of rights and freedoms associated with the institution of collective bargaining. Each of these rights and freedoms need to be distinguished:

- There is the freedom to bargain collectively – this is a negative right. It is a right normally raised against a government passing legislation prohibiting collective bargaining or having the effect of doing so.[2]
- There is the right to use collective economic power in pursuit of a demand;[3]
- There is the positive right with the concomitant duty to bargain – a state enforced duty to bargain. The compulsion normally takes the form of a judicially enforced duty to bargain. This is the model used in the US, Canada and Japan. It was also adopted by the Industrial Court under its broad unfair labour practice jurisdiction under the old LRA.[4]

The LRA gives effect to all three elements of the right to bargain. It gives effect to the freedom to bargain collectively by providing the institutional infrastructure for voluntary collective bargaining at sector level and for the binding nature of collective agreements. It gives effect to the right to use collective economic power in the provisions relating to strikes, lockouts,

1 66 of 1995 which came into operation on 11 November 1996.
2 See *Reference re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161.
3 See *In re Certification of the Constitution of the Republic of SA, 1996* 1996 (10) BCLR 1253 & (1996) 17 *ILJ* 1253 (CC). 'Collective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries . . . Once a right to collective bargaining is recognised, implicit within it will be the right to exercise some economic power against partners in collective bargaining' [at para 64].
4 28 of 1956.

replacement labour and picketing. And it imposes a positive right and structure to bargain collectively in the public sector. But it does not do so in respect of the private sector.

Although trade unions and employers and their associations in the private sector are free to determine the levels and structure of collective bargaining, the LRA clearly promotes sector level bargaining as the preferred level. It does so for the following reasons:

- Sector level bargaining is low on transactional costs. The negotiations are conducted by representative organisations;
- Sector level bargaining shifts collective bargaining on the major issues out of the workplace, with that workplace relations are less strained;
- Bargaining outcomes are general in nature allowing for variation at the level of the workplace;
- Sector level bargaining sets a social floor for competition. By setting reasonable standards applicable to all employers in the local market, competition between those employers is based on productivity rather than socially undesirable wages or extension of hours;
- Strikes and lockouts take place less frequently at sector level and are generally less damaging to individual employers because competitors in the local market are also subject to the strike;
- Labour mobility and economies of scale make sector wide benefit schemes desirable.

The concern that voluntarism may allow employers to refuse to bargain at all is met to some extent by the organisational rights accorded to trade unions in Chapter III of the LRA[5] and the provision of a statutory dispute resolution procedure. The LRA's approach is to provide the organisational infrastructure for union organisation at the workplace and to provide a conciliation procedure to resolve interest disputes irrespective of whether the trade union is recognised.

3 THE RIGHT TO BARGAIN IN THE CONSTITUTION

Section 23(5) of the Constitution confers the right 'to engage in collective bargaining'[6]. That phrase has been the subject of contending interpretations in the Transvaal Provincial Division of the High Court – two cases[7] in favour of interpreting it as imposing a duty to bargain and one case against.[8]

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5 See Part A ss 11–22, both inclusive.

6 'Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that legislation may limit a right in this Chapter the limitation must comply with section 36(1)'.

7 *SANDU v Minister of Defence & others (3)* 2003 (9) BCLR 1055 [2003] 9 BLLR 932 (2003) 24 *ILJ* 2101 & [2003] 3 All SA 436 (T); *SANDU v Minister of Defence & others (4)* Unreported, TPD (Bertelsman J).

8 *SANDU v Minister of Defence & others (2)* 2003 (3) SA 239, (2003) 24 *ILJ* 1495 (T).

In the first case concerning the *South African National Defence Union v Minister of Defence & another (1)*,[9] the Constitutional Court held that soldiers were akin to employees and accordingly workers for the purposes of section 23 of the Constitution.[10] Accordingly provisions in the Defence Act[11] and its regulations, which prohibited soldiers from belonging to trade unions and from engaging in public protests, were declared to be invalid. In response the Minister promulgated a set of regulations that provided for the registration and recognition of trade unions and that established a 'Military Bargaining Council' and a 'Military Arbitration Board' for the resolution of disputes.[12]

In a nutshell, the regulations established a collective bargaining structure and process for the Defence Force. That structure and process, however, did not permit soldiers to strike. SANDU, a trade union organising soldiers, was registered in terms of the regulations and subsequently admitted to the Military Bargaining Council.

