The Role of Collective Bargaining in Business Sustainability and the Future of Work: A South African Perspective

by

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Declaration

I declare that 'The role of collective bargaining in business sustainability and the future of work: A South African perspective' is my work. I have used the footnote convention for citation and referencing for the work by others. In this way, all contributions to and quotations in this thesis from other people's work(s) have been attributed, cited, and referenced.

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Abstract

Despite Africa's significant legislative and institutional framework developments, collective bargaining remains underdeveloped. As a contribution to the theoretical discourse on collective bargaining in South Africa, this thesis addresses the question: In what ways can collective bargaining support the viability of corporations while securing employment in the changing world of work? It suggests a need to look into various aspects that contribute to business sustainability within the collective bargaining landscape, which is adequately linked to job security, growth, the development of businesses, and strengthening industrial relations. The study adopted a qualitative research method to outline and combine such aspects using doctrinal, open-ended research questionnaires (based on desktop research) and comparative research methods. The thesis further contributes to an understanding that employers and employees have conflicting interests in employment relations.

The thesis argues that while businesses seek to make returns, employees also seek fair wages to satisfy their human needs. The findings further show that collective bargaining plays a vital role in the sustainability of a business by negotiating in good faith and recognising and reconciling various parties' interests. Additionally, collective bargaining can be used by employers and employees to ease the movement of skills development in the changing world of work in which the partnership between humans and machines is inevitable because the growing adoption of artificial intelligence will shape the future of work. The purpose of this thesis is to give clarity as to how collective bargaining can continue to serve its purpose in the changing world of work. To this end, the thesis is valuable in that it contributes to a deeper understanding of other relevant aspects of collective bargaining in the world of work.

Keywords

Business sustainability, collective agreement, collective bargaining, company, employee, employer, employers' organisation, stakeholder, trade union.

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List of abbreviations and acronyms

4IR	4th Industrial Revolution
ACAS	Advisory, Conciliation and Arbitration Service
AI	Artificial Intelligence
ALI	African Leapfrog Index
AMCU	Association of Mineworkers & Construction Union
AMWU	African Mine Workers' Union
ANC	African National Congress
ATM	Automated Teller Machines
BATNA	Best Alternative to a Negotiated Agreement
BCEA	Basic Conditions of Employment Act 75 of 1997
BLLR	Butterworths Labour Law Reports
CB	Collective Bargaining
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CFA	Committee on the Freedom of Association
COSATU	Congress of South African Trade Unions
CSR	Corporate Social Responsibility
DHET	Department of Higher Education and Training
DPRU	Development Policy Research Unit
ECA	Employment Contracts Act (New Zealand)
ECCAWUSA	Entertainment Catering Commercial and Allied Workers Union of South Africa
EEA	Employment Equity Act 55 of 1998
EIIP	Employment Intensive Investment Programme
EPWP	Expanded Public Works Programme
ERA	Employment Relations Act
FAWU	Food and Allied Workers Union
FMCS	Federal Mediation and Conciliation Service
FTE	Full Time Equivalent
FWA	Fair Work Act (New Zealand)
GDP	Gross Domestic Product

GFB	Good Faith Bargaining
GPSSBC	General Public Service Sector Bargaining Council
IBB	Interest-Based Bargaining
IC	Industrial Court
ICA	Industrial Conciliation Act
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IMSSA	Independent Mediation Service of South Africa
IoT	Internet of Things
IT	Information Technology
LAC	Labour Appeal Court
LC	Labour Court
LMRA	Labor-Management Relations Act (USA)
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
MAWU	Metal & Allied Workers Union
NALEDI	National Labour and Economic Development Institute
NDP	National Development Plan
NEDLAC	National Economic Development and Labour Council
NLRA	National Labor Relations Act (USA)
NLRB	National Labor Relations Board (USA)
NSA	National Skills Authority
NSF	National Skills Fund
NUFBWSAW	National Union of Food Beverage Wine Spirits & Allied Workers
NUM	National Union of Metal Workers
NUMSA	National Union of Metalworkers of South Africa
OECD	Organisation for Economic Cooperation and Development
PABO	Protected Action Ballot Order
POPCRU	Police and Prisons Civil Rights Union
PSCBC	Public Service Co-ordinating Bargaining Council
RDP	Reconstruction and Development Programme
RGA	Regulation of Gatherings Act
RLA	Railway Labor Act (USA)
SA	South Africa

SACCAWU	South African Commercial, Catering and Allied Workers Union
SACTU	South African Congress of Trade Unions
SADC	Southern African Development Community
SAMWU	South African Municipal Workers' Union
SANDF	South African National Defence Force
SANDU	South African National Defence Union
SATAWU	South African Transport and Allied Workers Union
SCA	Supreme Court of Appeal
SDA	Skills Development Act
SDL	Skills Development Levy
SEIFSA	Steel and Engineering Industries Federation of Southern Africa
SETA	Sector Education and Training Authority
TAWUSA	Transport and Allied Workers Union of South Africa
TVET	Technical Vocational Education and Training
UAMAWU	United African Motor and Allied Workers Union
UK	United Kingdom
ULP	Unfair Labour Practices
US/USA	United States/United States of America

Table of contents

Chapter 1: Introduction

1.1. Introduction to the study

Globally, a substantial literature on the role and importance of collective bargaining has been posed adequately by various scholars. Despite significant developments in legislative and institutional frameworks of collective bargaining in Africa, the process remains underdeveloped.[1] According to the Organisation for Economic Cooperation and Development (OECD), collective bargaining must be revamped to prevent rising labour market inequalities in the rapidly changing world of work.[2] In this study, the author provides a reflective understanding of how collective bargaining contributes to business sustainability by looking into good faith bargaining, recognition, and reconciliation of parties' conflictual interests and its role in relation to technology as the means to secure jobs.

The principal question is: How can collective bargaining support corporations' viability and employment security in the changing world of work? The following are the secondary questions guiding this fundamental question:

(a). What success stories led to implementing the principle of good faith in collective bargaining in South Africa, and what can South Africa learn from other countries concerning the requirement of good faith in collective bargaining?

(b). Does recognition of parties' interests in the process of collective bargaining have positive benefits for employers and employees, and how can these conflicting interests be reconciled?

(c). Does collective bargaining have a place in the world of work inclined by technology and does technology threaten the future of work?

The thesis focuses on collective bargaining, regulated by statutory provisions, collective agreements, and court principles.[3] There is a need for innovative contributive mechanisms that can assist in redefining, not to revolutionise collective bargaining entirely, but to cater to its purpose in the changing world of work. Employees seek recognition of their collective

[1] Geoff Wood & Chris Brewster *Industrial Relations in Africa* (2007). For an overview of collective bargaining developments in Africa see Susan Hayter 'International comparative trends in collective bargaining' (2010) 45 (4) *Indian Journal of Industrial Relations* (2010) at 596–608. See also International Labour Organization *Collective Bargaining: Negotiating for Social Justice High-level Tripartite Meeting on Collective Bargaining* Geneva (2009), available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_172415.pdf*, accessed on 01 April 2020.

[2] S Cazes, A Garnero, S Martin et al *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work* (2019).

[3] Fanie Van Jaarsveld, Anton Bakker and Len Dekker 'Labour Law', 3 ed Volume 24(1) para 428.

interests, as industrial relations require ongoing administration, negotiation, and adjustments as the incomplete nature of the employment contract opens the door for conflict, misunderstanding, and opportunistic behaviour as both parties seek to exploit contractual gaps and holes to their advantage.[4]

1.2. The nature and relevance of collective bargaining

Labour disputes may fall within disputes of interest or disputes of rights. Collective bargaining deals with a wide variety of disputes which fall within the ambit of 'matters of mutual interest'.[5] Disputes concerning mutual interests arise out of issues such as demands for higher wages, which may also include improved conditions of employment or a change to an existing collective agreement.[6]

The LRA does not provide for the term 'matters of mutual interest', however, it mentions it in other section 213 definitions. [7] It is not necessary to define the term 'matters of mutual interest' with any precision, but it required, in broad terms, no more than that the issue that is the subject of any term of any collective agreement, referral for conciliation or the subject of any strike or lock-out be work-related, or it must have concerned the employment relationship.[8]

The term is broad enough to include disputes of interest or disputes of right inter alia;[9] such matters include issues relating to the terms and conditions of employment, such as employee remuneration, service benefits, and compensation.[10] However, it has been found that a dispute

[4] Bruce E Kaufman *Theoretical Perspectives on Work and the Employment Relationships* (2004) at 55. See also MM Botha 'The Different Worlds of Labour and Company Law: Truth or Myth?' [2014] PER 56.
[5] MM Botha, In Search of Alternatives or Enhancements to Collective Bargaining in South Africa: Are Workplace Forums a Viable Option, 18 *Potchefstroom Elec. L.J.* 1812 (2015), available at www.scielo.org.za/pdf/pelj/v18n5/20.pdf, accessed 13 July 2022.
[6] Davis D and Le Roux M 'Changing the Role of the Corporation: A Journey Away from Adversarialism'2012 Acta Juridica 306-325.
[7] It appears in both definitions of a strike and collective agreement. See also section 134 of the LRA and the definition of a lock-out.
[8] *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA and Others* [2014] ZALCJHB 159; [2014] 9 BLLR 923 (LC); (2014) 35 ILJ 3241 (LC) para 17 (*Vanachem*). Also referred in *Department of Home Affairs & another v Public Servants Association & others* [2017] ZACC 11; (2017) 38 ILJ 1555 (CC); 2017 (9) BCLR 1102 (CC) para 7.
[9] See *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* [2013] ZALAC 3; (2013) 34 ILJ 1120 (LAC); [2013] 5 BLLR 434 (LAC). The term 'matter of mutual interest' is often erroneously used as a synonym for a dispute of interest, whereas disputes of mutual interest may be either disputes of rights or disputes of interest (*Air Chefs (Pty) Ltd v SA Transport & Allied Workers Union & others* (2013) 34 ILJ 119 (LC) para 15).
[10] Botha op cit note 5.

of right cannot be resolved as if it was a dispute of interest by resorting to industrial action.[11] In addition, it serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute-resolution mechanisms, and matters which may legitimately form the subject of a strike or lock-out.[12] It must be interpreted literally to mean any issue that concerns employment,[13] calculated to promote the well-being of the trade concerned.[14] In some cases, it has been used when employees demand an equity shareholding in their employer.[15]

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[11] *Mawethu Civils (Pty) Ltd and another v National Union of Mineworkers and others* (2016) 37 ILJ 1851 (LAC), paragraph 14. In *Gauteng Provinsiale Administrasie v Scheepers and Others* [1999] ZALAC 29, para 8 the Labour Appeal Court (LAC) held as follows regarding disputes of right:
'There is a valuable collection of authorities on what is to be comprehended under the notion of dispute of right in *Mineworkers' Union & another v AECI Explosives and chemicals Ltd, Modderfontein Factory* [1995] 3 BLLR 58 (IC). The discussion shows that, by and large, *disputes of right concern the application or interpretation of existing rights*. Generally speaking, *a dispute relating to proposals for the creation of new rights or the diminution of existing rights is a dispute of mutual interest*. *Such disputes are ordinarily to be resolved by collective bargaining*. See also: *Bester Homes (Pty) Ltd v Cele & Others (1992) 13 ILJ 877 (LAC)* at 886 D – H; *Hlope v Transkei Development Corporation Ltd* (1994) 15 ILJ 207 (IC(TK). The PSLRA defined 'matters of mutual interest' to mean, inter alia, terms and conditions of employment, employee compensation, remuneration and service benefits.' Since a rights dispute must be one about a right or rights, the applicants before the industrial court were obliged to show what that right was and where it was located. It could be located in statute, in a collective agreement or in a contract of employment or . . . under the 1956 Labour Relations Act.'
Similarly, the LAC in *HOSPERSA and another v Northern Cape Provincial Administration* the court held that:
[10] A dispute of interest *should be dealt with in terms of the collective bargaining* structures and is therefore not arbitrable.
[11] 'Broadly speaking, *disputes of right concern the infringement*, application or *interpretation of existing rights embodied in a contract of employment, collective agreement or statute*, while *disputes of interest (or "economic disputes") concern the creation of fresh rights*, such as higher wages, modification of existing collective agreements, etc. *Collective bargaining, mediation* and, as a last resort, *peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests*, while *adjudication is normally regarded as an appropriate method of resolving disputes of right*.' Rycroft & Jordaan A Guide to SA Labour Law (Juta 1992) at 169. (*HOSPERSA* op cit note 11 paras 10-11. See also *Apollo Tyres op cit note 9* para 33 and it was also not followed in paras 50-51)

[12] See the case of *Department of Home Affairs* op cit note 8, para 7 citing *Vanachem* op cit note 8, para 17. Similarly, in relation to strike see *Pikitup (Soc) Limited v SAMWU and Others* [2013] ZALAC 33; [2014] 3 BLLR 217 (LAC); (2014) 35 ILJ 983 (LAC) para 56. The matters mentioned here are not an exhaustive list. Matters of mutual interest include health and safety issues, dismissal of workers, and negotiation of disciplinary and retrenchment procedures (Mischke 2001 Contemporary Labour Law 89). They can also include proposals for the creation of new rights or the diminution of existing rights (*Gauteng Provinsiale Administrasie v Scheepers & others* (2000) 21 ILJ 1305 (LAC) para 8). See also *Gauteng Provinsiale Administrasie* op cit note 11, para 12 on disputes of interest which can be resolved by the mechanisms of collective bargaining.

[13] *De Beers Consolidated Mines Ltd v CCMA and Others* [2000] 5 BLLR 578 (LC); [2000] JOL 6265 (LC) para 16.

[14] See *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108 at 115 (*Rand Tyres*). Also applied in *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union & others* (1) (1997) 18 ILJ 716 (LC) at 725D-E and considered most recently in *Vanachem* op cit note 8 para 10 (*Ceramic Industries*).

[15] *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union & others* (2009) 30 ILJ 1099 (LC) para 73. This case was recently considered in the case of *Vanachem* op cit note 8, para 13. Although *Itumele Bus Lines (Pty) Ltd* dealt specifically with a demand made by employees in relation to equity shareholding, not all demand cases will be dealt with in the same manner. See the distinguished case of *Johannesburg Metropolitan Bus Services SOC Ltd v Democratic Municipal & Allied Workers Union & others* (2020) 41 ILJ 217 (LC) para 4. Thus, in *Vanachem* the court was not concerned with the true content of demands or whether they were inchoate but whether they could be construed as matters of mutual interest.

Whatever 'can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them'.[16] The determining factor is whether such a matter can be dealt with through collective bargaining, and it will not include political issues or demands against the State except if the State is acting as an employer.[17] Below are the characteristics:

- it must relate to the employment relationship between the employer and employee;
- it must create new or destroy existing rights in the employment relationship; and
- it must be a matter in the interest of both employer and employee and must concern the common good of the enterprise.[18]

The emergence of collective bargaining can be traced as far back as 1890.[19] In South Africa, collective bargaining has been underlined by the legacy of deep adversarialism between organized labour and employers, the recent struggles of the trade union movement to achieve recognition, and continued wariness on the part of unions against real or perceived attempts by employers to undermine their hard-won status.[20] From the gold and diamond rush to introducing protective labour legislation, trade unions, safe working conditions, and basic worker protections, workers were encouraged to organise and collaborate to demand better working conditions.[21]

The dual system under the apartheid regime saw collective bargaining reserved for White, Coloured, and Indian workers only.[22] Despite this, labour law and collective bargaining in South Africa have undergone significant developments. However, many workers' expectations in the post-apartheid have not yet been realised. Employees expected liberation from exploitation, social reconstruction, economic development, and improvement in their lives; however, these are yet to be fulfilled. [23]

[16] *Rand Tyres* op cit note 14.
[17] Mischke 2001 *Contemporary Labour Law* 89 and Manamela 2012 SA *Merc LJ* 111.
[18] *Vanachem* op cit note 8, para 14. Although this case dealt specifically with a demand made by employees in relation to equity shareholding, not all demand cases will be dealt with in the same manner. See the distinguished case of *Johannesburg Metropolitan* op cit note 15, para 4. Thus, in *Vanachem* the court was not concerned with the true content of demands or whether they were inchoate but whether they could be construed as matters of mutual interest.
[19] Beatrice Potter *The Co-operative Movement in Great Britain* (1891).
[20] Darcy Du Toit 'Collective Bargaining and Worker Participation' (2000) 21 *ILJ* at 1544.
[21] Marié McGregor, Adriette Dekker, Mpfariseni Budeli-Nemakonde et al *Labour Law Rules!* (2017).
[22] Shane Godfrey, Jan Theron & Margareet Visser *The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining*' (2007).
[23] Buhlungu Sakhela *A Paradox of Victory: COSATU and the Democratic Transformation in South Africa* (2010).

In South Africa, the right to bargain collectively has been recognised in law since 1983.[24] The Constitution of the Republic of South Africa, 1996 (Constitution) provides a foundation for a new labour dispensation in which three basic collective rights have been enacted, including the right to fair labour practices,[25] the right to collective bargaining,[26] and the right to strike.[27] The Constitutional Court once held that the 'entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment.[28]

Collective bargaining is one of many processes that combine to make up the field of employment relations study.[29] It is grounded on various theories: the marketing theory, the theory of Leiserson, and the joint management theory.[30] Its primary purpose is the regulation

[24] *United African Motor and Allied Workers Union & Others v Fodens SA (Pty) Ltd (1983) 4 ILJ 212 (IC)*1983 ILJ 212 (IC) (*Fodens*); *East Rand Gold & Uranium Co v NUM* 1989 ILJ 683 (LAC) (*East Rand Gold*); *NUM v East Rand Gold & Uranium* Co 1991 ILJ 1221 (A) (*NUM* 1991) and *NUM v Buffelsfontein Gold Mining Co* 1991 ILJ 346 (IC). Since 1994, this right had been recognised by our courts as well as various authors. For example, see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA* 108 of 1996 1996 ILJ 821 (CC) (regarding the right of individual employers to bargain collectively); *SANDU v Minister of Defence* 2003 ILJ 2101 (T); contra: *SANDU v Minister of Defence* 2003 ILJ 1495 (T); *SANDU v Minister of Defence; Minister of Defence v SANDU* 2006 11 BLLR 1043 (SCA); Vettori 2005 *De Jure* 382; Steenkamp et al 2004 *ILJ* 953; Van Jaarsveld 2004 *De Jure* 349, 2006 *De Jure* 655, 2007 *THRHR* 299; Fudge 2008 *ILJ* (UK) 25; Budeli 2010 *Obiter* 25 and Theron 2015 *ILJ* 849. This right was also recognised in section 27(3) (2) of the Constitution of the RSA 200 of 1993 and as noted above, currently in the Constitution of 1996.

[25] Section 23(1) of the Constitution.

[26] Section 23(5).

[27] Section 23(2)*(c)*.

[28] *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (2) BCLR 182; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) para 13.

[29] Nel P S *South African Employment Relations* 4 ed, 2002 at 134. Pretoria: Van Schaik.

[30] For a broad overview of these theories, see Piron *Collective Bargaining in South African Labour Law* 134, 1978 THRHR 183 and A Rycroft & B Jordaan *A Guide to South African Labour Law* 2 ed (1992) at 117. In respect of the marketing theory, collective bargaining is regarded as the purchase and sale of merchandise: thus to say, employees sell their labour through their representative (trade union), and the conditions of employment are determined collectively (Flanders 1968 *British Journal of Industrial Relations* 18). The Leiserson theory provides for a collective agreement which is regarded as the constitution of the industrial government of the region which it covers, therefore, collective bargaining consists of the process by which a constitution is drawn up (1970 Institute for Labour Studies Bulletin no 6 IAO 161). Lastly is the joint management theory which is based on the view that trade unions are participants in the management policy of an undertaking with regard to those aspects of decision-making that concern collective bargaining (Fanie Van Jaarsveld et al op cit note 3 at 608). Thus, despite management being the issuer of instructions, trade unions still play a huge role in that they must be consulted and must consent thereto (For the theories of Flanders and Piron, see Piron Collective Bargaining in SA Labour Law 148. See also Jordaan 1989 *ILJ* 791 regarding the nature of the philosophy of industrial pluralism).

of terms and conditions of employment[31] and can also act as an avenue for dispute resolution.[32] The aim behind this is to achieve a temporary reconciliation of management and labour's conflicting economic interests.[33] It is characterised by commonality and conflict.[34]

In addition, collective bargaining is established in respect of the right to organise:[35] a universal human right.[36] The Labour Relations Act 55 of 1996 (LRA) provides for collective bargaining to develop freedom of association.[37] Collective bargaining takes place at various levels. It may take place at a plant level, company (or enterprise) level, where there is more than one plant belonging to the same company or enterprise, and sectoral level, where there are different employers in the same industry or sector.[38] Its importance is explained by the fact that it has value for employers and workers. For employers, as a means of maintaining industrial peace,

[31] Basson *et a*l Essential Labour Law 5 ed 273. See also Davis 1990 AJ 45; Van Niekerk *et al* Law@Work 339; *East Rand Gold op cit note 24*; *SANDU v Minister of Defence* 2003 ILJ 2101 (T); *SANDU v Minister of Defence* 2007 ILJ 1909 (CC); *POPCRU v Ledwaba* 2014 ILJ 1037 (LC); Steenkamp et al 2004 *ILJ* 944; Du Toit 2007 *ILJ 1*405; Van Jaarsveld 2008 *THRHR* 12.

[32] *Essential Labour Law*, Volume 2: Collective Labour Law 3 ed 2002. See also Harrison D S *Collective Bargaining Within the Labour Relationship: In a South African* (unpublished B.Com. Dissertation, North-West University, 2004) page 14.

[33] Rycroft and Jordaan op cit note 30.

[34] The first is concerned with the common interests shared by both the employer and its employees. Thus, the benefits of the employment relationship are shaped by the common interests shared amongst the parties which can grow and sustain the business. Thus to say, both parties to the labour relationship have the organisation's well-being and profitability at heart, and for this to take place, the parties are forced to sort out their differences (Harrison op cit note 32 page 55). However, the latter contends that commonality of interest may override conflict. According to *Bendix*, this could occur when the general economy of a country or the future of the enterprise is threatened, where employees share in the decision-making process or where moral principles dictate the relationship (Bendix S *Industrial relations in South Africa* 4 ed 2001 at 234. Lansdowne: Juta). In such instances, the employer-employee relationship becomes more cooperative because both parties are aiming at the common good of the company rather than settling their opposing interests (Harrison, supra page 56). The second characteristic is focused on the conflict itself. As will be seen below in chapter 4, the parties also have different conflicting interests, with which each wants to pursue their individual goal to satisfy their interests. For conflict to be contained, there is a need to encourage trade unionism and advocate for collective bargaining as the appropriate way of resolving conflicts of interest (Harrison, supra page 56).

[35] Jelle Visser, Susan Hayter & Rosina Gammarano 'Trends in collective bargaining coverage: Stability, erosion or decline?' (2015) 1 *Issue Brief Labour Relations and Collective Bargaining* at 1.

[36] Universal Declaration of Human Rights art 23.4. The right is captured in the Right to Organise and Collective Bargaining Convention, 1949 (no. 98) art 4. On a national level, see also ss 18 and 23 (2) the Constitution. In addition, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (no. 98) plays a huge role when it comes to collective bargaining and the right to organise.

[37] Du Toit D'Arcy, Roger Blanpain & Frank Hendrickx *Labour Law and social Progress: Holding the Line or Shifting the Boundaries*? (2016) at 317.

[38] Labour Relations Act 66 of 1995. In a nutshell, firstly, a group of organised employees in a specific sector could be conjoined by means of trade unions with employers' organisations in a bargaining council; secondly, at the decentralised enterprise level an employer and his or her employees may establish a workplace forum of which the members must be elected by the employees (Fanie Van Jaarsveld et al op cit note 3 at 609). In a nutshell, the levels are as follows centralised bargaining level, company level, plant level and sectoral determination & coordination. However, the purpose of this study is not to dwell on these various levels, however, reliance has mostly been made to sectoral bargaining.

and for workers, as a means of maintaining certain standards of distribution of work, rewards, and employment stability.[39]

Chapter III, part A of the LRA, provides for collective bargaining and various organisational rights.[40] Organisational rights support a system of collective bargaining, where a union (or unions) engage or negotiates with the employer (or employers) over terms and conditions of employment and other matters of mutual interest.[41] These rights are aimed at assisting trade unions in establishing a foothold within the workplace.[42] The division of the rights is in this way: sections 12, 13, and 15 allow the sufficiently representative union to have access to the workplace, its subscription levies deducted, and time off for its officials; and once majority status is achieved, the union becomes entitled to appoint union representatives and to access of information courtesy of sections 14 and 16.[43] It should also be mentioned that the LRA 'is predicated upon the principle of majoritarianism'.[44] Similarly, the principle of majoritarianism states that the will of the majority prevails over that of the minority.[45] Chapter 2 provides a broad overview of the principle of majoritarianism.[46]

Among the LRA's objectives is promoting and facilitating collective bargaining at the workplace and sectoral levels. In this way, the Act provides a framework within which employees and their trade unions, employers, and employers' organisations can collectively

[39] Paul Davies and Mark Freedland, Kahn-Freund's Labour and the Law (Stevens 1983)69.
[40] Trade union access to workplace (s 12), deduction of trade union subscriptions or levies (s 13), trade union representatives (s 14), leave for trade union activities (s 15) and disclosure of information (s 16).
[41] CCMA 'Organisational Rights', available at https://uat.ccma.org.za/wp-content/uploads/2022/02/Organisational-Rights-Info-Sheet-2021-01.pdf, accessed on 11 July 2022.
[42] Stephen Kirsten, Granting Organisational Rights to a Trade Union, 09 March 2017.
[43] *Johanette Rheeder*, Organisational rights and the right to bargain, available at https://www.jrattorneys.co.za/south-african-labour-law-articles/collective-rights-and-strikes/organisational-rights-v-the-right-to-bargain.html, accessed on 11 July 2022.
[44] *Association of Mineworkers and Construction Union and Others v Royal Bafokeng Platinum Ltd and Others* (2018) 39 ILJ 2205 (LAC) para 19. In casu, the court held that the system of majoritarianism permeates our labour relations dispensation. The system which is a conscious policy choice that the legislature made runs through the Act. This policy choice was made in order to facilitate orderly collective bargaining, minimise union rivalry and to foster democratisation of the workplace. See also *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC); [2001] 1 BLLR 25 (LAC) para 19 and application of *Kem-Lin Fashions* in the cases of *Association of Mineworkers & Construction Union & others v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co (Pty) Ltd & others* (2016) 37 ILJ 1333 (LAC) of para 106 and *Association of Mineworkers & Construction Union & others v Royal Bafokeng Platinum Ltd & others* (2018) 39 ILJ 2205 (LAC) para 19.
[45] According to *Association of Mineworkers & Construction Union & others v Royal Bafokeng Platinum Ltd & others* (2018) 39 ILJ 2205 (LAC) para 21 this principle was also underscored in *Transport and Allied Workers Union of South Africa v PUTCO Limited* [2016] ZACC 7; (2016) 37 ILJ 1091 (CC); [2016] 6 BLLR 537 (CC); 2016 (4) SA 39 (CC); 2016 (7) BCLR 858 (CC).
[46] See chapter on the discussion of the case of *Professional Transport and Allied Workers Union obo members / Professional Aviation Service* [2016] 4 BALR 421which dealt with the issue of obtaining organisational rights.

bargain to determine wages, terms and conditions of employment, and other matters of mutual interest;[47] and to promote collective bargaining at the sectoral level and employee participation in decision-making in the workplace.[48] Accordingly, bargaining councils are central to this statutory imperative.[49] The term bargaining council is defined in section 213 of the LRA to mean a bargaining council referred to in section 27 and includes, in relation to the public service, the bargaining councils referred to in section 35.

A bargaining council consists of representatives of one or more registered trade unions and one or more registered employers' organisations.[50] The bargaining council system manifests the policy objective of establishing collective bargaining (self-government) at a sectoral level within a broad framework of labour relations.[51] Therefore, collective bargaining is based concretely within this system on a formal, organised basis, in which registered trade unions and employers' organisations are bound together voluntarily as bargaining parties in bargaining councils, which serve as co-ordinating bargaining entities at sectoral level.[52] The LRA provides for the establishment, power and functions, registration, and constitution of bargaining councils in sections 27, 28, 29, and 30.

The main function of a bargaining council is to maintain labour harmony in the sector over which it exercises jurisdiction through collective agreements in respect of conditions of employment and, whenever disputes arise between employers and employees, as well as to resolve them to the satisfaction of both parties.[53] Its functions are multifarious by nature.[54]

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[47] Section 1*(c)*(i) of the LRA. See also *Kem-Lin Fashions* op cit note 44, para 17.

[48] Section 1*(d)*(ii) of the LRA. See also See also *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* where the Constitutional Court held that the Act sought to provide a framework whereby employers and employees and their organizations could partake in collective bargaining and the formulation of industrial policy and that it sought to promote orderly collective bargaining with an emphasis on bargaining at sectoral level ,employee participation in decisions in the workplace and the effective resolution of disputes and *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3; (2017) 38 ILJ 831 (CC); 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC) para 25

[49] Fanie Van Jaarsveld et al op cit note 3, para 514.

[50] Section 27(1) of the LRA. See also *AMCU and Others v Chamber of Mines of South Africa and Others* op cit note 48.

[51] Fanie Van Jaarsveld et al op cit note 3 at 514.

[52] *National Police Service Union v National Negotiating Forum* 1999 *ILJ* 1081 (LC) and *Free Market Foundation v Minister of Labour and Others* [2016] ZAGPPHC 266; (2016) 37 ILJ 1638 (GP); [2016] 3 All SA 99 (GP); 2016 (4) SA 496 (GP); [2016] 8 BLLR 805 (GP) para 11. See also Fanie Van Jaarsveld et al op cit note 3, para 514. See also *National Police Service Union v National Negotiating Forum* 1999 ILJ 1081 (LC).

[53] The primary functions of bargaining councils were explained in *Free Market Foundation* op cit note 52, para 12. See also section 50 (2) of the LRA.