The proceedings of the Council did not progress smoothly. There were disputes over procedure, the agenda and the nature and scope of the bargaining process, particularly over policy. The union accused the Department of Defence of bad faith bargaining, in particular the use of unacceptable tactics such as delays, misrepresentations and negotiating without a mandate. The Department accused the trade union of being aggressive. It created unrealistic expectations among its members and threatened labour unrest when those expectations were not met. In particular, the trade union resorted to scathing and insulting personal attacks on the Department's collective bargaining representatives. Relations degenerated, the trade union threatened industrial action and the Minister suspended participation on the Bargaining Council.

This precipitated the first of the duty to bargain cases.[13] The union sought to compel the Minister and the Department to bargain with it in good faith relying on section 23(5)[14] and arguing that it conferred a constitutional duty to bargain, which the Minister and the Department had violated.

In the first application,[15] the High Court declined to hold that section 23(5) conferred a duty to bargain. The trade union subsequently brought several further applications based on the same legal claim but on different factual bases. These applications culminated in two judgments both holding section 23(5) to confer a constitutional duty to bargain. All three cases are on appeal to the Supreme Court of Appeal.

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9 1999 (6) BCLR 615, 1999 (4) SA 469 & (1999) 20 *ILJ* 2265 (CC).
10 Constitution of the Republic of South Africa 108 of 1996.
11 Act 44 of 1957 subsequently repealed by section 106 of the Defence Act 42 of 2002, except for section 104 and the First Schedule, being the Military Disciplinary Code.
12 See also section 55 of the Defence Act 42 of 2002 which came into operation on 2 June 2005.
13 See n 8 above.
14 Constitution of the Republic of South Africa 108 of 1996.
15 See n 8 above.

The reasoning engaged in all three cases turned on the text of section 23(5).[16] Judges Smit and Bertelsmann held in *SANDU (3)* and *(4)*[17] respectively, that the text of section 23(5) clearly imposed a duty to bargain. Judge Van der Westhuizen in *SANDU (2)*[18] held that the difference in wording between section 23(5) – 'the right *to engage* in collective bargaining' – and its predecessor in section 27(3)[19] – 'the right to bargain collectively' pointed to a distinction between a freedom and a right. The Court relied on 'academic authority'[20] to support that conclusion. That academic authority relied primarily on a textual analysis of the section and the voluntarism espoused by the ILO.[21]

Given the strong reliance on the ILO Conventions by the Constitutional Court in two recent cases,[22] the High Court could have made more of public international law and the ILO Conventions on Freedom of Association and Collective Bargaining to support the court's conclusion.[23] There are other arguments not referred to in the Court's decision that support its conclusion.

The *first argument* is that a positive right to bargain is not just a right – it is a policy regime that involves fundamental choices as to the form and level of collective bargaining. It commits a labour market to a collective bargaining regime centred on the workplace rather than at the level of industry. It requires a regulatory regime that requires court or tribunal determination of –

- who must bargain with whom – the threshold issues of representativeness;
- the bargaining constituency or unit;
- what may be bargained about – bargaining subjects; and
- the manner in which bargaining takes place (bargaining in good faith and the duty of fair representation).

The *second argument* is that the positive right to bargain collectively is not an element of the right in public international law. The ILO Convention 98 (which South Africa ratified in 1996) records the ratifying member's obligation in Article 4, which reads:

16 See n 6 above.

17 See n 7 above.

18 See n 8 above.

19 Constitution of the Republic of South Africa Act 200 of 1993. S 27(3) read 'Workers and employers shall have the right to organise and bargain collectively'.

20 Brassey and Cooper in Chaskalson and others *Constitutional Law of South Africa* (1998) at 30–30; Cheadle in Davis and others *Fundamental Rights in the Constitution: Commentary and Cases* (1997) at 232–5; Thompson and Benjamin *SA Labour Law* Vol I at AA1–13; Grogan *Workplace Law* (2001) at 288; and Brassey *Employment and Labour Law* Vol 3 at A1–8.

21 International Labour Organisation; established in 1919 of which South Africa was a founder member.

22 *NUMSA v Bader Bop (Pty) Ltd* 2003 (2) BCLR 182, [2003] 2 BLLR 103; (2003) 24 *ILJ* 305 and 2003 (3) SA 513 (CC) and *NEHAWU v University of Cape Town* 2003 (2) BCLR 154, 2003 (3) SA 1 & (2003) 24 *ILJ* 95 (CC).

23 For an extensive coverage of the subject see Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) at para 18.7.

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

The ILO Committee of Freedom of Association has glossed this as follows:

> Collective bargaining, if it is to be effective, must assume a *voluntary quality* and not entail recourse to measures of compulsion which would alter the *voluntary nature* of such bargaining.[24]

Where courts in comparative jurisdictions have derived a freedom to bargain collectively from the right to freedom of association, they have not deduced a positive right to compulsory bargaining. The European Court of Human Rights has consistently held that the right to form and join trade unions is not limited to association alone but extends to action in pursuit of the objects of the trade union:

> a trade union must be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard.