[54] See section 28 of the LRA and the case of *ICBI v Transnet Industrial Council* 1991 *ILJ* 69. See also Fanie Van Jaarsveld et al op cit note 3 at 517.

Although this is not an exhaustive list,[55] other functions include concluding agreements,[56] enforcing collective agreements,[57] and preventing and resolving labour disputes.[58] Once a bargaining council is registered, the legal effect will be given to the provisions of its constitution, which sets out the rules by which the parties thereto have agreed to be bound.[59] The constitution of a bargaining council is regarded as an enforceable collective agreement.[60] Moreover, the bargaining council is responsible for monitoring and enforcing compliance with such an agreement.[61] In addition, if the parties reach a consensus concerning existing, amended, or new conditions of employment, the collective agreement is enforceable.[62]

The overall growth in the number of workers covered by bargaining councils and the trend for councils to become bigger might suggest that sectoral bargaining is strengthening- a perception that was encouraged by the proposed establishment of a bargaining council for the mining

[55] For more functions see section 28(1)(e)-(l)of the LRA.
[56] Section 28(1)(a) of the LRA. See also *S v Allied Steel* 1976 4 SA 164 (RA); *SA Diamond Workers' Union v Master Diamond Cutters' Association of SA* 1982 ILJ 87 (IC); *Consolidated Woolwashing & Processing Mill v President, Industrial Court* 1987 ILJ 79 (D); *MIBC v Wolseley Panel Beaters* 2000 ILJ 2132 (BCA); *Lloyd v CCMA* 2001 ILJ 1832 (LC); *BCAWU v Kentz* 2011 ILJ 506 (BCA) (collective agreement regarding the solution of disputes); *PCASA v NUMSA* 2015 ILJ 256 (LC) and *Plastics Convertors Association of SA v NUMSA* 2016 ILJ 2815 (LAC) (establishment of a negotiating forum).
[57] Section 28(1)*(b)* of the LRA. See also *NIC Printing & Newspaper Industry v Copystat Services* 1980 1 All SA 42 (W); 1980 3 SA 631 (W); *BCCI, KwaZulu-Natal v Sewtech CC* 1997 *ILJ* 1355 (LC); *Kem-Lin Fashions CC v Brunton* 2000 *ILJ* 1357 (LC); *Kem-Lin Fashions op cit note 44*; *MIBC v COFESA* 2001 *ILJ* 556 (BCA); *CAPES v MIBC* 2015 *ILJ* 137 (GP) (statutory powers); *Rukwaya v Kitchen Bar Restaurant* 2016 *ILJ* 1466 (LC).
[58] Section 28(1)(c) read with s 51 of the LRA. See also *UAAWUSA v Minibus* 1985 ILJ 265 (IC); *Photocircuit* op cit note 58; *BAWU v Prestige Hotels CC* 1993 ILJ 963 (LAC); *Mandhla v Belling* 1997 12 BLLR 1605 (LC); *Seardel Groups Trading v Andrews* 2000 10 BLLR 1219 (LC); *Softex Mattress v PPWAPU* 2000 12 BLLR 1402 (LAC) (powers and conciliation functions); *Tao Ying Metal Industry v Pooe* 2007 ILJ 1949 (SCA); *Mokoena v Mittal Steel SA* 2007 ILJ 1391 (BCA); *Samancor Chrome v MEIBC* 2011 ILJ 1057 (LAC); *NUM v Samancor* 2011 ILJ 1618 (SCA); *Langa v Skyline Global Logistics* 2014 ILJ 1584 (LC) (confidentiality of proceedings); *NUMSA v J & L Lining Consultants* 2015 ILJ 2954 (BCA) (accreditation); *CTP v Mphaphuli* 2015 ILJ 1042 (LC) (interpretation of settlement agreement); *UASA v Hulamin* 2016 ILJ 1291 (BCA) (wage agreement dispute); *SACTWU v Wynta Designs* 2016 ILJ 1504 (BCA) (settlement agreement made arbitration award).
[59] Fanie Van Jaarsveld et al op cit note 3 at 527.
[60] Ibid at 520. See also *NBC for the Road Freight Industry v Snyman* 2004 8 BLLR 784 (LC) para 4–5; *Van Tonder v Pienaar* 1982 2 SA 336 (SE) 341B–342A; *Mall (Cape) v Merino Ko-operasie Bpk* 1957 2 SA 347 (C) 351E; *City of Cape Town v IMATU* 2016 ILJ 147 (LC).
[61] See section 33A (1) of the LRA. It is therefore important to note that a collective agreement is deemed to include any condition of employment in terms of the Basic Conditions of Employment Act 75 of 1997s 49(1) and the rules of any fund established by a council (s 33A (2) of the LRA). However, see *Rukwaya v Kitchen Bar Restaurant* 2016 ILJ 1466 (LC); *MIBC v COFESA* 2001 ILJ 556 (BCA); *BIBC Cape of Good Hope v Hatlin* 2001 8 BLLR 895 (LC); *NBCLISA v Balucci Footwear CC* 2004 ILJ 2107 (BCA); *NIC for the Iron, Steel, Engineering & Metallurgical Industry v PhotoCircuit SA* 1993 4 All SA 49 (C); 1993 2 SA 245 (C) (collateral challenge) and *Oudekraal Estates v City of Cape Town* 2004 3 All SA 1 (SCA); 2004 6 SA 222 (SCA) para 33.
[62] Fanie Van Jaarsveld et al op cit note 3 para 514. Regarding the feature of voluntarism, see *TWIU* (*SA*) *v Fabricius* 1987 *ILJ* 90 (T); *NUTW v IC Cotton Textile Manufacturing Industry* (*Cape*) 1988 *ILJ* 88 (IC); *SANDU v Minister of Defence* 2007 *ILJ* 1909 (CC); Fourie in *The Private Regulations of Industrial Conflict* 67; Steenkamp et al 2004 *ILJ* 956; Van Jaarsveld 2008 *THRHR* 124. See also Saul Porsche Makama and Lux Lesley Kwena Kubjana 'Collective Bargaining Misjudged: The Marikana Massacre Obiter 2021, 42(1), 39–56.

industry.[63] Unfortunately, the council's plans were pushed back by the Marikana massacre and the subsequent strikes on gold and platinum mines.[64] However, the return to relative stability in the sector has put the bargaining council back on the agenda.[65] Despite this, the bargaining council system is threatened by high unemployment rates and the growing number of employed employees.[66]

More so, as the proportion of unregistered employees within a sector increases, so does the pressure on registered employers to abandon sectoral bargaining arrangements.[67] Accordingly, this process has brought down major councils, such as the Gauteng Building Bargaining Council, and threatened others.[68] Collective bargaining is integral to a system that civilises the workplace, provides fair distribution between wages and profits, keeps the economy vibrant, and contributes to the broader democratic order.[69] In most cases, the bargaining process can be observed when employees have a rising interest in wages. This is the economic factor that can either build or destroy companies. In this case, wages are the fundamental reason employees tender their services. Hence, the decline in collective bargaining is connected to wage inequalities.

On the one hand, employees need trade unions to negotiate wage raises.[70] On the other hand, employers have a personal stake in the operational returns of a business. This fundamental interest conflicts with that of employees. However, the ability of workers to bargain collectively with their employers allows the division of profits to be equally shared amongst

[63] Bradley Conradie, Graham Giles, Shane Godfrey, Carole Cooper, Tammy Cohen, Anton Steenkamp and Darcy Du Toit *Labour Relations Law: A Comprehensive Guide* 6 ed.
[64] Ibid.
[65] Chamber of Mines Labour Policy Digest (August 2010) 3–4; Chamber of Mines of South Africa Annual Report 2012/2013 22–25; see also Godfrey et al Collective Bargaining in South Africa 203–210 for a more detailed discussion. Most importantly, the negotiations that ended the five-month strike in the platinum sector in June 2014 saw the three major companies in the sector bargaining together for the first time.
[66] For legal challenges to the extension of agreements see the following cases *NEASA v Minister of Labour* [2012] 2 BLLR 198 (LC); *Valuline CC v Minister of Labour* [2013] 6 BLLR 614 (KZP); *Free Market Foundation* op cit note 52, in which the North Gauteng High Court has been asked to find s 32(2) of the LRA unconstitutional and/or to strike down the existing constraints on the exercise of the Minister's discretion to extend bargaining council agreements.
[67] Conradie et al op cit note 63 page 53.
[68] Conradie op cit note 63 page 53.
[69] C Thompson 'Bargaining over business imperatives: The music of the spheres after Fry's Metals' (2006) 27 *ILJ* 704-705. See also Fiona Leppan, Avinash Govindjee & Ben Cripps 'Bargaining in bad faith in South African labour law: An antidote?' (2016) 37 (3) *Obiter* at 477.
[70] Richard B Freeman & James L Medoff 'What do unions do? A review symposium' (1984) at 43.

employees, management, and shareholders.[71] Collective bargaining remains crucial as it will enable employees to engage with issues that impact their livelihoods as legislation only provides a floor of rights.[72]

In addition, collective bargaining is regarded as a crucial way to ensure an equal voice for all workers, irrespective of their status, particularly in South Africa, where poverty, unemployment, and inequality are rife.[73] Hence, collective bargaining should not only be viewed considering the proliferation of non-standard work but also within the context where the labour market is characterised by extreme poverty, 'stark income inequality,[74] unemployment, and extremely low skills levels.[75] To succeed, labour law in South Africa needs to consider 'the country's particular socio-economic profile and develop an indigenous paradigm'.[76] Fortunately, the National Economic Development and Labour Council (NEDLAC)[77] assist in dealing with socio-economic challenges linked to the workplace.[78] It gives effect to the NEDLAC Act 35 of 1994 by ensuring effective public participation in the labour market and socio-economic policy and legislation and facilitating consensus and cooperation between the government, labour, business, and the community in dealing with

[71] Gordon Lafer & Lola Loustaunau *Fear at Work: An Inside Account of How Employers Threaten, Intimidate, and Harass Workers to Stop Them from Exercising Their Right to Collective Bargaining* (2020) at 1. See also 'A broken union election system'(2020), available at *https://www.epi.org/press/a-broken-union-election-system-new-report-takes-an-inside-look-at-how-employers-bust-unions/?fbclid=IwAR1rG1L0jX3CXpUYDl0MYueQuuNb4sMMaH85wXeRnvkM_996pbYneH2S-GY,* accessed 20 August 2020.

[72] Freedland M R & P L Davies *Kahn-Freund's Labour and the Law* 3 ed (1983) at 58.

[73] William Manga Mokofe 'The Changing World of Work and Further Marginalisation of Workers in South Africa: An Evaluation of the Relevance of Trade Unions and Collective Bargaining', *Comparative and International Law Journal of Southern Africa* Vol. 54, No. 2, 2021 page 13.

[74] Development Policy Research Unit (DPRU), An Exploratory Look into Labour Market Regulation (University of Cape Town 2007) 56.

[75] See also Colin Fenwick and Evance Kalula, 'Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives' (2001) 21 2 International Journal of Comparative Labour Law and Industrial Relations 193, drawing on the analysis developed in Sean Cooney and others(eds), Law and Labour Market Regulation in East Asia (Routledge 2005)204–211.

[76] *Ibid*.

[77] NEDLAC was established by section 2 of the National Economic, Development and Labour Council Act 35 of 1994. See the functions of the NEDLAC in section 203 of the LRA.

[78] The three defining challenges are: firstly, sustainable economic growth - to facilitate wealth creation; as a means of financing social programmes; as a spur to attracting investment; and as the key way of absorbing many more people into well-paying jobs. Secondly, greater social equity - both at the workplace and in the communities - to ensure that the large-scale inequalities are adequately addressed, and that society provides, at least, for all the basic needs of its people. Thirdly, increased participation - by all major stakeholders, in economic decision-making, at national, company and shop floor level – to foster cooperation in the production of wealth, and its equitable distribution (see NEDLAC Founding Declaration, available at https://nedlac.org.za/wp-content/uploads/2020/11/Nedlac-Founding-Declaration.pdf, accessed 01 August 2022).

South Africa's socio-economic challenges.[79] In this way, it is evident that socio-economic issues cannot be separated from issues directly related to the workplace.[80]

Even though collective bargaining can be enforced to counteract the unequal power between employers and employees,[81] it still has detrimental consequences. The process of bargaining involves power, confrontation, and impulsion. Sometimes the sanity of the intended goal is overtaken by desperation, which leads to employees(wrongly) resorting to violence and other criminal activities as a means to an end.[82] This is described as the tyranny of the mob, which remains an urgent concern, undermining democratic processes and rational negotiation.[83] Effective collective bargaining necessitates that parties utilise economic power to counter each other.[84]

The economic power usually takes the form of lockouts and strikes.[85] This proves that collective bargaining begins with naturally non-confrontational negotiations, and if concessions cannot be made, a strike is the inevitable course of action.[86] The right to lock out should be recognised in the same way that the right to strike is recognised and protected.[87] Collective bargaining aims to avoid possible industrial strife and to maintain peace.[88] The parties often negotiate to avert the economic pressures brought about by a strike or a lock-out.[89] This pressure is one of the principal driving forces behind the voluntarist system.[90] The terms collective bargaining and collective agreement are broadly defined below under the definition of terminologies.

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[79] Available at https://nedlac.org.za/#, accessed on 01 August 2022.
[80] Botha, Monray Marsellus 'Responsible unionism during collective bargaining and industrial action: Are we ready yet?', *De Jure* 2015, vol 48.
[81] *FAWU v Spekenham* Supreme1988 9 ILJ 628 (IC); Committee of Experts 'Freedom of Association and Collective Bargaining' para 200.
[82] *South African Transport and Allied Workers Union v Garvas* 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC).
[83] Hepple, Le Roux and Sciarra *Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (2015) 122.
[84] Darren C. Subramanien Judell L. Joseph 'The right to strike under the Labour Relations Act 66 of 1995 (LRA) and possible factors for consideration that would promote the objectives of the LRA', *Potchefstroom Electronic Law Journal* Vol. 22, No. 1, 2019 page 4.
[85] Ibid.
[86] Ibid page 47.
[87] *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* 1996 4 SA 744 (CC) at 840C-D.
[88] *Macsteel (Pty) Ltd v National Union of Metalworkers of SA and Others* (1990) 11 ILJ 995 (LAC) at 1006.
[89] *South African National Defence Union v Minister of Defence and Others, Minister of Defence and Others v South African National Defence Union and Others* [2006] ZASCA 95; 2007 (1) SA 402 (SCA); [2007] 3 All SA 493 (SCA); 2007 (4) BCLR 398 (SCA); [2006] 11 BLLR 1043 (SCA) para 11.
[90] *Ibid*.

1.3. Problem statement and research justification

There is a dearth of knowledge concerning collective bargaining as a feature for business sustainability. There is considerable research on the nature and relevance of collective bargaining. However, lack of devotion as a feature of sustaining companies. An examination of the current realities of work shows that the role of collective bargaining has not been mainstreamed. In this part, the author links the problems associated with collective bargaining with the justification in support of conducting this study.

In this way, the author posits that less attention has been placed on the role of collective bargaining as a tool for sustaining businesses by applying the good faith requirement in negotiations, recognising parties' interests, and using collective bargaining as a tool to address new technological challenges faced in the world of work. Where this is overlooked, the future of work remains threatened.

There are various justifications in support of conducting this research. To promote sustainability, a business must respond to employers and employees' challenges. There is always a need for adhering to the financial element in the operation of a business. This economic factor plays a significant role in the company's sustainability as it can build or collapse the business. Collective bargaining in this regard can assist employers and employees in negotiating how production can be achieved by making their voices heard without tainting the business's ability to survive. The dependency of these parties can be seen in that they are key role players in the development and sustainability of a company.[91] The study is conducted and justified on three critical elements in which collective bargaining can be improved.

Firstly, it bases arguments on bad faith bargaining in the workplace. Bad faith threatens the institution of collective bargaining. It can propel various consequences that may affect a company's existence, including a threat to strike and strike violence.[92] Strike violence is triggered by bad faith bargaining.[93] Companies' labor capacity depends on employees as contributors; if the latter embark on strike for a long time, this may negatively affect the

[91] Other key role players with an influence on the existence of a company include debtors, creditors, investors and consumers. However, this is not a closed list.
[92] Chapter 3 of the study discuss these consequences in a broader context.
[93] J Brand 'Strike avoidance: How to develop an effective strike avoidance strategy' (2010) [paper presented at the *23rd Annual Labour Conference*].

company's future.[94] Moreover, the company might close its doors due to unproductivity, lead to job losses and apply the principle of 'no work, no pay'—all of this initiates the threat of poverty and unemployment.

Strike violence frustrates labour peace, economic development, and other essential purposes of the Act.[95] They have their way of affecting the sustainability of businesses. Strike violence has been rightly described as an abuse of the right to strike and collective brutality.[96] Consequently, a strike marred by misconduct loses its protected status.[97] Various commentators have urged the courts to consider whether a strike should lose its protection when no longer 'functional' to collective bargaining. The Labour Court in *Universal Product Network* held as follows:

> The proper approach, it would seem to me, is that proposed by Prof Rycroft who acknowledges the practical difficulties that clearly arise, not least the determination of how much violence would have to have occurred before the court intervenes. He suggests that the court ask the following question: 'Has misconduct taken place to an extent that the strike no longer promotes functional collective bargaining, and is therefore no longer deserving of its protected status?' In answering this question, Prof Rycroft proposes that the court weigh the levels of violence and efforts by the union concerned to curb it. He explains that this is not an anti-union proposal; rather, he imagines a balancing counter-measure allowing . . . unions to launch a similar court application for an order granting protected status to an otherwise unlawful strike if it is in response to unjustified conduct by the employer.'[98]

No LRA provision expressly allows a strike to lose its protected status.[99] Although striking employees are immune from claims for damages and dismissal in a protected strike, an employer may still dismiss such employees for an acceptable reason based on their operational requirements or related to deviant behaviour during the strike.[100] In a broader context, where these challenges are faced, the overall existence of a company is obstructed. The author submits

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[94] M M Botha *Employee Participation and Voice in Companies: A Legal Perspective* (unpublished PhD thesis, North-West University, 2015) at 12.

[95] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* (2012) 33 ILJ 2549 (CC).

[96] Anton Myburgh 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' (2013) 23 (1) *Contemporary Labour Law*). See also Rycroft 'Can a protected strike lose its status? Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union (2012) 33 ILJ 998 (LC)' (2013) 34 *ILJ* 827. See also John Grogan *Workplace Law* at 413.

[97] Halton Cheadle et al *Strikes and the law* 2017. Durban: LexisNexis.

[98] *National Union of Food Beverage Wine Spirits and Allied Workers (NUFBWSAW) and Others v Universal Product Network (Pty) Ltd* [2015] ZALCJHB 421; (2016) 37 ILJ 476 (LC); [2016] 4 BLLR 408 (LC) para 32. (Footnote omitted.)

[99] See Alan Rycroft 'What can be done about strike-related violence?' (2014) 30 (2) *The International Journal of Comparative Labour Law and Industrial Relations* at 199. See also Rycroft op cit note 96 at 826.

[100] Giles Files *Good Faith Bargaining: Time to Impose It* (2012), available at *https://www.gilesfiles.co.za/impose-good-faith-bargaining/*, accessed on 05 June 2019.

that these challenges may contribute to progressive and long-lasting poverty should workers find themselves without work in cases where they have been dismissed or the employer locked them out or used the principle of 'no-work-no-pay'. Through work, wealth is created, and people find a dignified way out of poverty.[101]

It also follows that profits may be lost due to protracted strikes resulting from bad faith bargaining, which may effectively decrease investment and growth.[102] The most casual observation of the real world shows that collective bargains are often not reached without a test of strength which is necessarily costly to the parties involved.[103] Thus, this calls for good faith to be made a norm in negotiations. In this way, where treatment is fair and proper procedures are followed, there are increased chances of settling.[104]Another rising issue is that, although trade unions are often regarded as the vehicle for expressing employees' voices, they are equally perceived as offering an adversarial voice only.[105] The study highlights the importance of bargaining in good faith by looking at these challenges and others, as provided in chapter 3.

Secondly, the study looks into parties' underlying interests in collective bargaining. Parties to employment relations possess conflicting interests. Through the process of collective bargaining, these interests can be harmonised. There is a need for these interests to be measured against the overall functioning of the business. Although these conflicting interests are set and known to the parties, recognising these interests as foundational attributes to be examined in negotiations is overlooked. Similarly, to create wealth, employment, and productive businesses, stakeholders' interests must be appraised in line with the operation of the company.

As noted above, employers and employees contribute to the development of a business. Where a company makes profits, the country's economy is also boosted.[106] Collective bargaining and workers' voices are fundamental labour rights with the potential to improve labour market

[101] Juan Somavia 'Working Out of Poverty: Report to the 91st International Labour Conference, 2003. a report presented to the 91st Session of the ILO Conference, (2003) quoted in Mandoro L 'The Use of Social Dialogue in the Preparation of Poverty Reduction Strategies' Issue No.10, 2006/2 SRO Harare.
[102] Leppan, Govindree & Cripps op cit note 69 at 481.
[103] Weldon, J C 'Economic effects of collective Bargaining' (1953) 6 (4) *ILR Review* at 574.
[104] Julie Macfarlane Why do people settle? (2001) 46 *McGill L J* 663.
[105] Janice R Bellace 'Labor Law Reform for the Post Industrial Workplace' (1994) 462 *Labor Law Journal.*
[106] Henk LM Kox & Luis Rubalcaba *Analysing the Contribution of Business Services to European Economic Growth* (2007), available at *http://mpra.ub.uni-muenchen.de/2003/,* accessed on 17 September 2020. These authors capture how business services contribute to the economic growth in Europe.

performance.[107] They can open engagement platforms on issues that threaten their interests, help in planning for the changes that may affect them, and provide ways to resolve them.

Thirdly, there is a need to revolutionise negotiations. This is so because the workplace is constantly reformed, and the new norm cannot be overlooked. History shows a shift from power sources to automation, information technology, and automated production to connectivity in industrial revolutions in the last centuries.[108] Globalisation and modern technology impact the role of the traditional labour market.[109] The net effect of automation on employment is vague, which remains an empirical question to be addressed.

In this part, it is important to integrate the role of workplace forums with that of trade unions concerning technological changes affecting the world of work. The relevance of trade unions will be accomplished in that their power will increase if there is technological development because it can threaten employees' job security.[110] Moreover, we cannot disregard the fact that trade unions will always depend on collective bargaining to deliver services and benefits to members.[111] While it should not be looked upon as a substitute for effective government adjustment policies nevertheless; but, as an institution in our society dedicated to the economic and social protection of the workforce, collective bargaining can do much to alleviate many of the hardships associated with the introduction of technological change.[112]

The prominence that this study is trying to make is that collective bargaining must be enlarged to encompass many aspects of employer-employee relationships that have not previously been a matter of negotiation.[113] Thus, collective bargaining can be given a real opportunity to find adequate solutions to the multifarious problems posed by the introduction of automation and technological change.[114] Even in the past, unions customarily urged automation as a subject of

[107] Cazes, Garnero, Martin et al op cit note 2. See also OECD 'Revamp collective bargaining to prevent rising labour market inequalities in rapidly changing world of work' (2019).
[108] Gabriele Arcidiacono & Alessandra Pieroni 'The revolution lean Six Sigma 4.0' (2018) 8(1) *International Journal on Advanced Science Engineering Information Technology*.
[109] Marta Silva Santos *A New Labour Ecosystem in the Sharing Economy: A Platform for Growth? (*2017).
[110] Harrison op cit note 32 pp 69-70.
[111] Mokofe op cit note 73 page 32.
[112] Fryer J.F and Fryer J.L 'The Implications of Technological Change for Collective Bargaining', *Relations Industrielles / Industrial Relations* (1967) 22(3) page 412, available at http://www.jstor.org/stable/23069678, accessed 20 July 2022.
[113] Ibid.
[114] Ibid.

collective bargaining[115] to foster labor participation in the decision-making process.[116] Although collective bargaining in some industries has contributed to partially effective solutions for mitigating the dislocations of automation, it is generally agreed that the contours of collective bargaining must be fundamentally restructured to respond to the problems posed by technological change adequately.[117] These contentions are made as a way to put new technological developments within the issues that can be addressed through collective bargaining.

Disregarding the impact of these changes will result in the unemployment of many workers as some of the skills we need now and that will be in the future do not yet exist.[118] Accordingly, this poses serious challenges for providing training and education in industrial relations. The true and necessary domain of labour law is wide enough to include job creation, control of immigration, education and training of workers, and the provision of social security, which are immediate concerns for the South African workforce.[119] Chapter 5 of the study gives a broad overview of what various stakeholders, including businesses, educational institutions, and the government, can do to leverage such challenges. In the wake of the pandemic, Covid-19, working arrangements have been technologically inclined. The education sector is one example in this regard. All this came out with several barriers for workers.

Against this background, the study seeks to analyse and assess collective bargaining as a relational process contributing to business sustainability in South Africa. Thus, the success of a company cannot be considered if the total social value it creates is less than the social costs it throws off, and if the interests of society are what matters, then one cannot look just at the

[115] Some commentators have agreed that collective bargaining is a useful vehicle for resolving automation-related disputes. For example, see Cox 'The Future of Collective Bargaining', *Monthly Labor Review*, 1961, Vol. 84, No. 11, pp 1206-1212 and Taylor G.W 'Collective Bargaining and Technological Change', *Monthly Labor Review* 85, no. 8 (1962): 868–70, available at http://www.jstor.org/stable/41834813, accessed on 20 July 2022.

[116] Aronson 'Automation Challenge to Collective Bargaining?', in New Dimensions in Collective Bargaining 1959 57.

[117] 'Automation and Collective Bargaining', 1971 *Harvard Law Review*, *84*(8), 1822–1855, available at https://doi.org/10.2307/1339571, accessed on 20 July 2022. See also Coleman, 'Public Policy, Collective Bargaining and Technological Change in the United States and Canada,' I5 *LAB. L.J.* 802 (1964) and Taylor op cit note 115 at 868–70.

[118] Mokofe op cit note 73.

[119] Fenwick and Kalula op cit note 75 at 204–211.
As reflected, eg, in the policy of the South African Department of Labour. Its strategic objectives for 2004 to 2009 include: contribution to employment creation; enhancing skills development; promoting equity in the labour market; protecting vulnerable workers; and strengthening social protection. See <http://www.labour.gov.za/media/speeches.jsp?speechdisplay_id=5877> accessed17 January 2021. One important outcome of this approach has been the Skills Development Act 97 of 1998.

profit a company makes to know if it is successful.[120] Hence, industrial relation developments must be employer-employee centered.

1.4. The scope of the study

This study aims to investigate several ways collective bargaining can be refined to support and contribute to sustainable corporations in the changing world of work. This will be achieved relying on the following objectives:

a). To describe several factors that influenced the emergence of good faith bargaining principles;

b). Concerning the above, to draw a comparative analysis on good faith bargaining laws to provide lessons for South Africa;

c). To examine the impact of recognising the parties conflicting interests in negotiations; and

d). To contribute to the theoretical discourse on the role of collective bargaining and technology in the changing world of work.

Collective bargaining is developing in South Africa. Hence, there is no single approach in which perspectives or discussions may be outlined. Thus, contribution to knowledge by authors can be achieved in various ways. In this study, the author explores the role of collective bargaining as a tool for sustaining corporations. As already noted, multiple authors have broadly provided the role of collective bargaining, its success stories, and challenges. Although changes in the world of work occur internationally, individual countries need solutions corresponding to their problems, and South Africa is no exception. Hence, the future of labour law in South Africa requires a break from the cycle of 'borrowing and bending'.[121] Most importantly, the world of work needs statutes that respond to the person who is today's employee.[122]

The study is based on three focal features, as noted above. The goal of this study will be achieved by looking into the following:

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[120] Kent Greenfield 'New principles for corporate law' (2005) *Hastings Bus L J* at 90.

[121] E Kalula 'Beyond borrowing and bending: Labour market regulation and the future of labour law in Southern Africa' in Catherine Barnard, Simon Deakin & Gillian Morris (eds) *The Future of Labour Law* (2004). See also Mangan, David. *Book Review: The Future of Labour Law*, Catherine Barnard, Simon Deakin and Gillian S. Morris (Eds). Osgoode Hall Law Journal 44.3 (2006) at 585.

[122] Bellace op cit note 105.

- Theories of good faith bargaining in South Africa (two schools of thought). Focus is placed on good faith bargaining in collective labour law. This will be extended through the comparative analysis of the legal frameworks of New Zealand (NZ) and the United States of America (USA);
- The interests of various stakeholders in collective bargaining. In discussing parties' conflicting interests, the study will also analyse the impact of failed negotiations on employers, employees, and trade unions, which in the end affects the business; and
- The role of technology in the changing world of work.

The study also relies on the Companies Act to define key concepts used in the study without a definition in the LRA. To broaden this study, sound discourses would be drawn to provide insights on the application of collective bargaining worldwide and compare existing literature. These examples support local content on collective bargaining in South Africa.

1.5. Research methodology

The research is theoretically grounded. In collecting data to support the development of collective bargaining, reliance will be made on various sources of information. Both qualitative research and quantitative research methodologies have been employed.[123] The research methods used are discussed below.

1.5.1 Doctrinal research method

In the first instance, data is generated from both primary and secondary sources of law. These resources include legislation, judicial precedents (case law reports), journal articles (periodicals), opinion pieces (conference papers), international labour standards, conventions and policies, book reviews, and internet websites.

1.5.2 Open-ended research questionnaires (based on desktop research)

This method will investigate various motivations, recommendations, and opinions from scholars concerning good faith bargaining. This is drawn from theoretical arguments for and against implementing good faith bargaining principles in South Africa. The relevant question in this instance is*:* What contentions assisted in implementing the good faith bargaining code in South Africa? An extension to this part is discussed below under the comparative approach.

[123] Where statistical examples are made, the quantitative research method will be employed in the study.

1.5.3 Comparative research method

Labour law in Southern Africa is regarded to be comparative in nature.[124] There is a need to conduct a study based on a comparison of various legal frameworks to have analytical and research advantages. A comparative legislative analysis will be made from New Zealand (NZ) and the United States of America (USA) to draw on the similarities, differences, and lessons for South Africa. The author will avoid making assumptions based on symptomatic 'borrowing and bending' approaches in analysing the data.[125] The study will provide a broader understanding of the regulation and effectiveness of good faith in collective bargaining from the stance of these countries.

As it will be seen in chapter 3, there are various reasons why NZ and the USA have been chosen as comparative countries. It is important to note that the requirement to bargain in good faith is recognised in many countries worldwide. Like the USA, bargaining in good faith is a concept that had its origins also in South Africa.[126] According to Frino and van Barneveld, in these countries, the concept of good faith bargaining comes in addition to a clear legal obligation on employers to negotiate with trade unions to create genuine negotiations in collective bargaining.[127] However, in South Africa, the duty to bargain in good faith under the Industrial Court (IC) was repealed when the LRA was enacted.[128]

Firstly, the USA has a longstanding history evidenced by developments in good faith bargaining matters. Accordingly, the obligation to bargain in good faith is a feature of the collective bargaining system established by the United States in the National Labour Relations Act 1935.[129] It, therefore, becomes apparent to look into the history of the duty of good faith bargaining within the USA's legal framework. Moreover, it has been posited that support for adopting the duty of good faith came from examples of good faith industrial relation systems

[124] Fenwick & Kalula op cit note 75 at 193.
[125] Clive Thompson 'Bending and borrowing: The development of South Africa's unfair labour practice jurisprudence' in Roger Blanpain & Manfred Weiss (eds) *The Changing Face of Labour Law and Industrial Relations: Liber Amicorum for Clyde W Summers* (1993).
[126] Frino Betty and van Barneveld Kristin 'AWAs and the Doctrine of Bargaining in Good Faith – the End or A New Area of Unchartered Water?', 2011 page 1.
[127] Ibid page 1.
[128] The Industrial Court (IC) enforced and adopted the duty to bargain through its broad unfair labour practice (ULP) jurisdiction under the Labour Relations Act 28 of 1956.
[129] Frino op cit note 126 page 1.

in the USA and other countries.[130] It is posited that looking into the USA, one of the countries with broad literature on the status quo of the duty to bargain in good faith, will assist the author in drawing informed lessons on the challenges and success stories.

In the USA, parties are obliged to bargain in good faith, and the good faith requirement in collective bargaining dates back. Once a trade union represents a majority of the workforce, the employer is obliged to bargain with the union over wages, hours, and other terms and conditions of employment.[131] This obligation emerges from the National Labor Relations Act (NLRA) provisions, which commands the employer to 'bargain collectively with the representative of his employees'.[132] Moreover, the National Labor Relations Board (NLRB) has its criteria for determining whether parties have honoured their duty to bargain in good faith, for example, the willingness of a party to meet at reasonable times.

Secondly, reliance on NZ is to follow up simply because the latter has also made provisions concerning the duty to bargain in good faith and detailing that relying on the legal framework of the USA.[133] In addition, as will be seen below, the Employment Relations Act 2000 (ERA) contrasts sharply with its predecessor, the Employment Contracts Act 1991 (ECA). The ECA implemented a strongly new-right vision of labour law that seriously undermined both the collective and individual rights of employees and significantly enhanced the powers of employers to deregulate and deunionise their workplaces.[134]

Studies in NZ provide that the ECA has damaged collective bargaining, which would be difficult to reverse.[135] The author looks at developments in NZ, and the USA, to draw lessons.

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[130] Julie M Polakoski *The Impacts of Good Faith on Collective Bargaining: A New Zealand Case Study* (unpublished LLM Thesis Victoria University of Wellington, 2011) Page 53, , available at *https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/1928/thesis.pdf?* accessed on 25 February 2019 and *http://researcharchive.vuw.ac.nz/handle/10063/4524*, accessed on 25 February 2019.

[131] *J.I Case Co. v. NLRB*, 321 U.S. 332 (1944).

[132] National Labor Relations Act § 8(a) (5), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(a) (5) (1958).

[133] Polakoski posit that '. . . because New Zealand's duty of good faith was inspired by the duty of good faith existing in North American jurisdictions, much literature written in New Zealand has had a comparative law element. Accordingly, arguments surrounding how the duty of good faith should be applied and interpreted in being compared with the duty of good faith in Canada and the United States have also emerged in legal literature' (page 49).

[134] G Anderson 'Individualising the Employment Relationship in New Zealand: An Analysis of Legal Developments' and S Oxenbridge 'The Individualisation of Employment Relations in New Zealand: Trends and Outcomes' in, Employment Relations: Individualisation and Union Exclusion, eds S Deery and R Mitchell, Federation Press, Sydney, 1999.

[135] Gordon Anderson 'Just a Jump to the Left? New Zealand's Employment Relations Act 2000' (2001) 14 Australian Journal of Labour Law 62 at 63 – 64

Parties to collective bargaining in NZ are obliged to bargain in good faith. A Code of Good Faith in Collective Bargaining was implemented under s 35(1) of the ERA. The Code was enacted in May 2019 and gave employers and trade unions guidance on good faith bargaining for a collective agreement or variation.[136]

It is important to note that collective bargaining in South Africa is voluntary, and neither party is obliged to bargain.[137] In 2018, the South African government passed the Code of Good Practice: Collective Bargaining, Industrial Action, and Picketing (the Code).[138] Of interest to this study is that the Code broadly provides for good faith in collective bargaining. The Code provides for collective bargaining and disputes of mutual interest.[139] Although the study argues for the enforceability of the Code, the latter has just been introduced recently. In this regard, development concerning collective bargaining is yet to be seen through academic literature and judicial precedents. Chapter 3 of the study provides a broad overview of good faith bargaining principles development in South Africa and other countries.

1.6. Definition of terminologies

The study is based on several key concepts and terms guiding the subject matter. In the absence of definitions in the Constitution or the LRA, reliance will be made on other sources of law. The definitions are captured below in alphabetical order.

Business sustainability

The term sustainability is used in the study to support the need for using collective bargaining as a feature for the development of businesses through production. Business sustainability is defined as managing the triple bottom line — a process by which businesses manage their financial, social, and environmental risks, obligations, and opportunities.[140] These triple bottom

[136] See s1 of the Code of Good Faith: Collective Bargaining, Industrial Action, and Picketing.
[137] Interestingly, althoughSouth Africa does not impose a duty to bargain or bargain in good faith on parties to collective bargaining, other SADC countries apply such a duty. Lesotho has included in its statutory framework the duty to bargain and has introduced the duty to bargain in good faith. Parties in Lesotho are compelled to bargain and do so in good faith simply because trade unions are fragile, and employers are hostile to trade unions. See also Fumane Malebona Khabo 'Collective Bargaining and Labour Disputes Resolution: is SADC Meeting the Challenge?' (2008).
[138] GNR.1396 of 19 December 2018: Code of Good Practice: Collective bargaining, industrial action and picketing (Government Gazette No. 42121) (hereinafter referred to at the Code).
[139] Part B of the Code.
[140] Tima Bansal 'Primer: Business Sustainability' (2010), available at *https://www.nbs.net/articles/primer-business-sustainability*, accessed on 24 June 2021.

line dimensions are often referred to as people, planet, and profits (the three P's). The study will focus on the economic dimension only.

Collective agreement

The term collective agreement is defined in section 213 of the LRA as follows:

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

Collective agreements may take different forms. This depends 'on the level on which and the circumstances under which the collective bargaining between employees and employers was conducted'.[141] A distinction must be drawn between a collective agreement concluded in section 23 of the LRA and an agreement concluded in section 32.[142]

According to *Free Market Foundation v Minister of Labour and Others*, 'the primary functions of bargaining councils are to conclude and enforce collective agreements concerning terms and conditions of employment or matters of mutual interest; and to prevent and resolve labour disputes'.[143] When collective bargaining occurs under the auspices of a bargaining council, the parties must observe the requirements of that council's registered constitution.[144] Moreover, it is important to note that only collective agreements validly concluded in the bargaining council are capable of ministerial extension to non-parties under section 32 of the LRA. However, this must not accordingly 'be confused with collective agreements concluded outside a bargaining council',[145] which are also not capable of ministerial extension and may nevertheless be

[141] This is to say, a collective agreement concluded in terms of section 23 of the LRA is not similar to a promulgated industrial council agreement concluded in terms of the Labour Relations Act 28 of 1956. See also Schedule 7 item 13(1) LRA; *BCCI (Natal) v COFESA* 1998 ILJ 1458 (LC); *BCCI (Natal) v COFESA* 1999 ILJ 1695 (LAC); S*AMWU v Ethekweni Municipality* 2006 ILJ 225 (BCA).
[142] For the distinction, see Fanie Van Jaarsveld et al op cit note 3 at 633.
[143] *Free Market Foundation* op cit note 52 para 12. See also section 28 of the LRA.
[144] See *City of Cape Town v Independent Municipal and Allied Workers Union and Others* [2015] ZALCCT 58; [2015] 12 BLLR 1197 (LC); (2016) 37 ILJ 147 (LC).
[145] Fanie Van Jaarsveld et al op cit note 3 at 532.

imposed on non-party employees provided the provisions of section 23(1)*(d)* of the Act were met.[146]

Although the legal nature of collective labour agreements and similar agreements have not yet decisively received the courts' attention, it is generally accepted that they are fundamentally ordinary common-law contracts with strong labour law features.[147] A collective agreement effectively regulates terms and conditions of service and other matters of mutual interest.[148] Suppose the employees are identified in the agreement; in that case, the collective agreement binds all representing trade union members, including employees who are not members of the registered trade union or trade unions.[149] Thus, a trade union that enjoys a majority in a workplace may conclude a collective agreement with an employer and extend that agreement to bind all employees of that employer.[150] According to *Mzeku and others v Volkswagen SA (Pty) Ltd and others*, this includes employees who are not members of the union, those who may have been its members and resigned, and those that the employer is still to employ in the future.[151]

Collective bargaining

Collective bargaining is the leading concept guiding the study. Although the Constitution of the Republic of South Africa, 1996, and the LRA had a definition for collective bargaining, [152] Item 4(1) of the Code of Good Practice assists in this regard. Accordingly, collective bargaining is regarded as a voluntary process in which organised labour in the form of trade unions and employers or employers' organisations negotiate collective agreements to determine wages,

[146] *NUMSA obo Members v Transnet SOC Ltd and Others* [2016] ZALCPE 14; *AMCU and Others v Chamber of Mines of South Africa and Others* op cit note 48; 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC); [2017] 7 BLLR 641 (CC) and *Sasol Mining (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Another* [2016] ZALCJHB 408; (2017) 38 ILJ 969 (LC).

[147] See *Timms v Fidelity Guards Holdings* 1999 ILJ 1634 (CCMA); *DENOSA v Provincial Administration Western Cape* 2001 ILJ 1383 (LC); *Greathead v SACCAWU* 2001 ILJ 595 (SCA); Landman 1996 CLL 71.

[148] Du Toit et al *Labour relations Law* 6 ed, 2015 LexisNexis at 309.

[149] Section 23 (1) (d) (i) (ii) & (iii) of the Labour Relations Act 55 of 1996. The agreement expressly binds them if most employees in the workplace are members of the trade union.

[150] Khumalo B 'Extension of collective agreements in terms of section 23 (1) (d) of the LRA and the "knock on effect" on the right to strike: *AMCU v Chamber of Mines of South Africa* CCT87/16 [2017]' (Vol 2) [2018] *DE JURE* 22.

[151] *Mzeku and others v Volkswagen SA (Pty) Ltd and others* [2001] 8 BLLR 857 (LAC); 2001 (4) SA 1009 (LAC); (2001) 22 ILJ 1575 (LAC) paras 55 and 67. This was also confirmed in the case of *para Mhlongo & others v Food & Allied Workers Union & another* (2007) 28 ILJ 397 (LC)18.

[152] For various definitions see also P S Nel & P H van Rooyen *South African Industrial Relations Theory and Practice* (1991) at 165; Tembeka Ngcukaitobi, Anita de Bruin, Mark Anstey et al *Collective Bargaining in the Workplace* (2011) and Geoffrey Heald Why Is Collective Bargaining Failing in South Africa? A Reflection on How to restore social Dialogue in South Africa (2016).

terms and conditions of employment, or other matters of mutual interest.[153] Although collective bargaining and negotiation are closely related, they have been defined differently.[154] In this study, both concepts will be used interchangeably to mean a process in which an employer's organisation/employer and a trade union negotiate terms and conditions of employment, wages, and matters of mutual interest. In the case of *Metal & Allied Workers Union v Hart Ltd*,[155] the Industrial Court (IC) held that:

> to bargain means to haggle or wrangle . . . to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise or agreement.

The dynamic of collective bargaining is demand and concession with the ultimate objective of reaching an agreement.[156] In the context of this study, collective bargaining is beneficial to both employers and employees in that employers can benefit from its potential to facilitate and maintain industrial peace and stability within their operations, while employees can utilize it as a 'means of maintaining certain standards of distribution of work, of rewards and stability of employment'.[157] It is a process of interest accommodation that includes all sorts of bipartite discussions relating to labour problems that directly or indirectly affect a group of workers and are narrowly viewed only in connection with bipartite discussions leading to the conclusion of a formal collective agreement.[158]

Looking into the definition of collective agreement discussed above, one may conclude that a collective bargaining process imitates the features of a collective agreement. Thus, according to that definition, one may see that there must be employees' representatives (trade union(s)), an employer(s), and one or more registered employers' organisations. More so, one may also be able to see that there are various issues concerned that may be addressed by the parties mentioned above. Thus, as per section 1*(c)*(i) of the LRA, this may include wages, terms and conditions of employment, and other matters of mutual interest. Accordingly, this entails that negotiations can take place on any subject concerning conditions of employment that could be

[153] Item 4(1) of the Code op cit note 138.
[154] For the differences, see Sriyan de Silva *Collective Bargaining Negotiations* (1996) International Labour Organisation, Act/Emp Publication, available at *https://www.scribd.com/document/47947373/srscbarg*, accessed on 22 March 2018.
[155] *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) para 35.
[156] Grogan *Workplace Law* 10 ed (2009) 343
[157] Du Toit 'What is the Future of Collective Bargaining (And Labour Law) in South Africa?' 2007 28 *ILJ* 1405 at 1405.See also Leppan, Govindree & Cripps op cit note 69 at 476-477.
[158] J Bellace 'The Role of the Law in Supporting Cooperative Employee representation systems' (1994) 15 *Comparative Labour Law Journal* 441 at 443.

contained in a collective labour agreement, provided the subjects are of mutual interest to both parties or concern the employment relationship.[159]

Company

A company is a legal entity formed by one or more persons to sell services to consumers. South African companies are categorised into Non-Profit, Profit, Personal Liability, State-Owned, Public, and Private. Section 1 of the Companies Act 71 of 2008 defines a company as a juristic person incorporated in terms of this Act or a juristic person that, immediately before the effective date—

> *(a)* was registered in terms of the—
>
> (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or
>
> (ii) Close Corporations Act, 1984 (Act No. 69 of 1984) if it has subsequently been converted in terms of Schedule 2.
>
> *(b)* was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
>
> *(c)* was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973) and has subsequently been re-registered in terms of this Act.

In addition, the terms corporation and business will be used interchangeably to mean a company.

Employee

There are ongoing debates in South Africa about who qualifies as an employee.[160] In this study, reliance is made on s 213 of the LRA, which defines an employee as:

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[159] *NUM* (1991) op cit note 24 (wages); *Corobrik Natal v CAWU* 1991 ILJ 1140 (ARB) (introduction of new work practices); *Photocircuit SA v De Klerk* 1991 ILJ 289 (A) (stop-order facilities); *NUMSA v Iscor* 1992 ILJ 1190 (IC) (award of bonus); *SASBO v Bank of Lisbon* 1994 ILJ 555 (LAC) (pension fund); *Standard Bank v SASBO* 1994 ILJ 564 (LAC) (staff loans – discretionary matter); *SASBO v Standard Bank* 1994 ILJ 332 (IC) (bargaining units); *A Mauchle v NUMSA* 1995 ILJ 349 (LAC) (productivity); *SANSEA v NUSOG* 1997 4 BLLR 486 (CCMA) (withdrawal from bargaining unit*); Mthimkhulu v CCMA* 1999 ILJ 620 (LC) (dispute resolution procedure); *SADTU v Minister of Education* 2001 ILJ 2325 (LC); *NUMSA v Volkswagen* of SA 2008 ILJ 229 (ARB) (short-time); *NUMSA v Johnson Matthey* 2011 ILJ 1488 (BCA) (retrenchment agreement); *Makati v Bay United Football Club* 2011 ILJ 1807 (ARB) (settlement); *Department of Community Safety: Western Cape Provincial Government v GPSSBC* 2011 ILJ 890 (LC) (shift system); and *eThekwini Municipality v IMATU* 2012 ILJ 152 (LAC) (placement policy).

[160] See *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW) and Others* [2018] ZALCCT 1; [2018] 4 BLLR 399 (LC); (2018) 39 ILJ 903 (LC). Read literature on the three judicial test for determining who qualifies as an employee. Firstly, the control test, where an employer has the right not only to prescribe to the employee on work to be done but also to perform it (*Colonial Mutual Life Association v Macdonald* 1931 AD 412. In the case of *Discovery Health Limited v CCMA* (2008) 29 ILJ 1480 LC. See also *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) where the court held that the *'*greater the degree of supervision and control exercised by the employer over the employee the stronger the probability would be that it is a contract of *service'*). The control test has given way to a multi-factorial approach to determining an employee in South Africa, Australia and other jurisdictions (R Owens 'The future of the law of

> *(a)* any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive, any remuneration; and
>
> *(b)* any other person who in any manner assists in carrying on or conducting the business of an employer.[161]

It must be noted that this definition does not differentiate various categories of employees.[162] Because comparative examples are used in this study, the term employee will be used interchangeably to mean a worker. For this study, the term employee covers everyone included by the collective agreement provisions.

Employer

The Constitution and the LRA do not define the term employer. An employer is a person or a group of people or an organisation employing people with a duty to compensate them in exchange for their services. The employer determines the terms and conditions of an employment contract. The employment relationship provides both the employer and employee with rights and duties which must be observed. The employer's duties include paying employees for the services rendered and providing the latter with a safe working environment.

Employers Organisation

Section 213 of the LRA defines an employers' organisation as a number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions. Like a labour union, an employer's organisation stands for the employer's interests in negotiations.

Stakeholder

The term stakeholder means any group or individuals affected by the achievement of the objective of an organisation.[163] Stakeholders are defined as groups or individuals that:

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work' (2002) *Adelaide Law Review* 23(2) at 353. For the Australian law, see *Stevens and Gray v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and *Hollis v Vabu* Pty Ltd (2001) 207 CLR 21). Secondly, the organisation test, where the individual must be an integral part of the organisation (*R v AMCA Services & others* 1959 (4) SA 207 (A), *Bank Voor Handel en Scheepvart NV v Slatford* [1953] 1 QB 248 CA), and lastly, the dominant impression test which came up due to the deficiencies of the previous tests and is now the applicable test used for determining the nature of an employment relationship.

[161] See also Basic Conditions of Employment Act 1997 s 1.

[162] For example, casual, fixed, probationary, permanent and full-time employees. For differences between an independent contractor and an employee, see *SABC v McKenzie* (1999) 20 ILJ 585 (LAC).

[163] Geoff Goldman, Rachel Maritz, Hester Nienaber et al *Strategic Management: Supplement for Southern Africa* 9 ed (2010) at 46.

> (a) can be reasonably be expected to be significantly affected by the organisation's activities, products or service; or
> (b) whose actions can reasonably be expected to affe*ct* the ability of the organization to successfully implement its strategies and achieve its objectives.[164]

In this study, this term is used broadly to include various parties. However, it will be limited to the inclusion of parties with interest in collective bargaining, including employees, employers, and their organisations. It is essential to note that both internal and external stakeholders are essential to organisations as multiple agreements are entered between internal stakeholders, such as employees, managers or owners, and the corporation, as well as between the corporation and external stakeholders, such as customers, suppliers, and competitors.[165] An enterprise is best described as a series of contracts concluded by self-interested economic actors,[166] *including equity investors, managers, employees,*[167] *and creditors.* Companies consider the interests of all stakeholders, even of constituents such as pressure groups or non-governmental organisations, 'public interest bodies that espouse social goals relevant to the activities of the company'.[168] This appears to be the case simply because profits are not the only determinant factor for the enterprise's existence and, most importantly, sustainability.

Trade union

Section 213 of the LRA defines a trade union as 'an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations'. The standard function of a trade union is to maintain or improve the conditions of employment on behalf of employees.[169] Moreover, collective bargaining is their major contemporary function.[170]

The principal role of trade unions is representation and negotiation. To be specific, trade unions carry out the functions of collective bargaining and negotiations, which improves the situation

[164] Ibid.
[165] Freeman, R Edward & William M Evan 'Corporate governance: A stakeholder interpretation' (1990) *Journal of Behavioral Economics* at 337.
[166] Davis D & Le Roux M op cit note 6.
[167] Author emphasis added.
[168] Du Plessis JJ, Hargovan A & Bagaric M *Principles of Contemporary Corporate Governance* 3 ed (2011) 24 at 24.
[169] Sidney Webb, & Beatrice Webb *History of Trade Unionism* (1920) at chap 1.
[170] Hugh Armstrong Clegg *Trade Unionism under Collective Bargaining: A Theory Based on Comparisons of Six* (1976).

of their members as it concerns their employment.[171] The LRA places majority trade unions in the forefront, and their role in collective bargaining is broad.[172] Hence, the collective bargaining framework in South Africa, as provided in the LRA, is based on the principle of majoritarianism.[173] The LRA recognises both the majoritarian and pluralist approaches by providing that the requirement of sufficient representation of a trade union should be complied with when exercising organisational rights[174] and membership of a bargaining council.[175] The following must be considered when determining the representativeness of a trade union:

- *Majoritarian approach*: in this regard, an employer only negotiates with a trade union(s) that enjoys the support of the majority (50,1 percent or more) of the employees;[176]
- *Pluralist approach*: In the pluralist approach, the employer must negotiate with every trade union that enjoys substantial support or sufficiently representative of the employees. This will usually be the case if a trade union has the support of about 30 percent or more of the employees;[177] and

[171] Lizzy Ofusori 'The role of trade unions in upholding human rights in the workplace, South Africa' 2022, available at https://ddp.org.za/blog/2022/05/09/the-role-of-trade-unions-in-upholding-human-rights-in-the-workplace-south-africa/, accessed on 17 June 2022.
[172] See the case *of PUTCO* op cite note 45 footnote 41. The LRA affords majority trade unions a number of benefits. See, for example, section 14(1) (the right to appoint trade union representatives); section 16 (the right to information); section 18 (the right to establish thresholds of representativeness); section 26(2) (conclusion of agency shop and closed shop agreements); and sections 80 and 81 (establishment of workplace forums and choice of members from its elected representatives to serve on the trade union forum) See further section 23(1)(d), which allows the extension of collective agreements to employees that are not members of a majority trade union.
[173] Stefan Van Eck and Kamalesh Newaj 'The Constitutional Court on the Rights of Minority Trade Unions in a Majoritarian Collective Bargaining System', *Constitutional Court Review* 2020 Volume 10, 331–351.
[174] Section 11 of the LRA. See also Fanie Van Jaarsveld et al op cit note 3 para 454; *NUMSA v Feltex Foam* 1997 6 BLLR 798 (CCMA) and Snyman 2016 ILJ 865.
[175] Section 29(11)*(b)(*iv). See also Fanie Van Jaarsveld et al op cit note 3 paras 444 and 444 and Du Toit 1993 ILJ 1167.
[176] Fanie Van Jaarsveld et al op cit note 3, para 622; *Mynwerkersunie v African Products* 1987 ILJ 401 (IC); *Ramolesane v Andrew Mentis* 1991 ILJ 329 (LAC). See also *BAISEMWU v Iscor* 1990 ILJ 156 (IC); *SACCAWU v Southern Sun Hotel Corporation* 2017 ILJ 463 (LC); *SA Polymer Holdings v Llale* 1994 ILJ 277 (LAC); *Broodryk v SA Airways* 1996 ILJ 278 (IC); *NUMSA v Feltex Foam* 1997 ILJ 1404 (CCMA); *FGWU v Irvin & Johnson* 1999 ILJ 1547 (LC*); SAMA v University of Limpopo*; *Concor Projects v CCMA* 2013 ILJ 2217 (LC); 2014 ILJ 1959 (LAC); *Chamber of Mines v AMCU* 2014 ILJ 3111 (LC); *POPCRU v Ledwaba* 2014 ILJ 1037 (LC); *NUM v Lonmin Platinum* 2014 ILJ 486 (LC); *AMCU v Chamber of Mines* 2017 6 BCLR 700 (CC); 2017 ILJ 831 (CC); *Free Market Foundation* op cit note 52; *AMCU v Bafokeng Rasimore MS* 2017 ILJ 931 (LC).
[177] Fanie Van Jaarsveld et al op cit note 3, para 622. See also *NUTW v Rotex Fabrics* 1987 ILJ 841 (IC); *Mynwerkersunie v African Products* supra; *Stocks & Stocks v BAWU* 1990 ILJ 369 (IC); *CTMPSA v Municipality of the City of Cape Town* 1994 ILJ 348 (IC); *Mutual & Federal Insurance Co v BIFAWU* 1996 ILJ 241 (A); *UPUSA v Komming Knitting* 1997 4 BLLR 508 (CCMA); *OCGWU v Total* (SA) 1999 ILJ 2176 (CCMA).

- *The all-comers approach*: The all-comers approach implies that the employer is compelled to negotiate with every trade union represented in the undertaking, however small its support might be.[178]

As noted above, while a sufficiently representative trade union is entitled to the organisational rights provided in sections 12, 13, and 15, a majority trade union is entitled to all of them.[179] Lastly, it is important to note that the majority representation requirement of a union should be complied with:

- When electing shop stewards;[180]
- For disclosure of relevant information;[181]
- When concluding an agency shop agreement with a trade union;[182]
- When concluding closed shop agreements,[183]

[178] *NBAWU v BB Cereals* 1989 ILJ 870 (IC); *RTEAWU v Tedelex* 1990 ILJ 1272 (IC); *SASBO* op cit note 159; *SASBO v Standard Bank of SA* 1995 ILJ 362 (LAC); *FWCSA v Bokomo Mills* 1994 ILJ 1371 (IC); *TAWU v Motorvia* 1996 9 BLLR 1189 (IC). See also *NUM v Henry Gould* 1988 ILJ 1149 (IC); *PSASA v Minister of Justice* 1997 ILJ 241 (T) (regarding the determination of "representivity"). It was also held that the court would not intervene: *BAWU v Edward Hotel* 1989 ILJ 357 (IC). See also *BIFAWU v Mutual & Federal Insurance Co* 1994 ILJ 1031 (LAC); *Mkhwebane v Veesentraal* 1996 ILJ 162 (IC); *SAUJ v SA Broadcasting Corporation* 1999 ILJ 2840 (LAC); *NUMSA v Bader Bop* 2003 2 BCLR 182 (CC); 2003 2 BLLR 103 (CC); 2003 ILJ 305 (CC); *Transnet SOC v NTM* 2014 ILJ 1418 (LC) (number of minority unions); Thompson 1989 ILJ 808; Du Toit 1993 *ILJ* 1167; Kruger and Van Eck 1997 *De Jure* 152; Esitang and Van Eck 2016 *ILJ 7*63.

[179] See also section 18(1) of the LRA, which allows an employer and a majority trade union to conclude a collective agreement establishing thresholds of representativeness for the exercise of the organisational rights set out in sections 12, 13 and 15 of the LRA. An example of this can be drawn from the case of *SACOSWU v POPCRU and others* [2017] ZALAC 36, where the Labour Appeal Court (LAC) had to determine whether an employer is precluded from trade union organisational rights set out in sections 12, 13 and 15 of the LRA when it fell short of the representation threshold agreed between the employer and the majority trade union in terms of section 18 (1). The LAC found held that a minority union was not barred from seeking to be granted organisational rights set out in section 12, 13 or 15 and to conclude a collective agreement with the employer to record this notwithstanding a section 18(1) agreement having been concluded. This case confirms that allowing minority unions to function and challenge the hegemony of majority unions is compatible with the system of majoritarianism and that to the extent of such compatibility, an interpretation imposing less limitation on the fundamental rights of minority unions must be preferred (see Simmons and Simmons 'Majoritarianism, Minority Unions and the granting of Organisational Rights: The ball is in the employer's court' 2017, available at https://www.simmons-simmons.com/en/publications/ck0arwofynkpd0b36nnkr22rx/091017-majoritarianism-minority-unions-and-the-granting-of-organisational-rights-4fr1ca, accessed on 12 July 2022.).

[180] Section 14(1) of the LRA.

[181] Section 16(1) of the LRA. See also Du Toit 1993 *ILJ* 1167.

[182] Section 25(2) of the LRA.

[183] Section 26(2) of the LRA. *BIFAWU v Mutual & Federal Insurance Co* 1994 *ILJ* 1031 (LAC).

- When extending collective agreements to non-parties of a bargaining council;[184] and
- for the establishment of a workplace forum.[185]

It is important to note that the term trade union will be used interchangeably to mean labour union as referred to in other countries.

1.7. Conclusion and organisation of the thesis

This chapter provided a detailed introduction to the study, setting the scene by introducing the study and providing for the nature and role of collective bargaining. It outlined the research problem and questions. Since research is ongoing work, limitations on the study are also placed to support the scope and significance of the study while justifying the need for conducting this research. It also provides three research justifications and the method for data generation. Key concepts are defined according to their application in the study. Lastly, the chapter provides a conclusion with an outline of the thesis.

The rest of the thesis is set out as follows:
Chapter 2 discusses theoretical arguments for and against implementing good faith bargaining in South Africa. Chapter 3 is a build-up to the previous chapter. It provides a global comparative analysis of the good faith bargaining requirement as applied in New Zealand and the United States of America to capture gaps, insights, similarities, and differences to provide lessons for South Africa. Chapter 4 captures the importance of recognising parties' interests in collective bargaining. In addition, the study will also focus on various consequences that follow failed negotiations and how they may affect parties to collective bargaining.