But it has shied away from deriving a positive duty to bargain from the freedom to have that voice heard. In *Wilson v UK*[25] the European Court of Human Rights held that, where the trade union had the right to strike, the absence of a legal obligation on employers to enter into collective bargaining did not constitute a violation of article 11 of the Convention of Human Rights and Fundamental Freedoms, 1950. An obligation to bargain compulsorily is not the only way that the goal of collective bargaining can be achieved.

The *third argument* is the text. The text differs from the stronger wording used in the interim Constitution which imposed the right to bargain collectively. As argued above the right to engage, imports a freedom rather than a positive right. This is supported by the second and third sentences of section 23(5).[26] Collective bargaining is constituted by a complex of rights and duties, processes and institutions. The object of the second sentence is to provide a clear indication that the inclusion of a right to engage in collective bargaining is not an invitation to constitutionalise the content of collective labour law. The inference is that the right is restricted to a freedom and that the forms, processes, institutions and levels are the subject matter for the legislature.

This argument is also consonant with the implicit approach taken in *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and the Minister of Labour*.[27] In that case, the majority of the Constitutional Court held that the right to freedom of association in section 18 and the right to join a trade union in section 23 of the Constitution included

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24 Freedom of Association *Digest* 1996 at para 845. See also the European Social Charter (Part II article 6)

25 [2000] IRLR 568.

26 See n 6 above.

27 2003 (2) BCLR 182, [2003] 2 BLLR 103, (2003) 24 *ILJ* 305 & 2003 (3) SA 513 (CC).

the right of employees to have their trade union represent them in individual matters.[28] This aspect of the right has no judicially enforceable remedy under the LRA for unrepresentative trade unions. The Court passed no comment on this but by interpreting the LRA so as to entrench the right of unrepresentative trade unions to strike in order to acquire organisational facilities, it implicitly endorsed the statutory scheme that constitutional 'rights' do not have to be judicially enforceable but may be enforceable in other ways – ie, in the area of labour law, through collective bargaining backed by the resort to industrial action.

Counsel for the trade union raised an important argument against this construction of section 23. Section 23 guarantees a carefully balanced package of rights, freedoms and duties related to labour relations. This package includes the right to strike. The right to strike is a powerful tool in the hands of workers to persuade their employer to bargain collectively. Since the military are prohibited from striking, the balance in section 23 is disturbed. In order to restore that balance, there should be a duty on the employer to participate in collective bargaining. It is not clear from the judgment whether this was an argument over the meaning of section 23 or an argument concerning the constitutionality of the regulations, which prohibited the right to strike.

As a limitations clause analysis, the argument has much to support it. It cannot however be sustained as a basis for constructing the meaning of section 23. In any event, there is a simple answer to the argument. The solution is not a constitutional duty to bargain but a right to refer disputes to arbitration. That is the appropriate remedy for limiting the right to strike[29] – not the imposition of a toothless duty to bargain.

But the most extraordinary point missed by judges and counsel is that there was never any need to resort to section 23(5) in order to find a duty to bargain. The duty flows from the constitution of the Military Bargaining Council established in terms of the General Regulations for the South African National Defence Force and Reserve.[30] Clause 5 of the Councils' Constitution provides that the objectives of the Council are to 'negotiate and bargain collectively to reach agreement on matters of mutual interest'.

If this is not sufficient, the Council is given the power to conclude collective agreements (clause 6) and clause 21 spells out the procedure for any party wishing 'to initiate negotiations for the amendment of an existing agreement or the conclusion of a new agreement' and if at the end of that procedure there is a deadlock the dispute is referred to the Military Arbitration Board, established under the regulations, for compulsory arbitration.

28 At para 34.

29 See para 574 of the *Digest*, which requires that 'restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings'.

30 GG 20376 20 August 1999.

There is no need to look for the duty to bargain in the Constitution. It already exists in the regulations and the Bargaining Council's Constitution.

4 EXTENSION OF COLLECTIVE AGREEMENTS

There are currently two cases in which the Minister's power to extend collective agreements of bargaining councils to non-party employers and employees is being challenged on grounds of constitutional invalidity.

The grounds of constitutional invalidity are that the extension of collective agreements to non-parties is an infringement of the right to freedom of association, the right to engage in collective bargaining, the right to choose a trade or profession and the right not to be deprived of property arbitrarily. Only one of the alleged grounds warrants attention and that is the limitation on the right to bargain collectively, in particular to bargain for less than the minimum wages prescribed in the extended agreement.