Chapter 5 investigates how the future of work will be affected by technological changes and provide ways in which collective bargaining can be integrated with the role of workplace forums to contribute to sustainable businesses and job security. Chapter 6 provides an overall conclusion to the study. Alongside the conclusions is an outline of the various recommendations that may be useful to organisations and trade unions for effective negotiations in the future.

[184] Section 32(1) of the LRA and *AMCU v Chamber of Mines* 2016 ILJ 1333 (LAC); *Free Market Foundation* op cit note 52.
[185] Section 78(b) of the LRA.

Chapter 2: An overview of theoretical arguments for the development of the principles of good faith bargaining

2.1. Introduction

Chapter 1 set the scene by introducing the study. In addition, the previous chapter proved that bad faith bargaining has detrimental effects on the existence of a company. Supposedly, this has the potential to threaten business sustainability. In support of this, chapter 2 examines various theoretical views in favour and against implementing a judicially enforceable duty of good faith bargaining in South Africa. These views are highlighted through the two schools of thought: the 'voluntarists' and the 'compulsionists'. The chapter will investigate the advantages and disadvantages of good faith bargaining and its role in business sustainability.

The chapter opens with a historical background on the progression of good faith bargaining before the Code of Good Practice: Collective Bargaining, Industrial Action, and Picketing was enacted in 2018. In analysing the study, reliance is made on how the general duty to bargain is interconnected to good faith bargaining.

2.2. Background

The duty to bargain collectively is defined as the performance of a mutual obligation to meet and convene promptly and expeditiously in good faith to negotiate an agreement concerning work conditions; however, no party may be compelled to agree to a proposal or to make any concession.[186] The term good faith bargaining is not defined in South African labour laws. However, several countries provide for good faith bargaining matters.[187] Good faith negotiations within the business realm mean dealing with one another honestly and fairly for the parties to receive the benefits of their negotiated contract.[188] The purpose is to ensure that parties do not just come to the bargaining table to only focus on the motions.

The duty to bargain in South Africa is derived from the broad unfair labour practice jurisdiction under the Industrial Conciliation Act 28 of 1956 (Labour Relations Act, 1956). Under this Act,

[186] Philippines Labour Code, 1974 art 252. See also Emmett P. O'Neill 'The Good Faith Requirement in Collective Bargaining', 21 *Mont. L. Rev*. 202 (1959) and also available at *https://sharpexperts.com/requirements/hrm-reflective-essay-on-provided-youtube-video-documentary-5-pg-max-4275/*, accessed on 21 December 2021.

[187] Labour Code s 55(1) (i) (RSC 1985 c L-2); Labour Relations Act 1999 s 41; Labour Relations Act, 1996 s 31; Labour Relations Act 1985 s 8; and Trade Union and Labour Relations Adjustment Act (Law No. 5310, 1997) art 30.

[188] Katie Shonk 'Program on negotiation: How to negotiate in good faith?', available at *https://www.pon.harvard.edu/daily/business-negotiations/negotiate-good-faith/*, accessed on 03 September 2019.

the Industrial Court (IC) developed detailed guidelines on collective bargaining in the exercise of unfair labour practice jurisdiction-wide enough to allow the court to intervene in the bargaining process at the request of one of the parties.[189] Accordingly, the IC had powers to interfere in collective bargaining matters through judicial precedents. This Act formed part of the apartheid system of racial segregation in South Africa.

In 1986, recognition of the duty to bargain in good faith was given in the draft bill to amend the Labour Relations Act 28 of 1956.[190] In this regard, failure to bargain in good faith constituted an unfair labour practice. Accordingly, acts such as unreasonable failure or refusal to negotiate by either employer or trade union were regarded as unfair labour practices.[191] This international norm of collective bargaining was welcomed and, in some cases, rejected through judicial precedents.

In establishing unfair labour practices during negotiations, the court would, in appropriate circumstances, compel negotiation if it was satisfied that an employer's refusal to bargain constituted an unfair labour practice.[192] Moreover, Bleazard and Others v Argus Printing and Publishing Co. Ltd and Others recognized the good faith bargaining requirement.[193] In *casu*, the court ordered an employer to resume a bargaining relationship with an unregistered trade union for the parties to negotiate in good faith. The duty to bargain in good faith was considered fair by the IC during negotiations. Moreover, the courts were given powers to impose such on these parties.

In 1987, the Labour Relations Amendment Bill inexplicably excluded express reference to the duty to bargain in good faith.[194] However, reliance was still made on other provisions of Act 28 of 1956. Most importantly, the provisions catered to unfair labour practices. This norm was argued to be latent in the 'catch-all' provisions that defined unfair labour practices as any labour

[189] John Grogan *Collective Labour Law* 3 ed (2019). Such cases arose where there was bad faith, making unreasonable demands, when one prematurely called a halt to bargaining, etc. See also s 31(a) of the LRA of 1995.
[190] *Government Gazette* 10552 of 1986 notice 848 at 18–42.
[191] Archibald Rycroft 'Duty to bargain in good faith' (1988) 9(2*) Industrial Law Journal* at 202.
[192] *Metal and Allied Workers Union v Hart LTD* (1985) 6 ILJ 478.
[193] [1983] 4 ILJ 60 (IC). See also *Fodens* op cit note 24 at 226D where a company was ordered by the court begin negotiations with a trade union, and do this in good faith.
[194] Rycroft op cit note 191.

practice that unfairly affects the employer's business,[195] promotes unrest,[196] or detrimentally affects the employer-employee relationship.[197]

To observe good faith bargaining, parties to the bargaining table had to approach negotiations with an open mind and a genuine desire to reach an agreement.[198] This was encapsulated in the expression 'good faith bargaining' and practices that fell short of this standard thus undermining the bargaining process was unfair.[199] Although this is not an exhaustive list, unfair labour practices include:

- Sham bargaining, inadequate substantiation of the proposal and dilatory tactics; premature unilateral action;[200]
- Unreasonable preconditions for bargaining;[201]
- Denial of union access;[202] and
- Illegitimate pressure tactics.[203]

In response to the rejection norm for compelling parties to the bargaining table to bargain in good faith, the courts favoured the principle of 'voluntarism'. In this regard, support was founded on the idea that collective bargaining is a voluntary process in which the courts should not interfere.[204] Based on these conflicting contentions, the duty of good faith bargaining had two principal functions: the reinforcement of an employer's obligation to recognise a bargaining agent;[205] and the fostering of rational, informed discussion by minimising the potential of unnecessary industrial conflict.[206]

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[195] Labour Relations Amendment Bill Notice 848 Gazette 10552 of 1986 subclause (l) (i) of sch 1.
[196] Supra subclause (1) (iii).
[197] Supra subclause (1) (iv).
[198] *East Rand Gold and Uranium Co Ltd v NUM* (1989) 10 ILJ 683 (LAC).
[199] D du Toit, Shane Godfrey & Carole Cooper *Labour Relations Law: A Comprehensive Guide*, 6 ed (2015).
[200] *NUM v Goldfields* (1989) 10 ILJ 86 (IC). See also Johann Scheepers 'HAVE YOU CONSIDERED ALTERNATIVES TO RETRENCHMENT?' (2016), available at *http://www.workinfo.org/index.php/articles/item/1561-have-you-considered-alternatives-to-retrenchment,* accessed on 18 August 2018.
[201] *SENTRAL-Wes (Ko-op) Bpk v FAWU* (1990) 11 ILJ 977 (LAC*)* and *FAWU v Sam's Foods* (1991) 12 ILJ 1324 (IC).
[202] *Doornfontein Gold Mining Co Ltd v NUM* (1994) 15 ILJ 527 (LAC).
[203] Du Toit *et al Labour Relations Law: A Comprehensive Guide*, 6 ed (2015).
[204] *Building Construction and Allied Workers Union of South Africa & Others v Johnson Tiles* (1985) 6 ILJ 210 (IC) at 213F. See also *Metal and Allied Workers Union (*1985) 6 ILJ (IC) at 493H and *SAAWU v Border Boxes* (1987) 9 ILJ 478 IC.
[205] *Fodens* op cit note 24 at 226D.
[206] *United Electrical, Radio and Machine Workers of America v Devilbiss (Canada) Ltd 1976 Ontario Labor Relations Board Reports* 49 at 63.

The duty to bargain under Act 28 of 1956 was not enough to achieve collective bargaining objectives.[207] Support in this regard was found when the Labour Relations Bill was drafted.[208] Hence, the Labour Relations Act 66 of 1995 (LRA) abolished the broadly formulated unfair labour practice, which conferred the IC with powers to judicially enforce a duty to bargain on parties to collective bargaining.[209] The decision was that there is a potential danger in regulating a judicially enforceable duty to bargain.[210] Eventually, the consequence of such an action shall result in the judiciary determining the levels of bargaining and bargaining topics and would result in the rigidity that would be introduced to the labour market that is constantly changing according to the economic climate and, by virtue thereof, the levels of bargaining need to be flexible to allow this change.[211]

The duty to bargain was effectively removed after the promulgation of the LRA. While good faith bargaining was recognised in many international jurisdictions such as the United States of America (USA), such a duty was not incorporated in South Africa. However, the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing provides various principles to recognise good faith bargaining in employment relations. This will be explored in detail in Chapter 3, where a comparison of the good faith bargaining requirement in three selected countries is analysed.

Currently, parties are at liberty to determine the outcomes, subjects, and parties for collective bargaining. This became an ongoing problem, as the need to execute the duty to bargain in good faith had always been stressed. The study has noted in Chapter 1 that the principle of good faith in commercial law can be traced from contract law. However, this study aims to investigate this principle in employment relations, specifically collective bargaining.

2.3. The two schools of thought: Compulsionists and voluntarists

The background above provided the development of good faith bargaining in South Africa. Good faith bargaining was a vivid distinction between the concept of good faith and public

[207] Du Toit, Godfrey & Cooper op cit note 203.
[208] Draft Labour Relations Bill, 1995 – 'Explanatory memorandum'.
[209] Alan de Kock, C Thompson & P Benjamin *South African Labour Law* (1997) vol 1 AA1-5. See also Maria-Stella Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work*, (unpublished LLD, University of Pretoria 2005).
[210] Labour Relations Bill in *GG* 16259 of 10 February 1995 'The explanatory memorandum' published (1995) 16 *ILJ* at 292–293.
[211] Ibid.

policy.[212] Consequently, nothing drove a collective bargaining process into the ground more than the perception that one of the parties is not playing by the rules.[213] The application of the duty to bargain in good faith was abolished when the LRA came into force. This led to various conflicting theories supporting and against implementing a judicially enforceable duty to bargain in good faith. This chapter will examine various contentions raised by the two schools of thought.

In the first instance, the voluntarists provide that collective bargaining should be voluntary. The voluntarist believes that a judicially enforceable duty to bargain in good faith infringes the freedom to contract and offends the concept of voluntarism. Where negotiations fail, employees may exercise the right to strike as provided in law. In response, employers have the right to lock-out. The compulsionists base their views on the belief that collective bargaining may be subjected to bad faith. Where this duty is imposed, it may combat various consequences following failed negotiations.

In this regard, the absence of the good faith requirement in collective bargaining has been questioned as: 'if there is no statutory duty to bargain, let alone the 'washed out' concept of bargaining in good faith, then why bother to bargain at all?'[214] In Canada, both sides of politics recognise that good faith bargaining makes good industrial sense.[215] However, there is no automatic standard for the application of good faith. Thus, good faith in employment relations can be identified by considering the case's conduct and facts, including the parties' economic, cultural, and personal statuses.[216]

[212] Elsabé van der Sijde *The Role of Good Faith in the South African Law of Contract* (unpublished LLM thesis, University of Pretoria 2012), available at *https://repository.up.ac.za/bitstream/handle/2263/27443/dissertation.pdf?sequence=1&isAllowed=y*, accessed on 06 August 2019.
[213] Available at *http://www.nelson.com/hrmnow/hebdon/tag/bad-faith-bargaining/*, accessed on 05 June 2019.
[214] Johann Scheepers *The Resuscitation of the Common Law Duty: 'To Bargain In Good Faith?: A Repost '*(2015), available at *https://www.linkedin.com/pulse/resuscitation-notion-bargaining-good-faith-johann-scheepers*, accessed on 05 June 2019.
[215] Geoff Davenport 'Approach *to* good faith negotiations in Canada: What could be the lessons for us?' (2003) 28(2) *New Zealand Journal of Industrial Relations* at 150. See also Troy Sarina 'Does bargaining in good faith make good sense?' in *The Debate: Good Faith and the Employment Relationship* (2009) at 14.
[216] Pedro Barasnevicius Quagliato 'The duty to negotiate in good faith' (2008) 50 (5) *International Journal of Law and Management* at 213–225.

It is essential to articulate that honesty in business dealings should be standard practice.[217] This is a mechanism for inducing a well-trusted impression in parties' dealings and catering to one another's interests.

The overlap between the general duty to bargain and good faith bargaining has been noted above. These two are distinctively applied; however, the relation between the two will be seen in Chapter 3. Accordingly, in the USA, both are mandatory. Conversely, enacting good faith bargaining principles in South Africa is not built on the general duty to bargain. Thus, collective bargaining in South Africa is voluntary. Theoretical arguments for and against imposition of a judicially enforceable duty are discussed below.

2.3.1. The voluntarist Approach

In South Africa, the LRA observes support for voluntary bargaining.[218] The foundational belief of the voluntarists in voluntary negotiations is based on the fact that the imposition of a duty to bargain in good faith has ripple effects on an employment relationship. Accordingly, it is contended that organisational rights are sufficient to act as countermeasures where bad faith is met. However, these rights are not automatically applied to all trade unions.[219] Moreover, parties may exercise their right to strike. The point here is for the parties to foster fair dealings on the bargaining table, inhibiting bad faith and building mutual trust. The contentions are categorised into two, as discussed below.

a) Deviate from the concept of voluntarism in collective bargaining

Collective bargaining in South Africa is voluntary. Thus, parties to collective bargaining may not be compelled to bargain collectively. It remains a voluntary system that regulates the bilateral control of workplace relations between employers and unions.[220] Voluntarism in collective bargaining refers to the legislative choice not to impose a duty to bargain on parties to an employment relationship or even require the establishment of a bargaining council.[221]

South Africa does not conform to the judicially enforceable duty to bargain in good faith. The imposition of a duty to bargain in good faith contrasts with the voluntarism principle. This

[217] UpCounsel *Good Faith Bargaining: Everything You Need to Know*, available at *https://www.upcounsel.com/good-faith-bargaining*, accessed on 05 June 2019.
[218] Anton Steenkamp, Susan Stelzner & Nadene Badenhorst 'The right to bargain collectively' (2004) 25 *ILJ* 943; *NPSU v National Negotiating Forum* 1999 ILJ 170 (LC); and M S M Brassey *Employment Law and Labour Law* 2 ed (1999) Vol 3 A 1:8.
[219] See of the Labour Relations Act 66 of 1995 ss 12,13,14,15, and 16 for the limitations on trade unions.
[220] Rycroft & Jordaan op cit note 30 at 116.
[221] D Collier, E Fergus, T Cohen, et al *Labour Law in South Africa, Context and Principles* (2018).

principle is fostered by the LRA and regarded as the cornerstone of collective bargaining. Recognition of voluntarism in collective bargaining is well received in the international sphere. Accordingly, art 4 of the ILO Convention no. 98 of 1949 requires member states to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations to reach an agreement.

Recognition for the application of international law by the judiciary in South African labour relations stems from s 233 of the Constitution of the Republic of South Africa, 1996, and is extended in s 3(c) of the LRA. However, the duty to bargain is not envisioned under Convention no. 98 of 1949, nor does the LRA encourage it. This position was held positively by the International Labour Organisation's (ILO) Committee on the Freedom of Association (CFA), who observed that for collective bargaining to be effective, it:

> …must assume a voluntary quality and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining.[222]

The CFA emphasises the importance of respecting the parties' autonomy in the bargaining process to ensure the free and voluntary character of collective bargaining.[223] The ability of the South African economy to adapt to the changing requirements of a competitive international market can be safeguarded- where bargaining parties can determine the nature and structure of bargaining institutions, economic outcomes that should bind them, and, where necessary, renegotiate both the structures within which agreements are reached and the terms of these agreements.[224]

Accordingly, parties to collective bargaining are crucial bodies for sustaining the enterprises. The aim is to foster a trustful collective relationship in which companies may benefit in the future. Hence, this may not be feasible where parties are forced to observe such a duty. Employers' management of their companies should be radical in that they are open to innovative ideas, innovations, and development.

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[222] Freedom of Association *Digest* 1996 at para 96.
[223] ILO *Compilation of Decisions of the Committee on Freedom of Association, Collective Bargaining* at 15, available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3948011,2*, accessed on 08 august 2019.
[224] 'Explanatory memorandum' (1995) 16 *ILJ* 278.

The separation of powers by state organs is crucial. In this regard, the judiciary's duty remains to interpret the law as it is, *not as it ought to be*. Permitting the judiciary to interfere in the bargaining arena will fail the collective bargaining objectives. Therefore, the state's role is not to actively intervene in the labour-management relationship by compelling processes such as collective bargaining.[225] Hence, enforcing good faith bargaining contradicts the principles of freedom of contract in a free market economy.

As already noted, an enforced duty to bargain is not a component of the right to collective bargaining as entrenched and interpreted in the LRA and international law conventions governing the right to collective bargaining.[226] Therefore, the collective bargaining process is best if left to the power play between the parties, as the judiciary is ill-suited to take decisions that might interfere with the process.[227]

In South Africa, the objective of the drafters of the Constitution was to encourage consensus amongst various actors of collective bargaining in a labour environment.[228] However, voluntarism does not mean that employers and employees negotiate voluntarily, but they negotiate to avert the economic pressures of a strike or a lock-out.[229] This pressure is one of the principal driving forces behind the voluntarist system.[230] Employers and employees are akin to the impact of these economic pressures on the overall existence of the company.

Furthermore, proponents of voluntary bargaining contend that an enforceable duty to bargain harms sectoral bargaining. However, it is set to have potential benefits at workplace level bargaining. Consequently, it is undesirable to have a system of workplace-level bargaining in the absence of sectoral bargaining.[231] Cheadle articulates other assorted reasons in favour of

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[225] Mothepa E Ndumo *The Duty to Bargain and Collectively Bargain in South Africa, Lesotho and Canada: Comparative Perspective* (unpublished LLM thesis, University of Cape Town, 2005). Also cited in Mahlatse Innocent Malatji (MKXMAH002) 'Assignment 1' (unpublished research assignment, University of Cape Town, 2017), available at *https://vula.uct.ac.za/portal/site/7a598614-8ab6-49e3-b732-8b4aa32d760a/tool/d59d376a-7a1f-4741-afdc-8f25407afe5c?panel=Main*, accessed 18 February 2018.
[226] Dennis Davis, Nicholas Haysom & Halton Cheadle *South African Constitutional Law: The Bill of Rights* (2006) at 18–27.
[227] *SANDU v Minister of Defence* 2003 (3) SA 239 (T).
[228] Angela Patricia Molusi 'The constitutional duty to engage in collective Bargaining' (2010) 31 (1) *Obiter*. See also Mahlatse Innocent Malatji (MKXMAH002) 'Assignment 1' (unpublished research assignment, University of Cape Town, 2017).
[229] *Minister of Defence v SANDU* 2007 1 SA 422 (SCA); *Minister of Defence v SANDU* 2007 1 SA 422 (SCA) Para 11.
[230] Molusi op cit note 228.
[231] Davis, Haysom & Cheadle op cit note 226 at 18–31.

exclusion of the duty to bargain in collective bargaining matters as it has detrimental effects on the practice of sectoral bargaining in this way:

- sectoral bargaining is more efficient, low costs, and takes place by the representatives of that sector, which create agreements that set a minimum standard across the sector, which will have a greater impact than workplace bargaining;[232] and
- sectoral bargaining assists in regulating fair competition in an industry in that the employer organisations and parties shall be bound by reasonable standards and shall compete according to their productivity and not receive an unfair advantage because of undercutting wages of the employees and overtime hours.[233]

The idea behind these views appears from the disputations that the LRA grants sufficient protection by affording the creation of various mechanisms for collective bargaining. Thus, implementing a legally enforceable duty to bargain will impede the ability of the labour market to respond to the changing social-economic environment. Consequently, this obstructs the exercise of the right to strike.

In addition, the LRA provides an adequate framework for collective bargaining by offering machinery for creating forums such as workplace forums, bargaining councils, and statutory councils and by acquiring organisational rights. The avenue of a strike is essential in countervailing the employer's economic and social power, which compels an employer to engage in collective bargaining with a trade union. However, the high rate of strikes in South Africa is set to bring about the ineffectiveness of the law as a deterrent factor for strike-related misconduct. For example, Marikana constitutes a repetition of historical events in a different temporal context within the South African legal system.[234]

b) Disempowered? The right to strike and lock-out

The absence of a duty to bargain does not diminish collective bargaining rights and remedies that apply to the parties as afforded by the LRA.[235] As noted above, such rights include organisational rights granted to the trade unions subject to s12 to 16 of the LRA and referral of

[232] Ibid at 18–30.
[233] Ibid.
[234] Nico Buitendag & Neil Coetzer 'History as a system of wrongs: Examining South Africa's Marikana tragedy in a temporal legal context' (2015) 37 (2) *Strategic Review for Southern Africa* at 96, available at *https://repository.up.ac.za/bitstream/handle/2263/52193/Buitendag_History_2015.pdf?isAllowed=y&sequence=1*, accessed on 22 August 2019.
[235] Davis, Haysom & Cheadle op cit 226 at 18–30.

disputes for arbitration by the CCMA. In addition, employees are granted the right to strike where negotiations fail, courtesy of s 64 of the LRA. So, s 64(1) of the LRA supports the right to strike and the recourse to lock-out. Employees may exercise the right to strike where there is a reasonable belief that the employer is not playing by the rules.

In addition, the law provides for the dismissal of employees who engage in an unlawful strike and other illegal conduct. Thus, the court is given the power to interpret the law. Therefore, the courts become important actors in the flexibility/security debate as they regulate labour through their interpretative mandate.[236] The legal framework for the right to strike, lock-out, and dismissals is discussed below in Chapter 4. Legal intervention is necessary to protect the interests of various parties. This may include employees, employers, and, in some cases, the public. However, trade unions tend to call for protective legislation when they are under threat, and employers tend to demand restraints of trade on unions when there is a rising propensity to strike.[237]

Although the LRA permits legitimate protest action in workplace disputes (through CCMA processes) or socio-economic protest (NEDLAC), it is increasingly clear that workers and the broader society do not believe this aids them.[238] The sense of dis-empowerment inevitably leads to anger and violence, believing that this is the only way to get attention.[239] Consequently, this proves that, even though bargaining is conducted voluntarily, it does not take away that a business may be threatened by exerting socio-economic pressures.

Employers and employers' organisations have voluntarily engaged in collective bargaining in the USA. In so doing, this had not happened because they feared industrial action. However, it is due to the belief that it is the appropriate form of industrial governance – a 'system of industrial citizenship'- which provides employees with due process and a representative 'voice, whether or not their trade unions has the muscle that would win this recognition against the

[236] Lourens Marthinus du Plessis *Re-interpretation of Statutes* (2002) at 97–98; Du Plessis (1986) at 143; Labuschagne 'Die uitlegvermoede teen staatsgebondenheid' 1978 *TRW* 42 62; Labuschagne "Regsdinamika: opmerkings oor die aard van die wetgewingsproses" 1983 *THRHR* 422 and Le Roux, Wessel 'Undoing the past through statutory interpretation: The Constitutional Court and marriage laws of apartheid' 2005 5 *Obiter* at 526–548. Also available at *http://www.saflii.org/za/journals/DEJURE/2013/30.pdf*, accessed on 22 February2021.
[237] Barnard, Deakin & Morris *The Future of Labour Law: Liber Amoricum Bob Hepple QC* (2004), available at *https://epdf.pub/the-future-of-labour-law-liber-amicorum-sir-bob-hepple-qc.html*, accessed 22 July 2018.
[238] Files op cit note 100.
[239] Ibid.

employer hostility.'[240] Employers in this position often speak of and value the legitimacy they feel collective bargaining gives to their dealings with their employees.[241]

The Constitution recognises and protects the significant role collective bargaining plays in the labour dispensation. However, it does not impose a judicially enforceable duty to bargain between employers and employees.[242] Consequently, for an exceptionally long time, subject to debate is whether s 23 (5) of the Constitution of the Republic of South Africa, 1996, imposes a judicially enforceable duty to bargain. The question was addressed in the leading case of *South African National Defence Union v Minister of Defence v Minister of Defence & Others* (SANDU).[243] In *casu,* the court ruled against an enforceable duty to bargain in good faith on negotiating parties.

The *SANDU* case is the landmark judicial precedent that first addressed the issue of good faith bargaining in South Africa. In *casu*, various contentions were made by the union against the defence force that the former believed was rooted in bad faith. So, the union contended several delays, false intentions to negotiation, and a lack of mandates when bargaining. Moreover, the union claimed a lack of cooperation and aggressiveness and interpreted s 23(5) of the Constitution as a duty to bargain, which the department had breached.[244]

The litigants argued that the mechanisms in terms of the LRA created to engage collective bargaining were insufficient to protect the rights of all workers, especially those engaged in essential services.[245] The Supreme Court of Appeal (SCA) accepted that a right to bargain is meaningless unless reinforced by an acceptable mechanism to compel the other party to negotiate.[246] This was accordingly interpreted as a duty to bargain. However, the SCA concluded that a 'right to engage' instead of a 'right to bargain collectively' connotes freedom rather than a positive right matched by a corresponding duty to bargain. Section 23 (5) of the Constitution was analysed, and it was seen that collective bargaining was regarded as negotiation in good faith between employees and employers.[247]

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[240] Barnard, Deakin & Morris op cit note 237.
[241] W Brown, S Deakin, M Hudson et al *The Individualisation of Employment Contracts in Britain* (1998).
[242] *NEWU v Leonard Dingler (Pty) Ltd* [2011] 7 BLLR 706 (LC).
[243] *SANDU v Minister of Defence & Others* [2006] 27 ILJ 2276 (SCA).
[244] Halton Cheadle 'Collective bargaining and the LRA' (2005) 9 (2) *Law, Democracy and Development* at 149.
[245] A Landman 'The duty to bargain: An old weapon pressed into service' (2004) 25 *ILJ* 39 at 2.
[246] In *SANDU v Minister of Defence* [2006] 11 BLLR 1043 (SCA) paras 21–25.
[247] Section 23(5) of the Constitution of the Republic of South Africa, 1996.

When the case was referred to the Constitutional Court (CC), the CC found that there was freedom to bargain as opposed to a duty to bargain.[248] In the end, the CC echoed that, since SANDF members are excluded from the LRA and thus prohibited from exercising the right to strike, an enforceable duty to bargain is needed as they cannot compel their right to bargain on the employer.[249] However, it still stands that:

> the Constitution, while recognising and protecting the significant role of collective bargaining in our labour dispensation, does not impose on employers or employees a judicially enforceable duty to bargain. It does not contemplate that, where the right to strike is removed or restricted, but is replaced by another adequate mechanism, a duty to bargain arises.[250]

An effective duty to bargain is placed on the state as an employer by creating a statutory Public Service Coordinating Bargaining Council (PSCBC) and other bargaining councils in the public sector, thus creating a compulsory regime.[251]

2.3.2. The compulsionists' Approach

It is important to note that nothing in the literature about one's belief is immune to criticism. The absence of the duty to bargain and good faith bargaining leaves employees at employers' mercy. An enforceable duty to bargain combats the social strife experienced during bargaining. Recognising such a duty is set to help employers, employees, and South Africa.[252] As a result, the country's labour unrest and bad faith bargaining are the driving force for imposing such a duty.

Good faith imports the objective standard of fair dealing, while bad faith suggests a more subjective standard. However, to impose an objective standard of good faith bargaining, rather than outlawing bad faith, may impinge upon legitimate hard bargaining to too great an extent.[253]

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[248] Ibid.
[249] Johann Scheepers 'The Resuscitation of the Common Law Duty - *To Bargain in Good Faith*?' - A REPOST (2015), available at https://www.linkedin.com/pulse/resuscitation-notion-bargaining-good-faith-johann-scheepers, accessed on 05 June 2019.
[250] See *SANDU v Minister of Defence* [2007] ZACC 10 Para 41.
[251] Scheepers op cit note 249.
[252] Leppan, Govindree & Cripps op cit note 69.
[253] A Hutchinson 'Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?' (2011) 128 *SALJ* 273.

There are many consequences following the bargaining process. These ramifications pose challenges to the government, business, and labour.[254] Collective bargaining is said to hold its importance in the presence of a direct duty to bargain. Hence, organisational rights that form the foundation of effective collective bargaining would make no sense unless an enforceable fundamental right to collective bargaining exists.[255] However, even in the absence of the duty to bargain, the right to strike is afforded by law. [256]

Due to this voluntary approach, the issue of implementing a judicially enforceable duty to bargain in good faith arises. Hence, there is a need for a regulatory framework to address issues arising from bad faith bargaining and supply the criteria to be followed when bargaining. Parties to bargaining experience bad faith bargaining during negotiations, and what may be perceived as bad faith bargaining by one party may not be the case for the other.

a) The mechanism for keeping peace and power balance

It is in the best interests of both employers and employees that amicable bargaining takes place, emphasising good faith.[257] On the one hand, collective bargaining becomes essential because employers benefit from its potential to facilitate and maintain industrial peace and stability within their operations.[258] On the other hand, workers employ it to maintain specific employment standards.[259] Hence, the ability of employees and their representatives to engage effectively with employers in collective bargaining is widely accepted as fundamental for protecting the rights and interests of employees and maintaining labour peace.[260]

In this regard, good faith bargaining allows employees to gain countervailing power over the employer.[261] Moreover, collective bargaining addresses the inequality that flows from the power relationship between employers and employees.[262] It does, however, not necessarily mean that the parties at the negotiation table possess equal bargaining power. However, the power imbalance can be expected to be much less dramatic under a regime of collective

[254] Files op cit note 100.
[255] Davis, Haysom & Cheadle op cit 226 at 390–394.
[256] Constitution of South Africa, 1996 s 23(2) (c) and LRA s 213.
[257] Leppan, Govindree & Cripps op cit note 69 at 476.
[258] Du Toit op cit note 157 at 1405.
[259] Ibid.
[260] Ibid at 1406–1407. See also *National Union of Metal Workers of South Africa & Other v Bader Bop (Pty) Ltd & Another* [2003] 2 BLLR 103 (CC).
[261] Davidov 'Collective bargaining laws: Purpose and scope' (2004) 20 *IJCLLIR* 85.
[262] Botha op cit note 4.

bargaining. Once the position of the employees improves at the bargaining table, the problem of democratic deficits is also expected to be alleviated.[263]

The power imbalance that exists cannot be overemphasised. Steenkamp suggests that employers can include unfair pre-conditions, delay tactics, and undermine trade union representatives.[264] Accordingly, this initiates a need for a good faith bargaining regulatory framework to curb further unforeseen implications during or after negotiations.

Developments in good faith bargaining have been apparent even after the enactment of the LRA. In 2000, the Labour Court (LC) was faced with the question of whether a court could compel parties to bargain in good faith in *ECCAWUSA v Southern Sun Hotel Interests (Pty)*.[265] In *casu,* the applicants' contention was based on an implicit contractual duty to bargain, which the latter believed as a duty to bargain in good faith. The court dismissed this contention because the applicant must prove that the recognition agreement implied the term. In this way, the court held that:

> Although the applicants allege that there is a duty to bargain in good faith, which is implied in the recognition agreement, they did not explain what the content of this duty is. In the absence of any indication in an agreement as to what subjects are to be regarded as legitimate bargaining subjects, the content of an undertaking to negotiate must be simply that on whatever subject the parties choose to negotiate regarding the terms and conditions of employment, they shall attempt to reach agreement.[266]

Good faith bargaining has the characteristic of benefiting minority trade unions, which are not sufficiently representative and do not have organisational rights, with limited economic bargaining power.[267] This is so because minority trade unions do not have exclusive powers to exercise all organisational rights granted by the LRA. In addition, a duty to bargain in good faith has the effect of combating destruction during negotiations. Parties will be prohibited from engaging in nonsensical behaviour during negations. Destructive bargaining behaviours include:

- Bad or negative attitude, arrogance, insulting behaviour, disrespect, offensive behaviour, negative or incorrect perceptions and either of the parties not being

[263] Davidov op cit note 261.
[264] Steenkamp, Stelzner & Badenhorst op cit note 218 at 952. See the Constitutional Court case of *SANDU v Minister of Defence and Another* in which the court held that collective bargaining means negotiation in good faith between the employer and the employees. See also at Mpfariseni Budeli *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* at 273.
[265] (2000) 21 ILJ 1090 (LC).
[266] *ECCAWUSA v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC).
[267] Landman op cit note 245 at 3.

committed to resolving the dispute, refusal to be reasonable or to listen, racism- of which this may have an impact on the resolution of the dispute;

- Poor communication during the process, either about the dispute or the proposals;
- Being unreasonable in the communication of the demand or in the way that the demand is being rejected;
- Refusal to disclose relevant information or lack of information;
- Undermining attitude and by-passing employer/trade union;
- Unilateral behaviour such as the unilateral implementation of conditions or change to conditions;
- Unfair and undermining tactics such as delays, division, or conflict;
- bringing political interests into the workplace; and
- Unreasonable pre-conditions during negotiation procedures.[268]

All these destructions make the good faith bargaining requirement inevitable. In support of this, the requirement can also assist in combating these behaviours, which may have detrimental effects on a business. In this regard, parties will be free to negotiate the terms and conditions of their collaborative relationship to foster an employment relationship built on trust. Good faith bargaining will help the parties honour the set rules before negotiations. This will, in turn, aid in keeping order and power balance amongst the parties- an effective way of asserting positive communication.

The international labour law community recognises collective bargaining as an effective tool to protect those in weak bargaining positions.[269] Accordingly, a duty to bargain is regarded as a set of enforceable rules that are put in place to enable the achievement of just and fair collective bargaining. By so saying, Landman believes that resolving disputes through negotiations is desirable because it can minimise disruptions that may ensue during strikes.[270]

[268] Johanette Rheeder *Trade Unions; How to Deal with Power Play and Position Bargaining?,* available at *https://www.laboursmart.co.za/document/details/88dccb98-a6d9-459b-8ba4-d5761a463569,* accessed on 16 August 2019. In addition, the demands are unrealistic, mala fide, not the real reason for the unhappiness, frivolous, unfair or not obtainable. Here parties may be inclined to disrupting the means of reaching an agreement. See also Creamer Media Reporter 'Trade unions: Power play and the process of position bargaining' (2011), available at *https://www.polity.org.za/article/trade-unions-power-play-and-the-process-of-position-bargaining-2011-08-30,* accessed 20 January 2019.
[269] Polakoski op cit note 130.
[270] Landman op cit note 245 at 2.

Strong organisations of workers and employers contribute to bargaining in good faith because there would be some parity in the bargaining strength of the two parties.[271] In the absence of good faith, there will only be the process of bargaining without any result.[272] An important aspect in this regard is the ability of each side to understand the interests of the other (*to reconcile any conflicting interests*) to discover solutions that maximise both.[273] There should be a belief and faith in the value of compromise through dialogue in collective bargaining and the productive nature of the relationship collective bargaining requires.[274]

The compulsionists also contend that abstentionism by the state and its machinery from collective bargaining does not pay attention to the social realities of the labour-management relationship and the perpetual lack of equilibrium characterising it.[275] While collective bargaining was developed to bridge the communication gap between employers and employees, it can easily create further rifts in that gap instead of bridging them.[276]

Collective bargaining stunts the free-hand management has: if imposed, it will limit the authority and liberty that the employer has and may be further curtailed if the trade unions are far too influential and strong or consequential.[277] Therefore, the rationale behind collective bargaining is based on recognising that employers enjoy greater social and economic power than individual workers.[278]

b) The mechanism for combatting ramifications subsequent to failed negotiations

Bargaining in good faith is a universal standard regarding negotiation tactics.[279] Where a duty to bargain in good faith is enforced, strikes can be combatted, as parties would engage in effective mutual-gain negotiation instead of adversarial bad-faith negotiations.[280] As already noted, amongst the underlying principles of the ILO CFA lies good faith bargaining in negotiations

[271] De Silva op cit note 154.
[272] *Ibid.*
[273] Michael J. Wright, 'Collective bargaining and safety and health' (2011). (Author emphasis added.)
[274] De Silva op cit note 154.
[275] Ndumo op cit note 225. Also cited by Mahlatse Innocent Malatji (MKXMAH002) 'Assignment 1' (unpublished research assignment, University of Cape Town, 2017), available at *https://vula.uct.ac.za/portal/site/7a598614-8ab6-49e3-b732-8b4aa32d760a/tool/d59d376a-7a1f-4741-afdc-8f25407afe5c?panel=Main*, accessed 18 February 2018.
[276] Advantages and Disadvantages of Collective Bargaining: Occupy Theory, 01 January 2015.
[277] Ibid. See also MKXMAH002 'Assignment 1' op cit note 275.
[278] Molusi op cit note 228.
[279] Brand op cit note 93.
[280] Ibid.

between employers and trade unions in which good-faith bargaining is a necessary prerequisite for effective collective bargaining.[281]

Good faith bargaining has an element of reducing consequences that follow failed negotiations, including strikes, pickets, strike violence, dismissals, etc. However, a duty to bargain is not a duty to agree. Thus, despite legally enforcing parties to bargain in good faith, these parties may still fail to come to a settlement. It is argued that 'if the employer does not acquiesce to the union's bargaining demands, the unions' recourse will be' the same as if there has been no duty to bargain, that is, the right to strike action.[282] Consequently, depending on the process and the issue in dispute, parties may or may not be prepared to compromise or give up a dispute.[283]

Good faith bargaining may have a positive contribution towards the non-administration on the part of the judiciary. Thus, parties to collective bargaining will be inclined to have fair dealings without including the courts in their relationships. This encompasses a better way of building a sustainable relationship amongst parties to collective bargaining. Thus, the courts will not be burdened with making administrative decisions, which is time-consuming and may lead to delays. For example, parties can exercise their rights provided by the LRA if a dispute stays unresolved. In this case, employees have the right to strike, while employers have the recourse to lock-out.

In this case, where employees exercise the right to strike, s 76 prohibits the employer from employing replacement labour to continue or maintain production during a protected strike if the service in question has been designated as a maintenance service or to fulfill the duties of employees who have been locked out unless the lock-out is in response to a strike.[284] Conversely, s 67(3) of the LRA provides that an employer does not have to remunerate an employee for services not rendered. Thus, the principle of 'no work-no pay' is enforced.[285] This will be

[281] Leppan, Govindree & Cripps op cit note 69. These authors contend that the Constitution requires the LRA to consider ILO standards and recommendations which places a specific duty on parties to bargain in good faith.
[282] D du Toit *Labour Relations Law: A Comprehensive Guide* 5 ed (2006).
[283] Rheeder op cit note 268. In addition, Rheeder posits that an aggressive attitude, unreasonableness, dishonesty and mala fides will work against a resolution in the process.
[284] Stacy Lee Oberem 'The Right to Strike in South Africa', available at *http://www.seesa.co.za/the-right-to-strike-in-south-africa,* accessed on 12 August 2019.
[285] John Grogan *Workplace Law* 9 ed (2007) at 52, para 2. Here Grogan states that 'the employee's duty to tender service is the corollary of the employer's duty to remunerate, the maxim being 'no work, no pay'.

detailed in Chapter 4 of the study. This principle was satisfactorily outlined in *Coin Security (Cape) v Vukani Guards & Allied Workers' Union*,[286] where the court held that:

> A contract of employment is a contract with reciprocal rights and obligations. The employee is under an obligation to work, and the employer is under an obligation to pay for his services. Just as the employer is entitled to refuse to pay the employee if the latter refuses to work, so the employee is entitled to refuse to work if the employer refuses to pay him wages which are due to him.

Similarly, the principal obligation of employees under the contract of employment is to place their services at their employer's disposal.[287] Therefore, tendering services is a prerequisite to the employee's right to claim payment for wages.[288] These consequences may be combatted where a duty to bargain in good faith is in place. Thus, parties will come to the bargaining table with nothing but the means of negotiating for mutual gains. In this regard, the organisation's sustainability is observed, and recognition of the interdependence of the parties is well established.

In addition, where good faith bargaining is exercised, dismissals that arise from collective misconducts where employees engage in illegal conduct during industrial action may be alleviated. Dismissals for collective misconduct may be enforced through s 68 of the LRA. The latter provides that any conduct in contemplation or furtherance of an unprotected strike or lock-out may be grounds for dismissal. Therefore, though employees are afforded most rights, they are not immune to dismissal for illegal conduct.

Collective bargaining is characterised by a loss, win, or the will to compromise. Fortunately, good faith prohibits parties from starting and suppressing inaccurate information to cater to one side's interest. Negotiations based on good faith will foster an open-minded process that draws on the probability between profits, services rendered, and the whole organisation's operation. This, in turn, contributes positively to business sustainability.

Good faith place parties in a comfortable position of admitting that, to progress, there is a possibility that one may have to compromise. For example, employees may compromise and agree on a give-and-take method of negotiating. Therefore, collective bargaining that is started, proceeds, and is conducted in good faith will succeed. This entails that, when compromising, the goal is to find an expedient, mutually acceptable solution that partially satisfies both

[286] *Coin Security (Cape) v Vukani Guards & Allied Workers' Union* 1989 (4) SA 234 (C).
[287] *Smit v Workmen's Compensation Commission* 1979 (1) SA 51 (A) at 61C.
[288] Grogan op cit note 285 at 51.

parties.[289] Compromising might mean splitting the difference, exchanging concessions, or seeking a quick middle-ground position.[290] This allows the parties to set out their differences and act in their best interest and the business sustainability.

c) Good faith as a mechanism for reaching an agreement

According to the CFA, the principle of good faith implies making every effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustified delays, complying with concluded agreements, and applying them in good faith.[291] To this may be added the recognition of representative trade union organisations.[292] The bargaining process between labour and management in the labour relations system is characterised by an urgency to decide because of social, economic, and legal pressures.[293] Therefore, when parties agree to bargain in good faith, they agree to honour the rules they make with each other before the bargaining process even begins.[294]

Furthermore, the compulsionists believe that collective bargaining is time-consuming. It slows the decision-making process; it is more complicated as there is no authoritarianism and increased bureaucratisation.[295] This is considered because it is rare that parties may bargain in good faith, but this can be limited if judicially enforced. For example, an employer will bargain in a beneficial way to the organisation, though holding its interest. The same applies to the trade union representative toward the employer without considering other circumstances that the employer may suffer, for example, profit loss.

The compulsionists do not necessarily expect the state to conclude collective agreements for the parties; instead, the approach is that the state must and should ensure actual participation in the process.[296] Thus, if imposed, a long course of successful and bona fide dealings will lead to a generation of trust.[297] Failure to reach an agreement would ultimately necessitate employees resorting to industrial action. These debates are confined to academia, and the

[289] Rheeder op cit note 268.
[290] Ibid.
[291] ILO 1996a, paras. 814–818; and ILO, 1997c, Case No. 1919 (Spain), para. 325.
[292] Ibid. See also Bernard Gernigon, Alberto Odero & Horacio Guido 'ILO principles concerning collective bargaining' available at *https://www.ilo.org/public/english/revue/download/pdf/gernigon.pdf*, accessed on 18 March 2019. See also Leppan, Govindree & Cripps op cit note 69.
[293] Nel & Van Rooyen op cit note 152 at 165. See also Harrison op cit note 32.
[294] Bryan A Garner & Henry Campbell Black *Black's Law Dictionary* (2000). West Group.
[295] *Advantages and Disadvantages of Collective Bargaining* op cit note 276.
[296] Ndumo op cit note 225.
[297] De Silva op cit note 154.

judiciary is divided (not necessarily evenly) on whether the legislature should impose the duty to bargain in good faith, thereby inviting the courts to enter the collective bargaining fray.[298]

The compulsionists believe that implementing a judicially enforceable duty to bargain will reduce hardships experienced in negotiations and reduce ramifications following failed negotiations. The justification is that employers have more power than employees. This continues to create confusion, with employers' organisations bargaining on behalf of the employer's interests, on the one hand, and trade unions fighting to satisfy employees' needs. The study provides an analysis of the parties' interests in Chapter 4.

Different workplace cultures and environments have an impact on how settlements are reached. However, the end goal of every dispute is finding a resolution. A settlement is an official agreement between two sides involved in a conflict or argument.[299] Different parties hold different views/interests, and their expectations will differ. This may have an impact from the inception of the dispute pending resolution. Therefore, good faith in negotiations is unavoidable.

In addition, the absence of good faith impacts the time an agreement may be reached. To settle without delays and time consumption, parties must explore the values and resources at stake, their evolution, and transformation throughout the conflict. Effective negotiations are, therefore, inclined to be in good faith. Moreover, parties must be open-minded to contribute toward a positive collective bargaining process. Thus, face-to-face information exchange is crucial, and the meetings must be carefully managed to achieve their potential and eliminate further disputes.[300] Similarly, parties must treat their counterparts fairly and avoid bad faith bargaining.

The bargaining process is attached to unforeseen or involuntary conduct that may unfold during negotiations. For example, entering collective bargaining may encourage employees to claim increased terms and conditions — potentially creating disputes and rising employment costs.[301]

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[298] Ndumo op cit note 225.
[299] Available at *https://www.collinsdictionary.com/dictionary/english/settlement*, accessed on 02 October 2019.
[300] Macfarlane op cit note 104.
[301] International Organisation of Employers *Strategic Collective Bargaining: An Introduction for Employers*, available at *https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/meetingdocument/wcms_304046.pdf*, accessed on 02 October 2019.

Similarly, entering collective bargaining may disrupt working relations and lead to industrial disputes, which can harm the profitability and reputation of the company. [302] In so doing, this entails allowing greed to damage a good working relationship. However, the overall fair process can yield satisfactory results. When there is a dispute, parties to the negotiations must consider the following elements to reach an agreement:

- Their opponents' values (satisfiers and interests).
- The recognition and acceptance of ideological differences (culture).
    - Values and beliefs, and
    - Cultural assumptions and perceptions.
- Restriction of the scope of the dispute and negotiation.
- Develop trust and sharing of information to assist in reaching a consensus.
- Be ready to reach a consensus.[303]

A settlement may not be easily reached. A dispute may, in some cases, continue for the longest time. However, parties may settle due to fear of the time and costs attached. In most cases, where an agreement fails, parties rely on the Best Alternative to a Negotiated Agreement (BATNA) to assess the risk of continuing with a dispute.[304] However, during collective bargaining, a negotiator should take time out for an explicit translation process to ensure that one is not giving up a good deal in hand for a BATNA in the bush.[305]

One of the advantages of collective bargaining is the settlement of differences through discussions and agreements rather than conflict and confrontation.[306] The need for good faith in collective bargaining becomes a need for effective negotiations. In concluding the points mentioned above, the court in *Macsteel (Pty) Ltd v NUMSA*[307] set out a view on the importance of good faith in collective bargaining in this way:

> the LRA creates machinery which makes collective bargaining not only possible but compulsory. It helps to avoid, if possible, industrial strife and to maintain peace. Its operation is such that if parties negotiate genuinely and in good faith, and their demands

[302] Ibid.
[303] Macfarlane op cit note 104.
[304] It refers to the most advantageous alternative course of action a party can take if negotiations fail and an agreement cannot be reached.
[305] Guhan Subramanian *What is BATNA? How to Find Your Best Alternative to a Negotiated Agreement,* available at *https://www.pon.harvard.edu/daily/batna/translate-your-batna-to-the-current-deal/,* accessed on 02 October 2019.
[306] Albert Pule 'Collective bargaining paves the way for agreement'(2014), available at *https://www.vukuzenzele.gov.za/collective-bargaining-paves-way-agreement* , accessed on 02 October 2019.
[307] (1990) 11 *ILJ* 995 (LAC) 100B–E.

> and offers are reasonable, a settlement will be reached before a disruption occurs, if not through agreement *inter partes*, then with the help of the machinery provided for in the Act. The legislature tried to create circumstances enabling the parties to negotiate freely if they do so diligently and reasonably. In the process, it is essential that the parties be on equal footing and that one party does not have an unfair advantage over the other, forcing it to capitulate to unreasonable offers or demands. That being so, I believe that any action aimed at creating an advantage for one party over the other disturb the equality which the Act tries to establish and therefore is unfair.

2.4. Conclusion

The two approaches discussed above highlighted various contentions supporting and against a duty to bargain in good faith. In capturing the importance of voluntary bargaining, the ILO Committee of Freedom of Association (CFA) has annotated that, for collective bargaining to be effective, it must espouse a voluntary quality and not entail recourse to measures of compulsion that would alter the voluntary nature of such bargaining.[308] In South Africa, collective bargaining adopts this contention. Conversely, the study has proved the potential of how an enforceable duty to bargain in good faith can reduce hardships experienced in negotiations. Thus, undesirable consequences such as strikes and dismissals may be limited. So, this has positive benefits in that production may be increased, and organisations can be kept sustainable. Good faith bargaining is necessary and an object of keeping harmony amongst the parties to grow organisations of trust. These will guard against parties' involuntary bias during negotiations. Currently, the LRA provides guidelines for good faith bargaining in South Africa. However, collective bargaining is still voluntary, and the duty to bargain is not imposed on negotiating parties. The following chapter will discuss an overview of the legal framework on good faith bargaining principles and laws by considering the two countries' status quo comparatively to draw lessons for South Africa.

[308] Freedom of Association *Digest* op cit note 222. See also the European Social Charter (Part II, art 6).

Chapter 3: A comparative analysis of the historical development of the good faith bargaining requirement in New Zealand and the United States of America: Lessons for South Africa

3.1. Introduction

Chapter 2 highlighted various theoretical views supporting and against a judicially enforceable duty to bargain in good faith in South Africa before enacting the Labour Relations Act 66 of 1995 (LRA). Chapter 3 draws a comparative analysis of the law of good faith bargaining in New Zealand (NZ) and the United States of America (USA). This chapter aims to provide lessons for South Africa (SA) by comparing these two countries' comparative similarities and differences. This international comparative analysis is grounded on the contention that comparative law is sometimes seen and justified as a foot for shaping and guiding domestic decision-making, particularly legislation.[309]

The choice of these jurisdictions was informed by their legal framework, which in both countries provides a mandatory duty to bargain in good faith instead of South Africa. Furthermore, these comparator countries were chosen to build up an understanding of the law regulating good faith bargaining from an advanced country (USA) and a highly developed first-world country (NZ), which will compare the success stories and challenges of good faith bargaining law. The analysis shows several similarities and differences in all these countries, as seen below.

For SA, this is a build-up of the previous chapter, which observed many views in support and against a judicially enforceable duty of good faith bargaining. Also, the USA has a long history of collective bargaining laws evidenced by development. This history reflects a long cycle of developing trends that have been used by other countries worldwide. Despite the United States union growth, decline, and regeneration, the labour movement in the United States is still a strong base for working class advances and strengthening collective bargaining in years to come.[310] Thus, the USA has long-standing good faith bargaining laws.

[309] Eric Stein 'Uses, misuses-and nonuses of comparative law' (1977) 72 *NW.U.L.Rev*. at 198; O Kahn-Freund 'On uses and misuses of comparative law (1974) 37 *The Modern Law Review* at 1–27; Alan Watson 'Legal transplants and law reform,' (1976) 92 *L QuartRev* at.79.

[310] L Compa 'An overview of collective bargaining in the United States' in J. G. Hernández (ed) *El derecho a la negociación colectiva: Monografías de temas laborales* (2014) at 98.

NZ also remains one of the countries with dynamic employment transformation. Good faith is now the centerpiece of New Zealand's industrial relations management system.[311] The latter has progressed to a system that relies on the duty of good faith to protect and promote collective bargaining. Whereas the Employment Contracts Act (ECA) assumed that unions and employers have equal power at the bargaining table, the Employment Relations Act 2000 (ERA) recognises the inequality of power in employment relationships.[312] Therefore, the latter attempts to address this inequality by binding parties to a duty of good faith.[313] Despite this, collective bargaining coverage remains at the same low rate as during the ECA. It continues to decline, opening a gap to question good faith's ability to safeguard collective bargaining.[314] These comparative countries are helpful case studies for denoting the effectiveness of good faith bargaining laws. They can shed light on the value of good faith bargaining laws to provide lessons for South Africa.

A question that may arise in this regard is, why good faith bargaining in business sustainability? Good faith obligations recognise that employers and employees share many common interests.[315] However, these parties also have their separate conflicting interests. A discussion of these interests is provided in Chapter 4. Despite this, the parties may have a common interest in working together to increase productivity but may disagree about what should be done with increased profit.[316]

Similarly, it is posited that the duty of good faith is a tool to promote rational, informed discussion and minimise the chances of the parties resorting to actions such as strikes or lockouts.[317] The subsequent chapters will show that these actions have detrimental effects on the business. All in all, a productive employment relationship will depend on these parties working together for the sole purpose of sustaining the enterprise. This is the case because all other benefits may depend on such a business's existence.

[311] Polakoski op cit note 130.
[312] Employment Relations Act 2000, s 3.
[313] Polakoski op cit note 130.
[314] Ibid.
[315] Ministry of Business, Innovation and Employment *Employment New Zealand*; *Good Faith in Collective Bargaining,* available at *https://www.employment.govt.nz/starting-employment/unions-and-bargaining/collective-agreements/collective-bargaining/good-faith* accessed on 03 March 2019.
[316] Ibid.
[317] Ibid.

The result of engaging in good faith bargaining is that collective negotiations' outcomes are more likely to be perceived as fair and more equitable.[318] It benefits enterprises positively regarding worker commitment, stability, and productivity.[319] Workers can benefit in terms of improved wages and working conditions.[320] Thus, good faith in collective bargaining promotes a rational and informed process. On the contrary, experiences in North America, the United Kingdom, and New Zealand suggest that legislated good faith bargaining requirements have not been conspicuously successful.[321] However, cooperative bargaining assists parties in exploring constructive new ways in which both sides might benefit through improved production.[322]

If collective bargaining aids in combatting industrial strife and costly strike action, it must be conducted in good faith. Negotiating in good faith is regarded as an international norm.[323] The preparatory work for Convention no. 154 recognises that the effective functioning of collective bargaining can be achieved where both parties conduct the process in good faith.[324] However, there is no general rule in common law in which parties must negotiate in good faith.[325] It has been found in the previous chapter that collective bargaining in SA is voluntary. Also, the results can be achieved through the parties efforts to reach mutually beneficial agreements. This international norm of good faith bargaining can be seen in various federal laws, including those of the USA, NZ, and Australia. The scope of collective bargaining is enormous. This study focuses on the historical developments of good faith bargaining laws in NZ and the USA to analyse the impact of this requirement on employment relations.

3.2. The regulatory framework of the good faith bargaining requirement: The United States of America

3.2.1. Background

The USA's provisions regulating good faith bargaining are provided in the National Labor Relations Act of 1935 (NLRA) and the Taft-Hartley Act of 1947 (Labor Management Relations

[318] International Labour Organization *Collective Bargaining: Negotiating for Social Justice High-level Tripartite Meeting on Collective Bargaining* Geneva (2009), available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_172415.pdf,* accessed on 01 April 2020.
[319] Ibid.
[320] Ibid.
[321] Anthony Forsyth 'The impact of 'good faith' obligations on collective bargaining. Practices and outcomes in Australia, Canada and the USA' (2011) 16 *Can Lab & Emp L J* 8–21.
[322] Kenneth G Dau-Schmidt 'A bargaining theory of American labor law and the search for bargaining equity and industrial peace' (1992) 91 *MichL Rev* at 419.
[323] Barry O'Neill 'What Does it Mean for Nations to Negotiate in Good Faith?', available at *http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf,* accessed on 05 June 2020.
[324] International Labour Office, *Fundamental Rights at Work and International Labour Standards* (2003) at 25.
[325] Quagliato op cit note 216.

Act). The NLRA, also known as the Wagner Act, aimed at ideal bargaining. The main goal was to assist labour unions in organizing efforts according to workers' certain statutory rights designed to counterbalance the employer's common law rights.[326] The crucial purpose of the Act was to create aggregations of economic power on the side of employees, countervailing the existing power of corporations to establish labour standards.[327]

Whereas others saw the Wagner Act as a radical piece of social legislation designed to guarantee democracy in the workplace,[328] others saw it as the basis for a transformation of American society.[329] The act was based on the theory 'that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act does not attempt to compel'.[330] However, no appropriate statutory language was set out to guide the duty to bargain in good faith.[331]

The NLRA was amended by the Taft-Hartley Act,[332] which restricted the powers and activities of representative unions. This Act was enacted after the great strike wave in 1946.[333] The Act prohibited labour unions from engaging in unfair labour practices (ULP). United States labour law refers to a ULP as actions taken by the employer or labour union violating the NLRA.[334] Unlike other national constitutions,[335] the Constitution of the USA does not directly address worker rights issues or trade unions.[336]

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[326] Bellace JR 'The future of employee representation in America: Enabling freedom of association in the workplace in changing times through statutory reform' (2002) *University of Pennsylvania Journal of Labor and Employment Law* 5(1), 32-33 at 1–32.
[327] Archibald Cox 'Duty to bargain in good faith' (1954) 71 *Harvard Law Review* at 1401-1442.
[328] See for example, 79 Cong Rec 7565 (1935) (statement of Senator Wagner) (expressing a broader social vision with references to workers 'dwarfed by the size of corporate enterprise', and the need for cooperation among such workers so they can attain 'freedom and dignity').
[329] Ibid.
[330] *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 at 45 (1937).
[331] Alan K Simpson 'The concept of good faith bargaining under the Labor-Management Relations Act of 1947(1958) 12 Wyo L J at 136.
[332] 61 Stat. 136, 149 (1947), 29 U.S.C.
[333] There were a series of massive post-war labour strikes after World War II, the largest strikes in the history of the USA.
[334] See s 8 of the Act for various ULPs.
[335] For example Political Constitution of the United Mexican States, art. 123, translated in 12 Constitutions of the Countries of the World 114 (Gisbert H. Flanz ed., 1996); Constitution of the Republic of South Africa,1996 s 23, reprinted in 16 Constitutions of the Countries of the World 8 (Gisbert H. Flanz & Patricie H. Ward eds., 2011); the Basic Law of the Federal Republic of Germany, art 9(3) , translated in 7 Constitutions of the Countries of the World 4 (Rudiger Wolfrum & Gisbert H. Flanz eds., 2009).
[336] Barbara Fick 'Collective representation of workers in the United States: evolution of legal regimes concerning collective autonomy and freedom of association' (2013), available at *https://scholarship.law.nd.edu/law_faculty_scholarship/1224/*, accessed on 10 April 2019.

Although the concept of good faith is not defined within the American legal system, the judiciary addresses this on a case-by-case basis.[337] The courts assess parties' behaviour against a "totality of conduct" standard.[338] Good faith bargaining in the USA was not enabled and protected by legislation until the twentieth century.[339] The regulatory framework on the duty of good faith bargaining will be discussed below.