The justifiability of the limitation on the right to engage in collective bargaining depends very much on the justifications for sector level bargaining and the necessity of the extension mechanism for securing the integrity of sector level collective bargaining or its alternative (collective action). The right is also not absolutely abrogated – no bar is placed on joining the parties to the bargaining council and participating in collective bargaining through these institutions. Moreover provision is made for exemptions[31] which provide the space in which non-party employers can negotiate and conclude agreements different from the extended agreement.

5 THE CURRENT STATE OF SECTOR LEVEL BARGAINING[32]

Although a cascading effect of reform was expected with the implementation of the new LRA, the collective bargaining results have been disappointing. The sectoral nature of the bargaining councils remains fractured and piecemeal.

There are currently 57 councils registered with the Department of Labour, of which only 46 are functioning. There were 104 in 1983, 87 in 1992 and 80 in 1995. The decline in the number of councils ought not to be a matter of concern provided that the decline is associated with a concomitant consolidation. Godfrey, Maree and Theron attribute only part of this decline in numbers as a function of consolidation. It is clear from the number of employers and employees covered by some of the councils,[33] that they are not separately sustainable. And it is also clear from the

31 S 32(3)(e) of the Labour Relations Act 66 of 1995.

32 The data used in this section is drawn from the invaluable research done and contained in an unpublished paper: Shane Godfrey, Johan Maree and Jan Theron *Statutory Centralised Bargaining after the new LRA: A socio-legal examination of the bargaining council system and the challenges it faces*. Labour and Enterprise Project, University of Cape Town.

33 Nearly half of the councils cover 5000 employees or less. Only five councils in the private sector cover more than 100 000 employees.

councils being wound up that whole industries are being denuded of councils, particularly in building and the hospitality industries.

Notwithstanding an endeavour at NEDLAC to provide a broad goal of 32 sectors, little has been done by the trade union movement and the Department of Labour to achieve the consolidation of the different councils into single sector councils.

Of a working population of approximately ten million, only 2 337 721 employees are covered by bargaining councils. Over half[34] of those are in the public sector broadly defined: public service, local government and parastatals.[35] Add the three other large councils (Metal,[36] Motor[37] and Clothing)[38] and over 2 million employees are covered by effectively ten councils. The balance of approximately 336 564 employees are covered by 42 councils. The figures demonstrate that approximately 20% of the workforce is covered by bargaining councils but if one removes the public sector then only 10% of the workforce in the private sector (approximately just under 9 million) is covered by bargaining councils.

The President in his state of nation address announced the Government's intention to exempt small, medium and micro-enterprises from central bargaining.[39] It is not quite clear what is intended but the fact is that over half the current bargaining councils cover enterprises that on average employ less than 20 employees; ie in the micro and very small range. Only five councils in the private sector have average firm sizes in medium to large enterprises; ie over 50 employees. The implications for the sustainability of these councils is obvious.

It appears though, despite complaints, that the exemptions process is working reasonably well. Approximately 77% of approximately 14 500 exemptions were granted in 2003, approximately 1% partially granted, about 5% under consideration at the time the statistics were taken and approximately 17% refused. Most councils have made provision for representation of small businesses on the council and many provide for representation on exemption boards.

34 Approximately 1 461 000 employees are covered by the public sector councils.

35 Transnet Bargaining Council covers about 185 000 employees.

36 Approximately 270 000 employees.

37 Approximately 154 000 employees.

38 Approximately 117 000 employees.

39 'Based on the review of the regulatory framework as it applies to small, medium and micro-enterprises, before the end of the year, government will complete the system of exemptions for these businesses with regard to taxes, levies, as well as central bargaining and other labour arrangements, enabling these to be factored into the medium-term expenditure cycle.' The review is the SBP report on Counting the Costs of Red Tape. It is worth noting an important caveat to the report on page 6: 'It is important to note that we have not attempted to measure the benefits of regulation. Our estimates of compliance costs are gross of the benefits accruing to individual firms or to society in general. Clearly, the benefits of regulation are often substantial, but these are usually far better understood than their costs. It is therefore appropriate to focus research effort, at least in the first instance, on regulatory costs.'

6 CONCLUSION

The collective bargaining model espoused by the LRA is under attack. It is threatened with court challenges to its constitutionality. There is no concerted effort on the part of the Government or the trade union movement to consolidate and deepen sector level bargaining arrangements. Indeed the Government is considering a blanket exemption of small business from sectoral bargaining agreements, the consequence of which will be to further weaken the system of sectoral bargaining. The trade unions continue to conclude detailed collective agreements at sectoral level rather than framework agreements that are more appropriate to that level of bargaining. Detailed sectoral agreements not only ferment resistance on the part of employers but they effectively disempower union organisation in the workplace.

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