3.2.2. The National Labor Relations Act of 1935

Generally, collective bargaining regulation in the USA can be traced from the early nineteenth century. The principle of good faith in the USA appeared from the law of contracts. Good faith in negotiations was rooted in the legal concept of the 'implied covenant of good faith and fair dealing', in which parties were protected from taking advantage of one another in contract negotiation.[340] In 1933, the New York Court of Appeals ruled that every legal contract must hold an implied covenant in which neither party shall do anything to destroy or injure the party's right to receive the fruits of the contract.[341]

Good faith bargaining laws have existed in the USA and Canada for a very long time.[342] The USA has a long history of collective bargaining, evidenced by developments, with many international countries aligning their labour laws with its regulatory frameworks.[343] In 1935, Congress passed the National Labor Relations Act (NLRA).[344] The Act established the right of workers to engage in collective bargaining. In this way, the Act created the National Labor Relations Board (NLRB), an independent federal agency approved to enforce the right to

[337] Laura Carlson *Workers, Collectivism and the Law: Grappling with Democracy* (2018).
[338] Shonk op cit note 188.
[339] Compa L An overview of collective bargaining in the United States in J. G. Hernández (Ed.) *El derecho a la negociación colectiva: Monografías de temas laborales* (2014) at 98. In the early twentieth century, American society began looking to federal legislation to address continuing labor conflict and to develop a unified national policy regarding collective bargaining in the private sector.
[340] Shonk op cit note 188.
[341] Ibid.
[342] Anthony Forsyth *Good Faith Bargaining: Australian, United States and Canadian Comparisons* (2009).
[343] Richard N Block *Bargaining for Competitiveness: Law, Research, and Case Studies* (2003). W.E. Upjohn Institute for Employment Research, Kalamazoo. Australia is also one of the international countries that underwent deep conversation on whether to regulate their labor law in respect of collective bargaining considering good faith bargaining regulatory framework from the USA. Forsyth op cit note 342. In some cases, alignment was discouraged (Stephen Smith *Address to the Inaugural Sitting of Fair Work Australia*, (2009). In addition, Stuart Wood strongly argued that US law and International Labour Organisation conventions will need to be taken into account by FWA and the courts, particularly when considering the prohibition in s 228(1)(e) of the Fair Work Act relating to capricious or unfair conduct that undermines freedom of association or collective bargaining ('Good faith laws will end the Rio revolution' *Workplace Express*, 24 August 2009).
[344] 29 USCA.

bargain collectively.[345] The NLRB is empowered to prevent any person from engaging in any ULP.[346]

One of the objectives of the NLRA is to encourage the practice and procedure of collective bargaining.[347] The Act provides various provisions in which labour unions and employers may meet to negotiate employment conditions. A labour union must be recognised to represent employees.[348] Once a labour union is recognised, either through the NLRB election process or voluntarily by an employer, it is irrebuttably presumed to represent a bargaining unit at a workplace during the certification year or the collective agreement period.[349] The recognised labour union has the exclusive authority to negotiate on behalf of the employees regarding wages, hours, and other terms and conditions of employment.[350]

A certified union representing the workforce and the employer has a duty to bargain for a collective agreement to govern the terms and conditions of employment. A collective agreement concluded in this regard covers all employees irrespective of whether they are union members or not.[351] In response, an employer is also prohibited from unilaterally altering the terms of the agreements even if those terms are favourable unless the agreement contemplates flexible terms.[352] When a union is certified, an employer can be compelled by the NLRA to the bargaining table, and collective bargaining must be conducted in good faith.[353]

The duty to bargain collectively and in good faith in the USA with labour's exclusive representative is the chief burden placed on employers by the entire body of American labour

[345] Supra ss 157 and 153.
[346] Supra s160.
[347] Labor Management Relations Act s 1, 61 Stat. 137 (1947), 29 USC.s 151 (1952).
[348] In South Africa, a trade union must be registered with the Department of Labour in order to enjoy any rights conferred to the trade union by the Labour Relations Act 66 of 1995. Thus, for the trade union to be recognised, it must be properly registered as per stipulated procedure in Chapter VI of the LRA ss 95-106. (See *SA Labour Guide, Labour Law and Employment Manual (2013) Section F, Trade Union Guide, available at http://wieta.org.za/documents/4%20Freedom%20of%20association/SA%20Labour%20Guide%20to%20Trade%20Unions.pdf*, accessed on 10 April 2019).
[349] Carlson op cit note 337. Unlike many countries (e.g., South Africa which has Labour Courts, Labour Appeal Courts and the Commission for Conciliation Mediation and Arbitration), the USA does not have specialised labour courts. There are administrative labor tribunals, however, which interpret labour statutes and issue decisions (such as the Board of the NLRB which interprets the NLRA and state employment commissions which interpret state labour relations statutes) (Fick Barbara op cit note 336 at 4).
[350] See NLRA s 9 and 8(d).
[351] *J. I. Case Co. v. NLRB*, 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 762 [1944].
[352] *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S. Ct. 977, 43 L. Ed. 2d 12 [1975].
[353] Compa op cit note 339 at 94.

law.[354] The duty to bargain collectively impliedly includes the duty to bargain in good faith.[355] Any failure by the parties to engage in collective bargaining is regarded as an unfair labour practice courtesy of ss 8(a)(5) and 8(b)(3) of the NLRA.[356] The Act guarantees the right to bargain collectively with labour unions.

Section 8(d) of the Act provides for the general duty to bargain collectively. The latter section specifies that bargaining collectively is a 'mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment'.[357] Section 8(b)(3) places a reciprocal obligation on the labour union against the obligation placed on employers by s 8(a)(5). [358]

In addition, the NLRA protects the rights of workers to form and join labour organisations without the employers' interference or discrimination, protects the rights of employees and unions to strike and engage in other types of concerted activity for mutual aid, and requires employers and representative unions to negotiate with each other in good faith, and provides for enforcement of the provisions of collectively bargained agreements.[359]
The USA has three distinct regimes of collective bargaining: one for the railroad and airline industries,[360] for the rest of the private sector,[361] and the public sector.[362] For this study, the focus is on the NLRA. The NLRA, the Railway Labor Act (RLA),[363] and other national laws

[354] See Manfred Weiss *Labor Law and Industrial Relations in the Federal Republic of Germany* (1987) Kluwer Law and Taxation Publisher at 128-29; Adolf Sturmthal *Contemporary Collective Bargaining in Seven Countries* (1957) at *327*–34; T Ramm 'The German law of collective agreements, in labour relations and the law' in O Kahn-Freund (ed) *Labour Relations and the Law: Comparative Study* 1965 at 84-91; Derek Bok 'Reflections on the distinctive character of the American labor laws' 84 *Harv L Rev* 1394 (1971) at 1409 and 1436–38.
[355] *NLRB v. Jones & Laughlin Steel Corporation* 301 U.S. 1 (1936).
[356] 29 USCA s 158[a] [5], [b] [3].
[357] 29 USC s158(d).
[358] 29 USC ss 158(a) (5), 158(b) (3). See also *Virginian Railway v System Federation* No. 40, 300 US 515 (1937) and *NLRB v. Jones & Laughlin Steel Corp*., 301 US 1 (1937), in which it is held that compulsory collective bargaining is constitutional.
[359] Fick op cit note 336.
[360] The Railway Labor Act of 1926. It was only natural that the first important national legislation on collective bargaining arose in the railroad industry. The industry was vital to the national economy. To prevent labour conflict, Congress enacted the Railway Labor Act of 1926 (RLA).
[361] The National Labor Relations Act of 1935. In 1935 Congress adopted the NLRA covering most private sector workers outside the railroad and airline industries.
[362] Compa op cit note 339.
[363] 45 USC s 151 et seq.

impose the duty of good faith in bargaining where parties attempt to arrive at a collective agreement.[364]

The RLA is one of the federal statutes protecting the right to join unions and engage in collective bargaining in the private sector. The duty to bargain in good faith under the NLRA and the RLA applies only to issues considered mandatory subjects of bargaining related to wages, hours, and the terms and conditions of employment.[365] Despite parties having a mutual obligation to negotiate in good faith, parties are not obliged to agree or compromise.

The duty of good faith bargaining in the USA came as a requirement by Congress in the NLRA. As noted above, s8(a)(5) of the NLRA provides that refusal of an employer to bargain collectively with representatives of his employees is unfair labour practice.[366] Developments and application of the doctrinal requirement of good faith bargaining have been seen through judicial precedents that the NLRB created through the Act.

In 1936, it was decided that simply compelling parties to meet was insufficient to promote the purposes of collective bargaining.[367] Collective bargaining was more than just a meeting of an employer with the representative of his employees. The essential element was the serious intention to adjust differences and reach an acceptable common ground.[368] The purpose of collective bargaining was simple: parties had to deal with each other with an open, fair mind and sincerely endeavour to overcome obstacles or difficulties.[369]

The good faith requirement in the earliest years of the NLRA was a matter of statutory interpretation.[370] In early 1939, the good faith requirement was defined as necessitating an employer to enter into the discussion with a fair and open mind and sincere purpose of finding a basis of agreement.[371] Although this is not an exhaustive list, the Board's and the courts'

[364] Fick op cit note 336.
[365] Ibid.
[366] The original National Labor Relations Act, C. 372, 49 Stat. 453 (1935) s 8(5) provided that it was an unfair labour practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
[367] Charles J Morris et al *The Developing Labor Law: The Board, the Courts and the National Labor Relations Act* Vol 1 2 ed (1984) at 793.
[368] Ibid. See also *National Labour Relations Board* 1936: *Annual Report.*
[369] *NLRB v. Boss Mfg. Co*. iS F.2d. 187, u89 (7th Cir. 1941).
[370] Emmett P O'Neill 'The good faith requirement in collective bargaining' (1959) 21 *Mont L Rev* 202.
[371] *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

overall approach concerning the gradual development of what negatived the good faith requirement before 1947 can be reduced to the following circumstances:

- where the employer declined to sign the agreement entered into,[372]
- granted unilateral wage increases during the negotiations,[373]
- refused to examine the employees' proposals or to justify management's opposition,[374]
- failed to meet with the union within a reasonable time and at a suitable and convenient place,[375]
- failure to provide negotiators with sufficient authority to reach an agreement,[376]
- deliberately delay of negotiations and unwillingness to actively enter into the discussion,[377]
- exerted pressure in the discussions in the form of threats or reprisals,[378]
- refused to offer counterproposals when requested to do so or refused to include a clause recognizing the union,[379]
- withholding information,[380] and
- insisted that the union sign the agreement as a group of employees rather than as a union.[381]

The unifying factor in these situations is that the Board searched for an attitude that displayed a recognition of the union as an equal contracting partner with whom the employer is not only willing to reach an agreement but is eager to do so.[382] The good faith requirement was also a handy tool to prevent management from strangling incipient unionism by giving it the run-around and as a weapon to compel employers to take new unions seriously.[383]

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[372] *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). See also *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 637-38 (4th Cir. 1940). Cox also notes that; ordinary experience teaches us to be suspicious of anyone who is going through the motions of negotiating a contract yet evades questions about his willingness to reduce to writing any agreement that may be reached (Cox op cit note 327).).

[373] *NLRB v. Barret Co*., 135 F.2d 959 ((7th Cir. 1943).

[374] *NLRB v. Geo. P. Pilling & Son Co*., 119 F.2d 32 (3d Cir. 1941).

[375] *NLRB v. P. Lorillard Co*., 117 F.2d 921, 924 (6th Cir. 1941), rev'd on other grounds at 8, 314 U.S. 512 (1942).

[376] *Republican Publishing Co. v. NLRB, 73 N.L.R.B*. 1085 (1947), enforced, 174 F.2d 474 (1st Cir. 1949), adjudication in contempt, 180 F.2d 437 (1st Cir. 1950).

[377] *NLRB v. Montgomery Ward & Co*., 133 F.2d 676 (9th Cir. 1943).

[378] *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

[379] *McQuay-Norris Mfg. Co v. NLRB*, 116 F.2d 748 (7th Cir. 1940), cert. denied, 313 U.S. 565 (1941).

[380] *Pioneer Pearl Button Co. r N.L.R.B*. 837 (1936). In casu, the proof of refusal to supply relevant data probably supported the conclusion that the company did not intend to sign a contract with the union upon any terms, but it seems plain that the evidence was an unnecessary makeweight. The cases dealing with the withholding of information have an involved history, which epitomises the basic issue concerning the meaning of good faith.

[381] *Louisville Refining Co. v. NLRB*, 102 F.2d 678 (6th Cir. 1939), cert. denied, 308 U.S. 568 (1939).

[382] Comment, 61 *Harv.L. L. REv*. 1225 (1948).

[383] Charles Oscar Gregory *Labor and the Law* 2ed (1958) 401.

In addition, the court has confirmed that 'an employer, who, by his refusal to honour, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining'.[384]

Negotiations were sometimes based on the negotiation tactic of Boulwarism, built on a 'take it or leave it' basis. This principle originated in 1946 from the case of *General Electric Co 150 NLRB.*[385] In *casu*, a company made a firm settlement offer to the other party on a 'take it or leave it'. This was prohibited from being negotiated further, resulting in non-negotiation. Consequently, this meant that the negotiator from the beginning possessed powers as a unilateral dictator of the terms of any agreement.[386] This was put before the court as an unfair labour practice against the company and a refusal to bargain in good faith.[387] However, as the years preceded, the NLRB found that the bargaining technique, Boulwarism, violates the duty to bargain in good faith.[388]

In addition, the principle of Boulwarism conflicts with the guiding policy of the ILO.[389] The Ninth Circuit enforced the resulting order, saying that the duty to bargain in good faith is an

> obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. Not only must the employer have 'an open mind and a sincere desire to reach an agreement' but 'a sincere effort must be made to reach a common ground'.[390]

To determine good faith in negotiations, the NLRB will look at the totality of the circumstances of the case at hand. The objective criteria the NLRB looks for when determining a lack of good faith include whether the party is willing to meet at reasonable times and intervals and whether someone has the authority to make decisions at the table.[391] The ineffectiveness of the NLRB's

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[384] See *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (1941).
[385] *General Electric Co 150 NLRB* 192, LRRM 1491 (1964). This principle is used as a method of bargaining tactic in which the employer researches the probable outcome of collective bargaining, and the information is used to make a firm settlement offer to union on a take it or leave it basis (available at *https://definitions.uslegal.com/b/boulwarism/*, accessed on 26 January 2022).
[386] Leroy S Maxwell 'The duty to bargain in good faith, boulwarism and a proposal: The ascendance of the rule of reasonableness' (1987) 71 *Dickson LR* at 544.
[387] Ibid. See also *General Electric Co* 150 NLRB 193. This was the status in the American legal system during the era of the Boulwarism principle.
[388] *General Elec. Co.*, 57 L.R.R.M. 1491 (N.L.R.B. Dec. 16, 1964).
[389] Leppan, Govindree & Cripps op cit note 69.
[390] 133 F.2d 686 (9th Cir. 1943), quoting in part from *NLRB v. Reed & Prince Mfg. Co.*, iiS F.2d 874, 885 (1st Cir.), cert. denied, 313 U.S. 595 (1941).
[391] Laura Carlson *Workers: Collectivism and the Law, Grappling with Democracy* (2018).

remedial authority in cases of violation of the duty to bargain has been raised by the Court,[392] by the NLRB itself,[393] and by scholars.[394] There are, however, instances where an employer is allowed to conduct itself in a certain manner, including hard bargaining, provided good faith is sought to reach an agreement.[395]

The fact that collective bargaining in the USA is effective is nothing immune to challenges. This has been highlighted in this way:

> In the USA, we endured a period with labor venting its anger by violence in the workplace and in the streets. Counterforces met these actions and oftentimes management initiated provocative actions against labor… it is much tougher to uphold the peace and to make the necessary changes that are part of the negotiation process. Bargaining in good faith took a long time to realize in the USA, as well as throughout many parts of the world.[396]

The background above shows that judicial precedents suggested that the duty to bargain in good faith was mainly enforced on the employer. However, the duty was also applicable on the part of labour unions. The *Globe Cotton Mills*[397] provides that both parties must observe or fulfill the good faith requirement. However, the observation by labor unions was not mostly enforced as it was practically assumed that a union's existence is to bring about collective bargaining on behalf of its representatives and were presumed to act in good faith.[398] However,

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[392] See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).
[393] See *Ex-Cell-O Corporation*, 185 NLRB 107 (1970).
[394] See, for example, Notes: NLRB Remedies, 351 *Duke Law Journal* 354 (1975). The Labor Law Reform Act of 1978 was presented to Congress with the aim of amending the National Labor Relations Act to strengthen the remedies and expedite the procedures under the NLRA. The 1978 proposal passed the House but not the Senate.
[395] National Labor Relations Board *Bargaining in Good Faith with Employees' Union Representative (Section 8(d) & 8(a)(5))*, available at *https://www.nlrb.gov/rights-we-protect/whats-law/employers/bargaining-good-faith-employees-union-representative-s*, accessed on 05 March 2019. See also Mondaq Business Briefing *Good Faith Bargaining Insights from the USA* in which it was noted that under the US labour law employers are permitted to bargain hard and the obligation of bargaining good faith recognises that hard bargaining can be good faith bargaining, available at *https://www.lexisnexis.com/hottopics/lnacademic/?verb=sr&csi=149522&sr=HEADLINE(Good+Faith+Bargaining+Insights+From+The+USA)%2BAND%2BDATE%2BIS%2B2009*, accessed on 19 February 2019). An employer may also, adopt or assume a unionised predecessor's collective-bargaining agreement when you acquire its business, continue its operations largely unchanged, and hire a majority of your employees from the predecessor's workforce. The advice is to bargain with the union separately or through a multi-employer association; bargain hard, provided you seek in good faith to reach an agreement; bargain with the union concerning permissive subjects of bargaining, but not to impasse and make unilateral changes that are minor, or where the union has clearly and unmistakably waived bargaining, etc.
[396] Scheepers op cit note 249.
[397] *Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939).*
[398] Emmett P O'Neill op cit note 370.

a labour union can violate its contractual agreement with the employer by placing itself beyond the pale of the good faith standard.[399] The same may also appear with the employer.[400]

Good faith bargaining under the NLRA is a careful balance between regulating the conduct and context of collective bargaining to promote the parties' ability to act on their collective interest in cooperation; while maintaining private determination of terms and conditions of employment through negotiation and resort to economic weapons.[401]

3.2.3. The Labor-Management Relations Act of 1947

In 1947, changes were made following the NLRA by the Labor-Management Relations [Taft-Hartley] Act of 1947 (LMRA).[402] Congress incorporated the good faith requirement into American labour laws to solve bargaining without substance.[403] The LMRA provides the statutory basis on the requirement of good faith bargaining. At this time, the NLRB extended the duty to bargain on representative unions. Therefore, an obligation to bargain in good faith was now placed on both employers and employees.[404]

Section 8(d) of the LMRA provides an enforceable duty to bargain between the employer and labour union. This must be done in good faith. For this section, to bargain collectively is

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The language of s 8(d) seems to require finding a subjective bad faith on the employer's part to substantiate a refusal to bargain charge.[405] In the same vein, s 8(b)(3) imposed upon labour organisations a duty to bargain corresponding to that of the employer.[406] Section 8(b)(3)

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[399] *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).
[400] *Ibid.*
[401] Kenneth G. Dau-Schmidt *The Duty to Bargain in Good Faith*: NLRB v. Truitt Manufacturing Co. and NLRB v. Insurance Agents 'International Union' (2005).
[402] 61 Stat. 136, 29 U.S.C. (1952) §151 et seq.
[403] Morris et al op cit note 367.
[404] Taft-Hartley Act 61 Stat. 136, 149 (1947), 29 U.S.C. s 158 (1952).
[405] Francis A King 'The employer's "good faith" bargaining duty: A troublesome test in the Taft-Hartley Act' (1966) 17 *W Rsrv L Rev* at 1390.
[406] Labor Management Relations Act (Taft-Hartley Act) § 8(b) (3), 61 Stat. 141(1947), 29 U.S.C. § 158(b) (3) (1958).

follows that 'it shall be an unfair labour practice for a labour organisation or its agents to refuse to bargain collectively with an employer'. Any failure by either of the parties is regarded as a ULP under the LMRA. Section 8(a)(5) applies to the employer, and s 8(b)(3) applies to the unions. It was clear then that the LMRA intended to impose on labour unions an obligation strictly reserved for employers under the NLRA.

These essential changes in s 8(d) and 8(b)(3) made it clear that Congress had not only approved the judicial interpretation of making good faith a regular and an integral part of collective bargaining but also revealed the importance which Congress attached to this concept in using it to overcome the one-sidedness that had developed under the NLRA.[407] In the light of this Congressional approval, the case history of the good faith bargaining requirement serves a two-fold function under the LMRA.

Firstly, the standards and tests used by the court and the Board in dealing with the employer will continue to have applications for management under the new legislation.[408] Secondly, as Congress indicated when it adopted s 8(b)(3), the Board will be guided by its past decisions in judging labour's fulfilment of this newly imposed duty.[409]

The NLRB confirmed that good faith bargaining requires an employer who seeks to justify refusal of a wage increase on an economic basis to substantiate its economic position by reasonable proof.[410] An employer violates s 8(a)(5) by refusing to negotiate with the union during a slowdown, which was designed to pressure the employer to accept the union's terms.[411] Conversely, labour unions were said to violate the duty to bargain in good faith by engaging in a slowdown, a 'quickie' strike, or a strike in breach of contract during the negotiation of a collective bargaining agreement.[412]

Although the good faith bargaining requirement is reduced to the law in the USA, not all negotiations are set to align with the requisites of good faith bargaining. Not all negotiations

[407] Emmett P O'Neill op cit note 370 at 202.
[408] CONF.REP. No. 510, 80th Cong., 1st Sess. 43 (1947).
[409] *Ibid*.
[410] *Truitt Mfg. Co., IIO N.L.R.B.* 856 (1954), enforcement denied, 224 F.2d 869 (4th Cir. 1955), rev'd, 35I U.S. 149 (1956).
[411] *Phelps-Dodge Copper Products Corp*., 101 N.L.R.B. 360 (1952).
[412] *International Union, United Mine Workers* (the Boone County case), 117 N.L.R.B. 1095 (1957); *Textile Workers (the Personal Products case*), io8 N.L.R.B. 743 (1954), enforced in part, set aside in part, 227 F.2d 409 (D.C. Cir. 1955), cert. denied, 352 U.S. 864 (1956).

are required to be in good faith. This contrasts with the general requirement that contracts be carried out in good faith.[413] Accordingly, entering negotiations on the house just for curiosity is not considered illegal.[414] As noted, the LMRA does not compel parties to agree to a proposal or concession. Likewise, the NLRA did not require that the parties agree. However, the parties must "*negotiate*" to reach an agreement where possible.[415]

It became crucial for employers to know of the activities giving rise to the refusal to bargain charges, as one-third of the cases heard by the NLRB involved such a refusal.[416] Although there are various activities, the study focuses on '*per se violations'* .[417] *Per se violations* violate the spirit of the LMRA in that they form ULPs without a finding of subjective bad faith. This is an automatic refusal to bargain regardless of the employer's good or bad faith. These violations are captured below.

a). Refusal to discuss mandatory bargaining subjects

There are various mandatory subjects in which the parties to collective bargaining are obliged to negotiate in the USA. So, refusing to discuss such mandatory subjects of collective bargaining violates s 8(a)(5). Although there are various subjects of bargaining, including permissive and illegal subjects, the study focuses on the mandatory bargaining subjects. Mandatory bargaining subjects 'settle an aspect of the relationship between the employer and the employees'.[418] These subjects have nothing to do with the representative union.

A subject is mandatory when it directly affects the employment relationship.[419] Good faith would be immaterial if the subject were not within the area of mandatory bargaining.[420] The good faith clause delineates the subjects as wages, working hours, and other terms and

[413] Barry O'Neill op cit note 323 at 3.
[414] Ibid.
[415] *N.L.R.B. v. Highland Park Mfg. Co.* 110 F.2d 632 (4th Cir. 1940).
[416] National Labor Relations Board *Thirtieth Annual Report* (1965) at 180. The report lists a total of 3815 s 8(a) (5) charges for the fiscal year 1965, which represented 34.9% of all the charges filed with the Board. However, most of these were not singular § 8(a) (5) charges but were raised in combination with one or more of the other prohibitive of s 8 (a).
[417] Other violations include employer conduct evidencing bad faith bargaining and activities which bring economic pressure.
[418] *Allied Chem & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 178 (1971).
[419] *Central Michigan Univ Faculty Ass'n v Central Michigan Univ,* 404 Mich 268; 273 NW2d 21 (1978).
[420] *NLRB v. Dalton Telephone Co.*, 187 F.2d 811 (5th Cir.), cert. denied, 342 U.S. 824 (1951).

conditions of employment.[421] As bargaining in good faith is enforceable under the LMRA, any party's refusal to bargain collectively is regarded as a refusal to bargain in good faith.[422]

It is important to note that wage increase is still the most subject of interest for collective bargaining in the workplace. In the USA, the wage is divided into various forms, including insurance plans,[423] Christmas bonuses,[424] merit raises,[425] pension plans,[426] group health and accident policies,[427] and profit-sharing plans.[428] Thus, anything identifiable with remuneration is regarded as wages and is a mandatory bargaining subject.[429] Other mandatory subjects of bargaining provided by the Michigan Supreme Court include subjects such as hourly rates of pay, overtime pay, shift differentials, holiday pay, pensions, profit-sharing plans, rental of company houses, grievance procedures, sick leave, work-rules, seniority and promotion, compulsory retirement age, and management rights clauses.[430]

The *NLRB v. Borg-Warner Corporation* case is one of the leading cases that dealt with the effects of classifying a subject as mandatory or non-mandatory. In *casu*, management asserted that any negotiated contract must have a ballot clause calling for a secret, pre-strike employee vote on the last offer and a recognition clause that excluded the certified international union as a party to the contract and substituted its uncertified local affiliate. All these demands were found not to be mandatory subjects of bargaining. Therefore, any insistence on inclusion in the contract was regarded as a refusal to bargain about other items which were mandatory subjects and a per se violation.[431] *Borg-Warner Corporation* highlights the importance of insistence on a non-mandatory subject as bad faith bargaining. In *casu* the employer did not bargain in bad

[421] *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960) and *NLRB v. American Nat'l Ins. Co.,* 343 U.S. 395 (1952). See also *Amalgamated Transit Union, Local* 1564, *AFL-CIO v Southeastern Michigan Transportation Authority*,437 Mich 441; 473 NW2d 249 (1991).
[422] *W. W. Cross & Co. v. NLRB,* 174 F.2d 875 (1st Cir. 1949) and *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cir. 1948), aff'd, 339 U.S. 382 (1950).
[423] *W. W. Cross* cit note 383.
[424] *NLRB v. Niles-Bement-Pond Co*., 199 F.2d 713 (2d Cir. 1952). For other bonuses see *NLRB v. United States Air Conditioning Corp.*, 336 F.2d 275 (6th Cir. 1964); *NLRB v. Toffenerti Restaurant Co*., 311 F.2d 219 (2d Cir. 1962), cert. denied, 372 U.S. 977 (1963); *NLRB v. Wheeling Pipe Line*, 229 F.2d 391 (8th Cir. 1956). Contra, *NLRB v. Wonder State Mfg. Co.,* 344 F.2d 210 (8th Cir. 1965).
[425] *NLRB v. J. H. Allison & Co.*, 165 F.2d 755 (6th Cir.), cert. denied, 335 U.S. 905 (1948).
[426] *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cit. 1948), aff'd, 339 U.S. 382 (1950).
[427] *W. W. Cross & Co. v. NLRB,* 174 1.2d 875 (1st Cir. 1949).
[428] *NLRB v. Black-Clawson Co.*, 210 F.2d 523 (6th Cir. 1954).
[429] Don P Brown 'Interpretation of good faith bargaining' (1961) 12 *W Res L. Rev* 612.
[430] *Detroit Police Officers Ass'n v Detroit,* 391 Mich 44; 214 NW2d 803 (1974).
[431] King 'op cit note 405.

faith however, refused to agree. In surveying the whole bargaining situation, the court held that the parties had bargained in good faith.[432]

The good faith bargaining requirement is also applied in other countries. In Australia, s 228 of the Fair Work Act 2009 (FWA) institutes a duty upon those negotiating collective agreements to bargain in good faith. Like in the USA, the Act does not require bargaining representatives to make concessions or reach an agreement on proposed terms.[433] The FWA establishes minimum conditions for Australian employees, including wages, working hours, leave entitlements, and redundancy pay.[434]

Although it has been noted above that those mandatory subjects include other work conditions, this has given rise to considerable litigation. An employer's decision to shut down the business or discontinue an operation and subcontract were among the subjects held by the Courts and the Board to be mandatory. Constantly, management had supported those decisions tied to the operation of the business, which is solely their business and should not be extended and interfered with by unions. Thus, the business's running is under management's discretion, which was motivated by economic necessity.[435] However, the Board disagreed with this standing.

In the language of other conditions of work, subcontracting for economic reasons was regarded as a mandatory item in the wording of s 8(d).[436] When management in *Fibreboard Paper Prods. Corp. v. NLRB*[437] decided to contract out the work their plant employees could do; the Board decided that the company must discuss the issue with the union. The Supreme Court also upheld this decision and held that:

> The type of 'contracting out' involved in this case - the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment - is a statutory subject of collective

[432] *Borg-Warner Corp*., 113 N.L.R.B. 1288, 1320 (1955), modified, 356 U.S. 343 (1958), affirming 236 F.2d 898 (6th Cir. 1956).
[433] A Stewart 'Good faith: Necessary element in Australian employment law' (2011) 32(3), *Comparative Labor Law & Policy Journal* 521.
[434] Fair Work Act 2009 pts. 2-2, 2-3, 2-6 (Austl.). See also Jill Murray & Rosemary Owens 'The safety net: Labour standards in the new era' in Anthony Forsyth & Andrew Stewart (eds) *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) at 40.
[435] Sheinkman 'Plant Removal Under the National Labor Relations Act' 38 *TEMP. L.Q.* 229 (1965). See also Turner 'Plant Removals and Related Problems'13 *LAB. L.J.* 907 (1962).
[436] *Town & Country Mfg. Co. 6 N.L.RB*. 1022 (1962), enforced, 316 F.2d 846 (5th Cir. 1963).
[437] 379 U.S. 203 (1964).

> bargaining under s 8(d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.[438]

Once it is proven that a subject falls within the range of mandatory bargaining subjects, bargaining representatives are obliged to bargain on it. As will be seen below, any desire to change a mandatory bargaining subject by the employer must be agreed upon by all bargaining representatives. Thus, an employer is prohibited from unilaterally changing any mandatory bargaining subject without the representative union's consent.

b) Unilateral changes in mandatory bargaining subjects

Before 1962, any unilateral changes made by the employer on conditions in which the parties were obliged to bargain were strong evidence of bad faith on the employer's part.[439] Moreover, an employer who instituted wage increases during a bona fide contract negotiation without consultation with the labour union was found to have violated s 8(a)(5) of the Act irrespective of the fact that the change was made in good faith.[440] In addition, changes made by the employer regarding reducing the number of sick leave days per year, increasing wages, and instituting merit increases to twenty employees out of fifty in the unit is a violation of s 8(a)(5) of the Act.[441]

Conversely, other decisions supported unilateral changes in wages by the employer. The NLRB's rulings and the court decisions permitted isolated wage and merit increases during bargaining so long as they did not represent a pattern that may still be valid.[442] Support in this regard may be seen in the Court of Appeal case of *Dallas General Drivers v. NLRB,* where the court held that an employer could decrease wages unilaterally where the union had demanded an increase and the parties had bargained to a deadlock on the wage issue.[443] Accordingly, an employer is obliged to maintain the status quo and bargain in good faith until an impasse is reached.[444]

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[438] *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964).
[439] *Crompton-Highland Mills, Inc*., 70 N.L.R.B. 206 (1946), enforcement denied, 167 F.2d 662 (5th Cir. 1948), rev'd, 337 U.S. 217 (1949).
[440] *Williamsburg Steel Prods. Co 126 N.L.R.B.* 288 (1960), enforcement denied, *NLRB v. Katz*, 289 F.2d 700 (2d Cir. 1961), rev'd, 369 U.S. 736 (1962).
[441] *NLRB v. Katz* 369 U.S. 736 (1962).
[442] *NLRB v. Superior Fireproof Door & Sash Co*., 289 F.2d 713 (2d Cir. 1961) (merit increases); *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958) (isolated bonuses and wage increases).
[443] 355 F.2d 842 (D.C. Cir. 1966). The union maintained that since the parties continued to bargain and reached agreements on other issues, there was no genuine impasse. The court rejected this argument, however, saying that an agreement on other issues did not mean that an impasse had not been reached on wages.
[444] *NLRB v. Katz,* 369 U.S. 736 (1962).

An impasse is a point in negotiations where parties are warranted or have a reasonable belief to assume that further bargaining will be fruitless. Thus, both bargaining parties must believe they have reached the rope's end.[445] It can only be when an impasse has been reached that an employer may be permitted to implement its offer unilaterally.[446]

Although wages remain one of the leading reasons for collective bargaining, there are other issues that the employer is prohibited from changing conditions. Unilateral reduction of an employee's working hours, unprecedented plant shutdown, and consequent layoff by the employer without consulting the union are practices violating s 8(a)(5). It can be safely concluded that an employer is prohibited from making unilateral changes to work conditions apart from isolated wage changes as noted above after consultation with the union has been made.

c) Disclosure of information: Financial Data

Representation of employees in collective bargaining by trade unions in the absence of a duty to furnish information by the employer is futile. This leaves representative unions in puzzling situations. This is because representative unions cannot find the truth about what they are looking for without relevant information to substantiate their case. In the end, trade unions will be forced to agree to anything the employer provides.

American labour law reached a point where unionised employees lacked the right to receive relevant information about their imminent employment status. This can be best explained by the blind adherence to the rigid model of adversarial bargaining that underlined the NLRA.[447] Employers were not obliged to tell employees anything unless required by law, and all the NLRA required was that employers disclose information relevant and necessary to bargaining.[448]

[445] *A.M.F. Bowling Co.,* 314 NLRB 969 (1994) enf. denied 63 F.3d 1293 (4th Cir. 1995).
[446] *Litton Financial Printing Division v. NLRB* 501 U.S 190, 198 (1991). See also *American federation of television and Radio artists v. NLRB,* 395 F.2d 622,624 (D.C. Cir. 1968).
[447] Janice R Bellace 'Mandatory consultation: The untravelled road in American labor law' (1987) 40 *Indus Relations Research Ass'n Proc*, at 79–83. Here it is argued that the duty to bargain often actually serves to constrain the collective bargaining process.
[448] 29 U.S.C. Section 158.

To strengthen their bargaining position, trade unions were aided by the NLRB.[449] For example, *Aluminium Ore Company*[450] is the first case law handed down in which the duty to furnish relevant information appeared. In *casu*, a representative trade union was denied access to data about the business wage history. The employer contended that the information enclosed is confidential. The board confirmed this as a refusal to bargain, which violates s 8(5) of the Act. [451] In this regard, furnishing information became a source of evidence of good faith or the lack thereof.[452]

In decisions that came later, a mere refusal of an employer to provide a union with all relevant data concerning bargaining issues was regarded as a violation of the good faith clause.[453] Consequently, a refusal to furnish information concerning wages alone is a clear expression of a refusal to bargain in good faith, and this is regarded as a ULP.[454]

An employer's refusal to supply labour unions with financial data to assist in bargaining is a complete violation of the Act. The rationale behind the position of an employer providing the union with its financial information is based on the fact that this information is crucial in that it can enable the union to establish a meaningful set of standards. An important question is whether the employer is obliged to provide the union with all its financial data? If not, what can be revealed? The NLRB provided a summary of these questions in that:

> An employer's duty to bargain includes the obligation to furnish the bargaining representative with sufficient information to bargain intelligently, understand and discuss the issues raised by the employer in opposition to the union's demands, and administer a contract.[455]

This doctrine has been applied to several matters, including wage matters. The employer's information to be disclosed to the union includes information on job rates and classifications and other pertinent financial data.[456] An employer must assist the union even when the union

[449] Cox 'The duty to bargain in good faith' (1958) 71(8) *Harv L Rev* at 1425–28.
[450] *N.L.R.B.* 1286 (1943), modified, 131 F.2d 485 (7th Cir. 1942).
[451] *Aluminum Ore Co. v. NLRB*, 131 F.2d *485* (7th Cir. 1942). Section 8 (5) was subsequently changed to s 8 (a) (5) in the 1947 amendments.
[452] Brown op cit note 429.
[453] *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2d Cir. 1951). The issue of the duty to furnish information has arisen in many areas of the labour field. Only the duty to furnish wage information will be discussed here, as the same rules and doctrines are used in each area.
[454] *NLRB v. Whitin Machine Works*, 217 F.2d 593 (4th Cir. 1954), cert. denied, 340 U.S. 905 (1955).
[455] NLRB *Seventeenth Annual Report* at 172 (1953).
[456] *NLRB v. Fitzgerald Mills Corp., 313 F.2d 260 (2d Cir.), cert. denied, 375 U.S. 834 (1963); Whitin Mach. Works, 108 N.L.R.B. 1537 (1954), enforced, 217 F.2d 593 (4th Cir. 1954).* See also Cox op cit note 327.

has alternate sources for obtaining such information.[457] Where unions bargained for an increase in wages and the employer refused, the latter must supply the union with detailed financial statements.[458]

An unwarranted delay in supplying the requested information constituted a violation without reasons for furnishing such information in time.[459] This conduct was only significant in determining the employer's overall subjective bad faith.[460] Turning to the abovementioned questions, the NLRB made a few exceptions to the employer's duty to supply requested financial data to the union. In the *Administrative Decision of NLRB Gen.Counsel, the* Board upheld an employer who failed to supply requested information contained in thirty-one filing cabinets and covering over 800 jobs, where the union was permitted to inspect and copy anything it desired.[461]

An employer can also be exonerated for reduced wages in an apparent inability to pay.[462] Likewise, management must furnish financial data when it claims the inability to grant wage increases and other benefits involving monetary outlays.[463] However, a company is not obliged to present the information solicited when irrelevant to any bargainable issue.[464] For example, in *United Fire Proof Warehouse,* various trucking association members demanded wage cuts for all their drivers' categories, arguing that they were losing money on local hauls.[465]

The association refused to furnish financial information supporting this contention for its overall operations; however, the information provided in this regard connected to its local haulage. The Board upheld a refusal to bargain charge. On appeal, the court held that the employer's failure to furnish the requested information was not based on a claimed inability to pay but on a steadfast refusal to raise wages or maintain them at existing levels.[466] Thus, since an employer can always refuse to raise wages or demand decreased rates, the association was

[457] *B. F. Goodrich Co.,* 80 N.L.R.B. 1151 (1950).
[458] *NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Taylor Foundry Co., 338 F.2d 1003 (5th Cir. 1964), enforcing 141 N.L.R.B. 765 (1963).*
[459] *Dierk's Forests, Inc., 148 N.L.R.B. 923 (1964).*
[460] King 'op cit note 405.
[461] *Administrative Decision of NIRB Gen. Counsel,* 1961 CCH NLRB 10,502, No. SR-1564.
[462] *United Fire Proof Warehouse Co. v. NLRB,* 356 F.2d 494 (7th Cir. 1966).
[463] *NLRB v. Jacobs Mfg. Co.,* 196 F.2d 680 (2d Cir. 1952).
[464] *Yawman* op cit note 453.
[465] *United Fire Proof Warehouse* op cit note 462.
[466] Ibid at 356 P.2d 494, 498 (7th Cir. 1966).

under no duty to supply financial data.[467] Consequently, the obligation to furnish financial data can simply be evaded.

In addition, an employer in *Labor Board v. Truitt Mfg. Co., 351 U.S. 149 (1956)* claimed that it could not afford to pay higher wages to its employees but refused the union's request to produce financial data to substantiate this claim. Consequently, the NLRB found that the employer bargained in bad faith, violating s 8(a)(5) of the National Labor Relations Act.[468] These prohibited activities, as noted above, are not a closed list in this category as there are other miscellaneous actions prohibited in this regard.[469] Although the NLRB faced other miscellaneous per se violations in other cases, the ones captured above were mainly brought to the Board.

d) Employees' duty

Violation of the duty to bargain in good faith under the LMRA in the case of employers was dealt with in the same manner as it was under the NLRA. Discussions above note such violations. On this part, it is essential to address the employees' duty in relation to the changes made. Before the enactment of the LMRA, good faith decisions served as 'benchmarks and guideposts to establish the bargaining obligations of unions'.[470]

The powers of the NLRB made it possible to hold employees to the good faith bargaining requirement as it was with the employer under the NLRA. However, limited judicial precedent supports employees' violation of the good faith bargaining requirement. Conversely, there is enough to show that the Board and the courts have followed the adage that 'what is sauce for the goose is sauce for the gander'.[471]

Employees have been found to violate the good faith requirement when the union insisted upon a prohibited hiring hall provision[472] or an outlawed closed shop union security clause.[473] A

[467] Ibid.
[468] Pp. 351 U. S. 149-154.
[469] King 'op cit note 405.
[470] Brian Leiter 'The *Meaning of Collective* Bargaining' (1955).6 *Lab. L.J* 835.
[471] Emmett P O'Neill op cit note 370.
[472] *National Maritime Union*, 78 N.L.R.B. 971 (1948), enforced, 175 F.2d 686 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950). The Board said this is a violation of the good faith obligation because it evinces a mind closed and without purpose to find a basis for agreement, an attitude which the Board and the courts have found to be incompatible with good faith bargaining. Id., 78 N.L.R.B. at 981.
[473] *Penello v. International Union, UMW*, 88 F. Supp. 935 (D.D.C. 1950).

union violates its obligation to bargain in good faith by starting a series of unprotected harassing tactics to exert pressure on the company while negotiations are in progress.[474] Conversely, this Board's decision was reversed by the Court of Appeals, which held that engaging in an unprotected activity makes the employees liable for discharge by the company. However, it does not furnish the basis for declaring that the union had not engaged in good faith bargaining.[475] Accordingly, '[t]here is not the slightest inconsistency between genuine desire to come to an agreement and the use of economic pressure to get the kind of agreement one wants'.[476] Criticisms followed this decision.[477]

3.3. The regulatory framework of the good faith bargaining requirement: New Zealand

3.3.1. Background

Since the eighteenth century, collective bargaining issues in New Zealand (NZ) have been resolved through legislation. The Industrial Conciliation and Arbitration Act of 1894 (IC&A Act) guide the era of abstract-backed collective bargaining. Throughout the past decades, New Zealand has moved from one of the most heavily regulated labour markets to one of the least regulated.[478] Subsequently, following World War II, developed countries endorsed collective bargaining and enacted legislation regulating good faith bargaining. However, NZ did not conform to such an international norm.[479]

New Zealand has progressed from a system that provided no protections for collective bargaining to a system that now relies on the duty of good faith to protect and promote collective bargaining.[480] It has become one of the countries that have undergone major labour law changes.[481] Previously, NZ relied in formal terms upon compulsory conciliation and arbitration rather than collective bargaining as the principal means of regulating terms and conditions of employment.[482]

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[474] *Personal Products Matter of Textile Workers Union,* 108 N.L.R.B. 743 (1954).
[475] *Textile Workers Union v. NLRB (Personal Products case),* 227 F.2d 409, 410 (D.C. Cir. 1955), cert. denied, 352 U.S. 864 (1956).
[476] Ibid 227 F.2d at 410.
[477] See the discussion on the criticisms in Emmett P O'Neill op cit note 370.
[478] Polakoski op cit note 130.
[479] Pam Nuttall & Breen Creighton 'Good faith bargaining downunder' (2012) 33 *Compq Lab L& Pol'y J* at 257.
[480] Polakoski op cit 130.
[481] Gordon Anderson; Peter Gahan; Richard Mitchell et al 'The evolution of labor law in New Zealand: A comparative study of New Zealand, Australia, and five other countries' (2011) 33 *Comp Lab L & Pol'y J* at137.
[482] Breen Creighton & Andrew Stewart *Labour Law* 5 ed (2010) TT [12.03]– [12.04].

The approach of good faith bargaining was abandoned in favour of collective bargaining-albeit with mixed results.[483] In 2000, the Employment Contracts Act of 1991 (ECA) was repealed and replaced with the Employment Relations Act of 2000 (ERA). While the change was necessary for New Zealand's economy to survive in the global market, the ECA seriously impacted unionisation and collective bargaining.[484] The ERA enshrines the principle of dealing "*in good faith*" as a central element of collective and individual relations.[485]

The ERA aimed at achieving a balance "*in the relationship between employers, employees and the government.*"[486] Fortunately, the ERA sought to move away from the ECA's premise that the parties to an employment relationship possessed equal strength, thus imposing a statutory duty for employers and unions to conduct their behaviour in good faith.[487] The 2000 Act remains in force, although the National government elected in 2008 has introduced several changes that, for the most part, reduce protections for workers.'[488] In addition, New Zealand provides Codes of Practice, which follow the United Kingdom's (UK) more voluntaristic treatment of the issue.[489]

Good faith bargaining laws in NZ have been introduced in response to the political failure of individual contracts-based employment regulation.[490] Good Faith Bargaining (GFB) represents a tactical and strategic option within the negotiation process available to both unions and employers.[491] Thus, the GFB test seeks to prevent sham or surface bargaining while leaving the parties wide latitude in selecting their negotiation tactics.[492] In the end, the outcome is intended to reflect the desires and strengths of the parties.[493]

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[483] Stephen Blumenfeld, Sue Ryall & Peter Kiely *Employment Agreements: Bargaining Trends and Employment Law Update 2009/2010* (2020) at 14.
[484] Margaret Wilson 'The Employment Relations Act: A Framework for a Fairer Way' (2001) 26 (1) *NZJIR* 9 at 12.
[485] Anderson; Gahan; Mitchell op cit note 481 at 137.
[486] Wilson op cit note 484 at 19.
[487] Polakoski op cit note 130.
[488] See, for example, Employment Relations Amendment Act 2008 2 s 2 (Austl.); Employment Relations Amendment Act 2010 2 s 2 (Austl.). The latter changes took effect in April 2011, which is concerned with the state of the law between 1970 and 2010.
[489] Ray Fells, Donella Caspersz & Catherine Leighton 'The encouragement of bargaining in good faith –A behavioural approach' (2018) 60(2) *Journal of Industrial Relations* at 266–281.
[490] Aaron Rathmell 'Fair Work's good faith bargaining requirements in perspective' in Australian Institute of Employment Rights in *The Debate: Good Faith and the Employment Relationship* (2009) at 12–13
[491] Michael Gillan & Donella Caspersz 'The introduction of good faith bargaining in Western Australia: Policy origins and implications for collective bargaining' (2005).
[492] James A Gross, Donald E Cullen & Kurt L Hanslowe 'Good Faith in labor negotiations tests and remedies' (1968) 53 *Cornell L Rev* at 1009.
[493] *Ibid.*

3.3.2. The Employment Relations Act of 2000

The Employment Relations Act of 2000 (ERA) is the principal legislation introducing good faith bargaining in employment relationships. One of the primary objectives of the ERA is to encourage collective bargaining—the ERA contrast with the ECA. The ECA implemented a strongly new-right vision of labour law that seriously undermined both the collective and individual rights of employees and significantly enhanced the powers of employers to deregulate and deunionise their workplaces.[494]

Failure of the ECA to give weight to internationally recognised principles on freedom of association was one of the most strongly criticised features and the subject of an adverse report by the ILO Committee on Freedom of Association (CFA).[495] The Labour Party proposed a moderate reform based on the core ILO principle- the key reform being the statutory obligation of good faith.[496] A different approach to employment relations had been seen under the ERA and its subsequent amendments.[497]

a). Defining good faith in collective bargaining

The term good faith in collective bargaining is not easily defined. The principle has been defined from the stance of contract law and labour law. The obligation of good faith as provided in the ERA does not mandate a wholly objective definition of good faith.[498] Applying the principle of good faith in employment relations should not be afforded the same as in contracts. So, it would be a mistake to equate the good faith reasoning in the employment relations arena with ordinary contract cases.[499]

The NZ Parliament has left it to the courts to determine what is good faith bargaining. However, some help can be gained from similar legislation in other jurisdictions, particularly Canada and the USA.[500] At a minimum, employers and unions must observe the following:

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[494] Anderson op cit note 134.
[495] ILO Committee on Freedom of Association, Case No 1698: Complaint against the Government of New Zealand, *Official Bulletin*, Vol 77, Series B, No. 3 at 39.
[496] Gordon Anderson 'Transplanting good faith into New Zealand Labour law: The experience under the Employment Relations Act 2000' (2002) 9 (3) *Murdoch University Electronic Journal of Law*.
[497] B Foster, E Rasmussen, J Murrie & et al 'Supportive legislation, unsupportive employers and collective bargaining in New Zealand' (2011) *Industrial Relations* 66 (2), 192–212.
[498] See *Auckland City Council v New Zealand Public Service Assn Inc* [2004] 2 NZLR 10 at 15.
[499] *Wellington City Council* 5 [2002] 3 NZLR 486, at 497.
[500] *NZ Amalgamated Engineering etc. Union Inc. v. Carter Holt Harvey Ltd*., [2002] 1 ERNZ 597 at [4] (EC).

- Be active and constructive in proving and maintaining a productive employment relationship. Thus, the parties must be responsive, communicative, open, and honest without misleading.[501]
- Be responsive and communicative and use their best endeavours to agree on an effective and efficient bargaining process.
- Meet to consider and respond to proposals.
- Not mislead nor deceive each other.
- Recognise the role and authority of bargaining representatives.
- Not bargain, directly or indirectly, with persons other than bargaining representatives.
- Not undermine the bargaining process.
- Provide, on request, information that is reasonably necessary to support or substantiate claims or responses.[502]

In addition, the Employment Relations Authority in *New Zealand Licensed Rest Homes Association Incorporated and Others v Midland Regional Health Authority* said that the parties to bargaining must make open-*minded and respectable efforts to reach a fair and reasonable accommodation*.[503] To foster this, good faith does not:

- Mean that parties must put their interests aside when they are negotiating. It allows vigorous bargaining, including economic pressure from strikes and lockouts.
- Restrict the subject matter of negotiations. It is up to the parties to decide on the terms they wish to include in their collective agreement.
- Mean the parties must keep bargaining if they cannot reach an agreement.
- Assume that collective bargaining involves only calm, reasoned argument - bargaining often involves emotion, tension, grandstanding, and pressure tactics. These are normal aspects of the process, and good faith bargaining allows for this.[504]

In negotiations, parties may portray emotional behaviours due to several factors during the process. Anger may also infiltrate negotiations where parties believe or perceive their counterparts are not acting in good faith. Thus, when emotions run amok, negotiators lose

[501] Code of Good Faith in Collective Bargaining, s 1.3.
[502] See s 32 of the ERA, which sets forth the requirements for the parties to comply with s 4 concerning treating one another in good faith.
[503] Geoff Davenport & Judy Brown *Good Faith in Collective Bargaining* (2002) at 65.
[504] Ministry of Business Innovation and Employment op cit note 315.

perspective, make serious mistakes, or perform poorly.[505] It is therefore postulated that negotiators are expected to keep their emotions in check during the negotiation. Similarly, emotions make us care for our interests and those of others; however, they can also cause intense irrational behaviour and cause conflicts to escalate and negotiations to break down.

Most importantly, emotions cannot be easily avoided, as they form part of our human life. Therefore, negotiators need not eliminate emotions but strive to become aware of them, manage their feelings, and control their expression.[506] Without this, the business may suffer due to ramifications that may follow. Furthermore, the duty of good faith is extended to employers with certain prohibitions. In this way, employers:

- Are required to provide information to employees about any proposal that will or is likely to harm the continuation of their employment. Employers must also provide an employee with an opportunity to comment on that information unless good reasons exist for maintaining confidentiality.
- Must not advise or do anything to induce an employee not to be involved in collective bargaining or not to be covered by a collective agreement.
- Must not pass on to employees not covered by a collective agreement, a term or condition agreed to in that agreement, where this is done with the intention of undermining the agreement and which has that effect.[507]

With these obligations also exist limitations placed on both parties to further their objectives, which include not allowing strikes and lockouts during the first 40 days after bargaining starts, encouraging the parties to seek agreement at the bargaining table, and allowing parties to use the information to persuade, but not to mislead or deceive.[508] The principle of good faith in NZ is applicable in both individual and collective employment relations. It extends to both individual and collective agreement and in the bargaining process.[509] Although good faith extends beyond the bargaining table, it is collective bargaining where the impact of these

[505] RS Adler, B Rosen & E M Silverstein 'Emotions in negotiation: How to manage fear and anger' (1998) 1 Negotiation *Journal* at 161–179.
[506] Ibid.
[507] Ministry of Business, Innovation and Employment op cit note 315.
[508] Ibid.
[509] See s 4(4) Employment Relations Act 2000. In respect of bargaining for an individual employment agreement, the Employment Relations Act 2000 applies only to employers and employees who have attained that status such that there will be no statutory cause of action for breach of good faith in the bargaining process if there has been no offer and acceptance.

requirements has mostly been felt.[510] The ERA requires these minimum provisions and is extended and provided for in the Code of Good Faith, detailed below.

(b). The general duty to bargain in good faith

The significant role of good faith is set out in the key provisions of the ERA. The ERA sets forth the objectives for achieving this policy goal in s 3 (as amended in 2004) of the Act:

> (a) to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship –
>
> (i) by recognising that employment relationships must be built on good faith behaviour; and
>
> (ii) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships; and
>
> (iii) by promoting collective bargaining; and
>
> (iv) by protecting the integrity of individual choice, and
>
> (v) by promoting mediation as the primary problem-solving mechanism; and
>
> (vi) by reducing the need for judicial intervention; and
>
> (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively.

Section 3(a)(iii) of the ERA provides that the promotion of collective bargaining is a key objective of the statute. So, new bargaining rules such as the good faith obligation are fundamental to this objective. In addition, s 3(a)(ii) and (iii) of the ERA entails that irrespective of the provisions by legislation, power dynamics are attached to the collective employment relationship. Thus, there is an inherent inequality of bargaining power between these parties. The Act enforces the parties to bargain in good faith to address such inequality.

[510] Andrew Caisley 'Clarity or confusion: The Employment Relations Amendment Act 2004 under the lens, in employment relationships: Workers, unions and employers in New Zealand' (2010) in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions And Employers in New Zealan*d (2010) at 56.

Although the imbalance is beyond the legislative intervention, legislation is brought frontward to control such imbalances and check good faith relationships amongst the parties. While legislation rarely transforms the nature of specific employment relationships, it can strongly influence the environment within which those relationships occur.[511] By so doing, the ERA seeks to build productive employment relations by requiring parties to collective bargaining to engage with one another in good faith.[512]

In this regard, good faith requires trade unions and employers to engage in 'cooperative and facilitative methods of resolving bargaining disputes' instead of being adversarial.[513] Therefore, good faith bargaining provides employers and unions the best opportunity to reach a successful collective agreement or variation.[514] To strengthen the protection of collective bargaining and the duty of good faith in NZ, the Labour government enacted the *Employment Relations* Amendment Act 2 of 2004. The Amendment Act sought to increase penalties for a breach of good faith, limit employers' ability to undermine collective bargaining, and strengthen provisions to encourage the conclusion of a collective agreement.[515]

In addition, the Amendment Act removed the word '*bargaining*' from the object of the Act to recognise that 'the inherent inequality of power in employment relationships requires a broader focus than on bargaining power alone'.[516] A duty of good faith under the ERA is an obligation that is meant to permeate 'all aspects of the employment environment and the employment relationship'.[517] This obligation is intended to drive a different pluralist approach to employment relationships that contrasts with the market-driven ECA.[518] However, the New Zealand Court of Appeal in *Counts Cars Ltd v Baguley [2001] I ERNZ* held in contrast to this contention and noted that,

> We do not see that the new statutory obligation on employers and employees to deal with each other in good faith introduces any significantly different obligation to that the Courts have placed upon parties to employment contracts over recent years.[519]

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[511] Ibid.
[512] Richard Rudman *Employment Law Guide* (2010) at 89.
[513] Ibid at 79. See also *Assn of University Staff Inc v Vice Chancellor of the University of Auckland* [2005] 2 NZELR 277, [2005] 2 (1) NZLR 277.
[514] Ministry of Business, Innovation and Employment op cit note 315.
[515] Polakoski op cit note 130.
[516] Employment Relations Amendment Act (No 2) 2004 Explanatory Note at 3.
[517] Employment Relations Act of 2000 s 3.
[518] Gordon Anderson, Transplanting and Growing Good Faith in New Zealand Labour Law, 19 AUSTL. J. LAB. L. 1, 13 (2006).
[519] C*ounts Cars Ltd v Baguley* [2001] I ERNZ 660, 672 per P Richardson, J Gault & J Blanchard. See also Caisley op cit note 510 at 56.

To advance good faith practice, the ERA aims to ensure fairness and equity in collective bargaining by safeguarding the role of trade unions in promoting their members' collective interests.[520] However, in the same way we use words and phrases such as 'fair', 'reasonable', and 'just', it would be churlish or worse to proclaim one's opposition to 'good faith'. [521] Thus, the phrase 'good faith' is often linked to the word 'bargaining', and indeed all employment bargaining must be conducted in good faith.[522]

In addition, s 4 of the ERA provides for some definitional elements on the good faith in the following way:

(1) The parties to an employment relationship specified in subs (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subs (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer before the decision is made.

[520] Ibid.
[521] Graeme Colgan 'Good faith obligations in practice: When, what, by whom and to whom?' (2008).
[522] Ibid.

Subs (1A) of the Amendment Act significantly strengthened an employer's obligations when consulting with employees about changes affecting their continuity of employment. It made it clear that the duty of good faith is not a static and reactive requirement but requires a proactive approach. In enacting subs (1A), Parliament intended to add and modify common law principles applicable to employment law.[523] The parties must now specifically be 'active and constructive' in establishing and maintaining an employment relationship and being 'responsive and communicative', wording that appears to have been designed to reject the Court of Appeal's approach in *Auckland City Council* and is in part an implied rebuke to the Court.[524]

These definitional elements of good faith dealings provided in s 4 address what might be referred to as the honesty or transparency of dealings between parties so that deceiving and misleading, whether intentional or consequential, are prohibited.[525] In simple terms, s 4 does not constrain an employer from engaging in otherwise lawful bargaining tactics with a union but requires the employer to do so transparently and truthfully and to open and maintain channels of communication with the union.

Section 4(4) of the Act sets out matters to which the good faith obligation applies and notes them as examples, not a definitive list- which covers a broad spectrum of circumstances, including all matters arising under agreements, consultation about collective employment interests, employers' proposals such as contracting out and selling a business; redundancy situations; and union workplace access.[526] The Act also provides cases where a breach of the obligation of good faith can be seen. For example, a union might breach the duty by not discussing alternative working arrangements with an employer during a proposed strike[527] or does not comply with an undertaking to re-enter negotiations.[528]

[523] *Air New Zealand Ltd. v. Hudson* [2006] ERNZ 415 (EC).
[524] The wording of s 4(1A) (b) in particular suggests this.
[525] *National Distribution Union Inc v General Distributors Ltd* [2007] 1 ERNZ 120, at 140.
[526] Employment Relations Act 2000 s 4(5).
[527] *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd* (Employment Court, Auckland, AC 43/07, 11 July 2007, Chief Judge Colgan).
[528] *Professor Graeme Fogelberg, Vice Chancellor of the University of Otago v Association of University Staff* (Employment Court, Christchurch, CC 23/02, 16 February 2002, Judge Palmer).

In addition, employees may take a personal grievance against an employee who fails to follow the rules of good faith.[529] Where the Employment Relations Authority or the Employment Court found that the employer did not follow good faith rules, they may award a penalty for a breach of good faith.[530]

Ports of Auckland Ltd v New Zealand Waterfront Workers Union Inc,[531] held that it is not a breach of good faith to issue a notice to strike during ongoing independent mediation designed to progress negotiations. The Court seems to have viewed that the ERA provides a comprehensive code for when strikes are lawful and that they are not prepared to introduce uncertainty into this by opening up a 'good faith' restriction. Judicial precedents following the enactment of good faith in NZ are limited, unlike the USA case, which had observed this requirement for many years.

The ERA is explicit in that the duty of good faith does not require an employer and a union to either agree on any matter for inclusion in a collective agreement or to enter into a collective agreement.[532] This is the same as in the USA. The Authority is expressly precluded from fixing terms and conditions of employment.[533] These observations have also been seen under the federal laws of the USA. These obligations represent a distillation of the North American case law, particularly Canada.[534]

Some requirements to bargain in good faith are highlighted below under the Code of Good Faith in Collective Bargaining discussions as an extension. The basic obligations of good faith in collective bargaining must be noted. Section 32(1)(a)-(b) requires that after the bargaining process has been initiated, parties must use their best endeavours to enter an arrangement. This agreement must set out a process for conducting bargaining effectively and efficiently. For bargaining, parties must also meet occasionally. Section 32(1)(c) requires parties to consider and respond to the proposal made by the other party.

[529] Employment New Zealand *Good Faith*, available at *https://www.employment.govt.nz/resolving-problems/employer-and-employee-must-dos/good-faith/*, accessed 17 August 2021.
[530] Ibid.
[531] (2001) unreported AC 44/01.
[532] Section 33.
[533] Section 161(2).
[534] Anderson op cit note 496.

The Act also prohibits undermining of the bargaining process, courtesy of s 32(1)(d)(i) - (iii) of the Act. This requirement poses three related obligations, including that:

- parties must recognise the role and authority of the other's representative;
- a party must not bargain (whether directly or indirectly) with the persons represented by the other party; and
- must refrain from any action likely to undermine the bargaining or the other party's authority in the bargaining.

Section 32(1)(e) of the Act applies to the provisioning of information. As in the USA, an employer is obliged to furnish information that it considers confidential for effective bargaining. The information can be provided even to an independent third party whose function is to decide whether the information substantiates the claim. Disclosure of information to the other parties is a basic aspect of the duty of good faith, promoting informed bargaining and good faith relationships and a way of understanding the parties' separate interests.[535] The following chapter addresses the importance of recognising conflicting interests of individuals (employer and employees) to sustain companies through collective bargaining.

Lastly, in dealing with good faith in bargaining for a collective agreement, s 32 of the Employment Relations Amendment Act 2010[536] was amended by adding subs (6):

> To avoid doubt, this section does not prevent an employer from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with subs (1)*(d)* of this section and the duty of good faith in section 4.[537]

3.3.3. The Code of Good Faith in Collective Bargaining

The Code of Good Faith in Collective Bargaining existed under the espousal of s 38 of the ERA. However, this was revoked by the Minister of Workplace Relations and Safety with effect from March 2015. Changes made from the previous Code were recommended by the Committee on the Code of Good Faith in Collective Bargaining to reflect practices, developments, and experiences in applying the duty of good faith under the Act and considering

[535] Ministry of Business, Innovation and Employment op cit 315. The most interesting aspect of good faith bargaining in New Zealand is the fact that, it emphasises on parties' interests, a crucial part that cannot be ignored when parties are engaged in collective bargaining.
[536] Public Act 2010 No 125, assented on 26 November 2010, came into force on 1 July 2011(only s 11 of the Act) and the rest of the Act came into force on 1 April 2011.
[537] See s 9 of the Employment Relations Amendment Act 2010 (Good faith in bargaining for collective agreement).

the Employment Relations Amendment Act 2010 and the Employment Relations Amendment Act 2014.[538]

In 2016, the Code was approved under s 35(1) of the ERA and enacted into legislation in March 2016. The Code is a guideline for employers and unions when bargaining for a collective agreement or variation.[539] It is regarded as an essential Code by which the Employment Relations Authority and the Employment Court may use to determine whether parties have acted in good faith in their dealings.[540]

This Code is not a substitute for the Act. However, the Employment Relations Authority (the Authority) or the Employment Court (the Court) may have regard for it in determining whether or not the parties have dealt with each other in good faith in bargaining for a collective agreement. [541]The code assists parties in finding all the things they should consider when trying to bargain in good faith.[542]

The Code provides for several provisions on good faith bargaining. Section 1 is the introductory section outlining the purpose of the Code,[543] its effect,[544] what good faith requires of the parties,[545] the requirements,[546] bargaining for a collective agreement,[547] disputes over interpretation,[548] etc.[549] In addition, s 3 provides various aspects of parties to bargaining, amongst which a collective agreement is dealt with. Other relevant ss address an individual issue that deals with good faith bargaining. This includes agreeing on the bargaining process,[550]

[538] Ministry of Business, Innovation and Employment op cit 315.
[539] Section 1 of the Code, the introductory section. Ministry of Business, Innovation and Employment, op cit note 315. There are specific Codes of good faith for employment relationships for the New Zealand Police, and the public health sector which cover (but are broader than) collective bargaining, available at *https://www.hrinz.org.nz/site/resources/knowledge_base/a-h/bargaining.aspx*, accessed on 12 March 2019.
[540] Ministry of Business, Innovation and Employment op cit note 315.
[541] See s 1.2 of the Code of Good Faith in Collective Bargaining.
[542] Ministry of Business, Innovation and Employment op cit note 315.
[543] ERA 2000 s 35 (1) 1.1.
[544] ERA 2000 s 35 (1) 1.2.
[545] ERA 2000 s 35 (1) 1.3.
[546] ERA 2000s 35 (1) 1.4.
[547] ERA 2000 s35 (1) 1.5.
[548] ERA 2000 s 35 (1) 1.6.
[549] the ERA 2000 ss 35 (1) 1.6 and 1.7.
[550] ERA 2000 s 35 (2) (ss 2.1-2.3).

bargaining issues,[551] mediation,[552] facilitation,[553] and breach of good faith.[554] Furthermore, s 35 (6) plays a crucial role in addressing good faith violations by parties to collective bargaining.

Where a party believes there has been a breach of good faith concerning collective bargaining, it shall, whenever practicable, indicate any concerns about perceived breaches of good faith at an early stage to enable the other party to remedy the situation or provide an explanation.[555] Moreover, the aggrieved party may also seek a penalty imposed on the other for breach of good faith.[556] In addition, the parties are at liberty to apply to the Authority to fix the collective agreement provisions to which the bargaining relates.[557]

This Code is still the guiding legislation for good faith bargaining, read together with the ERA and the ERA as amended. The study above highlighted the relationship between the ERA, the ERA as amended, and the Code of Good Faith in Collective Bargaining.

3.4. The legislative framework: South Africa

Before discussing the developments of the law regarding good faith in South Africa, it is essential to note the principal laws regulating collective bargaining in this regard.

3.4.1. The Constitution of the Republic of South Africa, 1996

The Constitution provides for ground labour relations provisions dealing with labour matters. These fair labour provisions are expanded in the Labour Relations Act 66 of 1995 (LRA), which provides various labour rights. Section 23 of the Constitution provides for fair labour practice, a blanket right to fair workplace treatment. The right to bargain collectively is recognised in s 23(5) through trade unions, the employer's organisation, or the employer. However, the right to bargain collectively can be limited through the law of general application courtesy of s 36.

[551] ERA 2000 s 35 (3) (ss 3.1-3.20).
[552] ERA 2000 s 35 (4) (ss 4.1).
[553] ERA 2000 s 35 (5) (ss 5.1).
[554] ERA 2000 s 35 (6) (ss 6.1-6.3).
[555] ERA 2000 s 35 (6) 6.1.
[556] ERA 2000 s 35 (6) 6.2.
[557] ERA 2000 s 6.3. An application may be made whether or not any penalty has been imposed for a breach of good faith. The Authority will then decide whether the application to fix the provisions satisfies the grounds set out in the Act.

In addition, it provides for collective rights such as the right to organise, strike, and participate in trade union activities.[558] These rights are equally available to both employers and employees. Moreover, the right to strike applies to employees, and employers have the recourse to lock-out, both underwritten in s 64(1) of the LRA. This is discussed below. South Africa has also passed several legislations dealing with labour matters on different scales.[559] The primary employment legislation applicable to this study is the LRA.

3.4.2. The Labour Relations Act 66 of 1995

The LRA is the primary legislation regulating employment relations between employers and employees. It serves as legislation enacted to enforce the provisions of s 23 (5) of the Constitution. Although it provides detailed provisions on employment relations, it draws guidance from the Constitution as posited above and provided in s 1(a) of the LRA. In addition, the LRA recognises the position of the International Labour Organization (ILO) and the obligations to which the nation must adhere.

Collective bargaining under the ILO is recognised as a fundamental right. Conventions supporting the right to collective bargaining are the Right to Organise and Collective Bargaining Convention, 1949 (no. 98) and the Collective Bargaining Convention, 1981 (no. 154).[560] These instruments provide an international framework in which extended national laws can be enacted to assure workers' rights.

In addition, Article 15 of the African Charter on Human and Peoples' Rights, 1981 affirms that every individual has the right to 'work under equitable and satisfactory conditions', which can be achieved through collective bargaining. Although international conventions highlight provisions for labour relations, these conventions also foster for considering the national law.[561]

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[558] Constitution ss 23(2)(a)(b) &(c). Employers also have the right to form and join a trade; participate in its activities

[559] The Basic Conditions of Employment Act 75 of 1997(BCEA), Employment Equity Act 55 of 1998(EEA) and the Skills Development Act 97 of 1998(SDA). There are other legislations dealing with other issues, e.g., harassment, etc.

[560] Although this is not an exhaustive list, the ILO has adopted a number or instruments dealing directly or indirectly with collective bargaining and related issues: The Collective Agreements Recommendation, 1951 (no. 91), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (no. 87), the Right to Organise and Collective Bargaining Convention, 1949 (no. 98), the Workers' Representatives Convention, 1971 (no. 135), the Voluntary Conciliation and Arbitration Recommendation, 1951 (no. 92), the Rural Workers' Organisations Recommendation, 1975 (No. 149), the Labour Relations (Public Service) Convention, 1978 (no. 151), the Labour Relations (Public Service) Recommendation, 1978 (no. 159), the Collective Bargaining Convention, 1981 (no. 154), and the Collective Bargaining Recommendation, 1981 (no. 163).

[561] See Convention, 1948 (no. 87) art 8(1).

The purpose of the LRA is expressly set out in s 1 of the Act as to advance economic development, social justice, labour peace, and the democratisation of the workplace through the promotion of:

(i) orderly collective bargaining,

(ii) collective bargaining at sectoral level,

(iii) employee participation in decision-making in the workplace, and

(iv) the effective resolution of labour disputes.

It is guaranteed that collective bargaining and the attendant right to strike are possibly the most significant changes brought about by the LRA in 1995.[562] This way, collective bargaining is key to a fair industrial relations environment.[563] Traditionally, the subjects of the negotiation are wages, benefits, working conditions, and fair treatment.[564] In addition, collective bargaining plays an essential role in the workplace as a mechanism for realisation the parties' interests. The LRA promotes collectivism as one of its central themes rather than individualism.[565] Thus, democratic attributes can be found at the heart of collective action.[566] Collective action is any form of organized social or political act carried about by a group of people to address their needs.[567] This is so because an individual employee is powerless to act on himself rather than in a collective body with other employees and their representative unions' assistance. Hence *Rycroft et al.* state that:

> the individualism of legal rules places the worker at a disadvantage as against capital and it is only through collective action, by combining the power of the labour against the combined power of the capital, that workers can muster a sanction sufficiently strong to ensure a fair regulation of the employment relationship.[568]

In addition, the court in *Ex parte Chairperson of the Constitutional Assembly* held that:

> [c]ollective bargaining is based on recognising that employers enjoy 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.[569]

[562] Buitendag & Coetzer op cit note 234 at 96. See also s 1 (c)*(d)* of the LRA.
[563] *Bader Bop (Pty) Ltd* supra op cit note 260.
[564] Michael J Wright op cit note 273.
[565] Botha op cit note 4 at 2042-2103.
[566] Davidov op cit note 261.
[567] Available at *https://study.com/academy/topic/group-decisions-homework-help.html*, accessed on 04 October 2018.
[568] Rycroft A & Jordaan B *A Guide to South African Labour Law* 1 ed (1990).
[569] *Ex parte Chairperson of the Constitutional Assembly* op cit note 24, para 66.

Collective bargaining under the LRA is voluntary. The LRA has no express provision for a duty to bargain. Unlike the USA and NZ laws, the LRA neither mentions the duty to bargain in good faith. However, as it will be seen below, it provides a guideline for bargaining in good faith. The *SANDU*[570] judgment discussed above eliminates the possibility that unions may bypass the LRA and the Labour Court to secure a right to bargain by relying directly on the Constitution.

Accordingly, this forecloses any attacks on the LRA because it gives inadequate recognition right to bargain collectively.[571] It ends arguments that a duty to bargain or in good faith can be derived from the LRA. It has been long confirmed in the case of *ECCAWUSA v Southern Sun Hotel Interests* (2000) 21 ILJ 1090 (LC), where the court observed the following:

> Although the concept of the duty to bargain in good faith was recognised in relation to the unfair labour practice jurisdiction of the 1956 Labour Relations Act, this is not the approach adopted in the current act. Accordingly, the duty which existed under the 1956 Act, under the unfair labour practice jurisdiction has not been incorporated into the current Act. There is no legal duty, implied by the Act, or any other law to the effect that there is a duty to bargain in good faith.[572]

The process of bargaining is not entirely voluntary. Collective bargaining is functional with the right to strike. Such factors affect the voluntary element of collective bargaining. Thus, the right to strikes and the recourse to lock-outs may render the process involuntary.[573] This may force either of the parties to engage in collective bargaining with the other. *Brassey et al.* also posit that there would be no serious endeavour to negotiate and conclude a collective settlement without the potential for pain.[574]

Although the court may enter into the bargaining frail under two exceptions,[575] it will, however, neither readily imply into a collective agreement a duty to bargain nor lightly adjudge a demand

[570] *SANDU v Minister of Defence & Other* (1999) 20 ILJ 2265 (CC).
[571] Grogan op cit note 189.
[572] *ECCAWUSA v Southern Sun Hotel Interests* (2000) 21 ILJ 1090 (LC) Para 27.
[573] *Minister of Defence v SANDU* 2007 1 SA 422 (SCA); *Minister of Defence v SANDU* 2007 1 SA 422 (SCA) para 11.
[574] Brassey M; Cameron E; Cheadle H & Olivier M *The New Labour Law: Strikes, Dismissals and the Unfair Labour Practice in South Africa* 2 ed (1987). See also K J Selala 'The right to strike and the future of collective bargaining in South Africa: An Exploratory analysis' (2014) *International Journal of Social Sciences* III (5), pp. 120.
[575] Where a duty to bargain is imposed by collective agreement; and where one of the parties makes a demand that is so 'unconscionable or outrageous' that it is possible for to infer that that party has no intention of reaching an agreement (*ECCAWU and Others v Southern Sun Hotel Interests (Pty) Ltd* (2000) 21 ILJ 1090 (LC)). See also John Grogan *Collective Labour Law* (2007) at 98.

unfair or unconscionable.[576] The LRA does not provide for the duty to bargain but merely facilitates collective bargaining, leaving the rest to the parties involved.[577] However, it imposes a duty on the employer to disclose all relevant information to a representative trade union to enable effective collective bargaining.[578] The refusal of an employer to provide information or sufficient information relevant to the negotiations is regarded as unfair conduct.[579] According to *Cheadle,*[580] the LRA gives effect to 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 the sector level and the binding nature of collective agreements;[581]
- It gives effect to the right to use collective economic power in the provisions relating to strikes, lockouts, replacement labour and picketing;[582] and
- It imposes a positive right and structure to bargain collectively in the public sector.[583]

[576] *Buthelezi v Labour for Africa* (1991) 12 ILJ 588 (IC) at 592G. In *casu*, the court held that '[I]t is not for this court to interfere in bargaining between management and labour on the basis of what the Court, on evidence or on its own volition, regards as a fair or unfair demand. By so doing the Court would be stepping its legitimate terrain. The Court may be entitled to have regard to the nature of the demand in extreme cases such as where the demand in unconscionable or so outrageous that one can infer that there is no intention to negotiate with the object of reaching an agreement.'

[577] Khabo op cit note 137 at 8.

[578] LRA s 16 (3).

[579] Section 16 of the LRA. See also *Nasionale Suiwelkoöperasie Bpk v FAWU* 1989 ILJ 712 (IC); *NUMSA v Metkor Industries* 1990 ILJ 1116 (IC); *CWIU v Indian Ocean Fertilizer* 1991 ILJ 822 (IC); *NUMSA v Uniross Batteries* 1996 ILJ 175 (IC); Brand and Cassim 1980 ILJ 249. Employers unfair conduct can also be seen in the following instances: refusing to disclose information not only *inter partes*, but also to other interested parties, should circumstances dictate such disclosure (*CWIU v Indian Ocean Fertilizer* supra; *Hoogenoeg Andolusite v NUM* (*1*) 1992 *ILJ* 87 (LAC); *SACCAWU* op cit note 176, undermining, ignoring or side-stepping the bargaining agent (trade union-*NUM* 1991 op cit note 24; *NUM v Gold Fields of SA* 1989 *ILJ* 86 (IC); *NAAWU v Atlantis Diesel Engines* 1989 *ILJ* 948 (IC); *FAWU v Sam's Foods* 1991 *ILJ* 1324 (IC); *FAWU v KWV* 1994 *ILJ* 1065 (IC)); imposing new conditions of employment and changing existing work practices in a one-sided manner without prior consultations with the trade union (*BCAWU v Thorpe Timber Co* 1991 ILJ 843 (IC); *Yichiho Plastics & SACTWU* 1991 ILJ 1395 (ARB); *Iscor* op cit note 159; *SASBO* op cit note 159; *A Mauchle v* op cit note 159; *SAUJ v SABC* 1999 11 BLLR 1137 (LAC); *NUMSA v Eskom* 2001 10 BLLR 1144 (LC); *UTATU & Metrorail Services* 2002 ILJ 1330 (BCA); *SANDU v Minister of Defence* 2007 ILJ 1909 (CC)); locking employees out to compel acceptance of the employer's demands (*Schoeman v Samsung Electronics* 1999 ILJ 200 (LC); *Fry's Metal v NUMSA* 2003 ILJ 133 (LAC); 2005 ILJ 689 (SCA) (threat of retrenchment)); implementing a final offer prematurely (*NUMSA v Eskom* 2001 10 BLLR 1144 (LC). Regarding the implementation of a final order after an impasse, see SAUJ v SABC 1999 11 BLLR 1137 (LAC)); and the unequal treatment of employees (*Palaborwa Mining Co and NUM* 2002 ILJ 245 (ARB)). See also *SA Airways v NTM* 2016 *ILJ* 2128 (LC)for the conclusion of a collective agreement with only one faction of a trade union who is not the rightful one for such conclusion.

[580] Cheadle op cit note 244.

[581] *Reference re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161.

[582] *In re Certification of the Constitution of the Republic of SA,* 1996 (ICJ) BCLR 1253 & (1996) 17 ILJ 1253 (CC). Collective bargaining is 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 co exercise some economic power against partners in collective bargaining (at para 64).

[583] Labour Relations Act 28 of 1956.

3.4.3. Development of good faith bargaining principles: The Labour Relations Act: Code of Good Practice on Collective Bargaining, Industrial Action and Picketing

a). Background

South Africa is one of the countries that has seen developing trends in good faith bargaining. Collective bargaining is a process by which employers, including their organisations and registered trade unions, can establish fair wages and working conditions.[584] As noted above, collective bargaining in South Africa is voluntary. The law does not impose a duty to bargain or enforce the parties to bargain in good faith. The LRA holds on to this voluntarist philosophy in that:

> The law does not interfere with power relations. It is the balance of forces that ultimately determines the outcome. Expressed differently, as argued by Kahn Freund, labour law operates within the framework of a collective laissez-faire. This concept relates to the power by which the free play of the collective forces of labour and capital shape industrial society. Inside this framework, the law intervenes only where the disparity of these powers is great enough to prevent the successful operation of an autonomous process of negotiation and settlement.[585]

Before enacting the LRA, the Industrial Court (IC) enforced and adopted the duty to bargain through its broad unfair labour practice (ULP) jurisdiction under the Labour Relations Act 28 of 1956. The IC made significant inroads through judicial decisions, which compelled employers' organisations and trade unions to bargain in good faith. Bargaining relationships were imposed by judicial intervention.[586] At this time, good faith bargaining had two main functions. Firstly, to reinforce the obligation of an employer to recognise the bargaining agent; and secondly, to foster rational, informed discussion, which reduces the potential for unnecessary industrial conflict.[587]

The IC's ULP position can be reflected in the old case of *Bleazard & Others v Argus Printing and Publishing Co. Ltd & Others.*[588] In *casu*, an unregistered trade union of the South African Society of Journalists had been party to a non-statutory conciliation board with the employers' body for many years. The court ordered the employer to resume negotiations in good faith in

[584] International Labour Organisation *Collective Bargaining and Labour Relations* (2019), available at *https://www.ilo.org/global/topics/collective-bargaining-labour-relations/lang--en/index.htm*, accessed on 20 September 2019.
[585] S Godfrey, J Maree, D du Toit et al *Collective Bargaining in South Africa* (2010) at 20. See also Davis & Le Roux op cit note 06 at 316.
[586] John Grogan *Collective Labour Law* (1993).
[587] Rycroft op cit note 191 at 203.
[588] [1983] 4 ILJ 60 (IC).

the proceedings.[589] Effectively, the IC was imposing, by implication, an enforceable duty to bargain in good faith on the parties to an employment relationship.

The IC decided cases differently during its era. For the first time, the IC dealt with an employer's refusal to bargain without any pre-existing relationship as a ULP in *UAMAWU and Fodens*.[590] In addition, the IC had advanced these powers by developing guidelines to be followed by the parties. The guidelines dealt with how bargaining should be handled, and where parties neglected such guidelines, the court did not hesitate to interdict such conduct.[591] Although this is not an exhaustive list of bad faith bargaining, the ULP conducts included, amongst others:

- Abusive language and threatening conduct.[592]
- Personal insults.[593]
- The adoption of an adamant uninspired attitude during negotiations.[594]
- Discriminating against a union in a multi-union bargaining arrangement.[595]
- Setting unfair preconditions, the usage of delaying tactics or undermining the representativeness of a trade union.[596]
- Favouring non-members at the expense of members of a recognised union.[597]
- By-passing unions by dealing directly with employees.[598]
- Adopting a superior and haughty attitude.[599]

In addition, the list below contains unfair conduct from both the employer and employee:

- The imposition of preliminary or unfair conditions before or during negotiations;[600]

[589] See also the case of *UAMAWU v Fodens (Pty) Ltd* (1983) 4 ILJ 212 (IC).
[590] Ibid.
[591] John Grogan *Collective Labour Law* (2007) at 102.
[592] See *National Union of Metal Workers of SA & Others v Jumbo Products CC* (1991) 12 ILJ 1048 (IC) and *United African Motor and Allied Workers Union & Others v Fodens SA (Pty) Ltd* (1983) 4 ILJ 212 (IC).
[593] *East Rand Gold* (1989) op cit note 24.
[594] *Chamber of Mines v Mine Workers Union* (1989) ILJ 133 (IC).
[595] *SA Commercial Catering & Allied Workers Union v Southern Sun Hotel Corporation (Pty) Ltd & Others* (1992) 12 ILJ 132 (IC).
[596] Steenkamp, Stelzner & Badenhorst op cit note 218 at 952
[597] *National Union of Mine Workers v Henry Gould (Pty) Ltd & Another* (1988) 9 ILJ 1149 (IC).
[598] *Food & General Workers Union v Lanko Co-op Ltd* (1994) 15 ILJ 1380 (IC).
[599] See *Mashifane & Others v Clinic Holdings Ltd & Another* and *Hlabane & Others v Clinic Holdings Ltd & Another* (1993) 124 ILJ 954 (LAC).
[600] *Sentraal-Wes (Koöp) v FAWU* 1990 ILJ 977 (LAC); *FMU v Rolan Essential Oils, Rustenburg* 1990 ILJ 1086 (IC); *BIFAWU v Mutual & Federal Insurance Co* 1994 ILJ 1031 (LAC); *Fry's Metal v NUMSA* 2005 ILJ 689 (SCA) (threat by employer); *SANDU v Minister of Defence* 2007 ILJ 1909 (CC).

- Revealing a negative attitude or acting in a negative or counterproductive way in respect of or during the negotiations;[601]
- Implementing unfair delaying tactics;[602]
- Displaying conduct that is not conducive to constructive and peaceful negotiations between the parties;[603]
- Refusing to discuss the demands of the other party or to attend meetings or proceedings relevant to the resulting dispute;[604]
- Claiming that the bargaining in bad faith of one party entitles the other party to act unfairly or unreasonably;[605]
- Showing no respect or civility to the other party;[606] or
- Making demands that are outrageous or unconscionable or unreasonable.[607]

In all instances, bad faith bargaining was regarded as a ULP under the regulation of the IC.[608] This position was echoed under the American principle of Boulwarism discussed above. The IC's discretion and application of Act 28 of 1956 came under attack on the discretion of good faith bargaining issues. The IC had ripple social effects.[609] In this way, many employers hostile to unions altered their propensity to refuse recognition as a matter of course and changed direction in deference to the law.[610] The number of recognition disputes also altered dramatically, and unions began recruiting with renewed vigour.[611]

When the LRA came into operation, it abolished the broadly formulated ULP jurisdiction, which allowed the IC to create a judicially enforceable duty to bargain in good faith. As noted above, this was aptly put in the decision of *Entertainment Commercial Catering & Allied Workers Union of SA & Others v Southern Sun Hotel Interests Ltd.*[612] Accordingly, the duty to

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[601] *NUM v Marievale Consolidated Mines* 1986 ILJ 123 (IC); *Chamber of Mines v MWU* 1989 ILJ 133 (IC); *Iscor* op cit note 159; *Mashifane v Clinic Holdings; Hlabane v Clinic Holdings* 1993 ILJ 954 (LAC).
[602] *FBWUSA v Tvl Atlas Wholesale Meat Distributors* 1987 ILJ 335 (IC).
[603] *Gubb & Inggs v SACTWUSA* 1991 ILJ 415 (ARB); *CWIU v Indian Ocean Fertilizer* 1991 ILJ 822 (IC); *SAEWA v Goedehoop Colliery (Amcoal)* 1991 ILJ 856 (IC); *NUM v Buffelsfontein Gold Mining Co* 1991 ILJ 346 (IC); *Performing Arts Council, Tvl v PPWAWU* 1994 ILJ 65 (A); *Mazibuko v Hotels, Inns & Resorts* 1996 ILJ 263 (IC) (withdrawal of union's mandate); *Betha v BTR Sarmcol* 1998 ILJ 459 (SCA) (ulterior motives); *Kwik Kopy v Van Haarlem* 1999 1 SA 472 (W); *Adcock Ingram Critical Care v CCMA* 2001 9 BLLR 979 (LAC).
[604] *SATDU v Ebrahim's Taxis* 1999 ILJ 229 (CCMA).
[605] Ibid, *Performing Arts Council, Tvl v PPWAWU* and *Gubb & Inggs v SACTWUSA*. See also *NUMSA v Nalva* 1992 ILJ 1207 (IC); *SACCAWU* op cit note 176; *SANSEA* op cit note 159; *NUM v Black Mountain Development Co* 1997 4 BLLR 355 (A).
[606] *Adcock Ingram Critical Care v CCMA* 2001 9 BLLR 979 (LAC).
[607] *ECCAWUSA v Southern Sun Hotel Interests* 2000 4 BLLR 404 (LC); *Fry's Metal v NUMSA* supra (threat of retrenchment).
[608] *Metal & Allied Workers Union v Natal Die Casting Co (Pty) Ltd* (1986) 7 ILJ 520 (IC); *Nasionale Suiwelkooperasie Bpk v Food & Allied Workers Union* (1989) 10 ILJ 712 (IC); and *East Rand Gold* (1989) op cit note 24.
[609] De Kock, Thompson & Benjamin op cit note 209.
[610] Ibid.
[611] Ibid.
[612] [2000] 21 ILJ 1090 (LC).

bargain was effectively removed from South African labour law after the promulgation of the LRA. However, the notion of creating a judicial duty to bargain was explored when the LRA was negotiated.[613] This absence of a duty of good faith bargaining sparked much debate on whether there must be an enforceable duty to bargain in good faith in South Africa. The two schools of thought discussed in the previous chapter highlighted the theoretical views in support and against good faith bargaining.

The above shows that the good faith bargaining in South Africa's employment relations is one of its own. From the imposition of good faith to outlawing it due to the discrepancies to re-introduction in a unique perspective. Although views have been noted in the previous chapter, detailing how the two schools of thought gave insights on why there is a need for good faith and not, the government decided to fudge the choosing game and work within the means of its voluntary mechanism. Neither could this be a win for either party of the schools of thought. Thus, collective bargaining in SA remains voluntary. Its operation concerning good faith is captured under the new code, which will be discussed below. A notice was given in terms of s 203(2) of the LRA that the NEDLAC has issued under s 203(1) of that Act a Code of Good Practice: Collective Bargaining, Industrial Action and Picketing as set out in the Schedule.

b). Code of Good Practice: Collective Bargaining, Industrial Action and Picketing

The Code of Good Practice on Collective Bargaining, Industrial Action and Picketing (Code) came into effect in December 2018. Its basis is to guide collective bargaining, resolution of mutual interest disputes, and resort to industrial action.[614] Item 3(1) of the Code provides that the purpose of the Code is to strengthen and promote orderly collective bargaining through the promotion of trust, mutual understanding, constructive engagement, and maximum involvement of workers. This item speaks to s 1(d) of the LRA.

In this regard, s 1 of the LRA provides that this Act aims to advance economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling its primary objectives. An important object specific in this study is the promotion of orderly collective bargaining at the sectoral level. In addition, amongst the four pillars noted above is economic

[613] André van Niekerk & Marlyn Christianson *Law@Work* at 40.

[614] Code op cit note 138. In addition, the Code is intended to be a guide to those who engage or want to engage in collective bargaining or who seek to resolve disputes of mutual interest by mediation, conciliation, and arbitration or as a means of last resort, industrial action. The Minister of Labour accented to this code in the Labour Relations Amendment Act 8 of 2018.

development. Economic development will be vulnerable when collective bargaining is conducted in bad faith. The development of our economy depends on the proper functioning of businesses, which are also productive.

The principles guiding good faith in collective bargaining are provided in Item 7 of the Code. The LRA encourages and promotes self-regulation of bargaining mechanisms in the workplace.[615] With this, the LRA also confers various organisational rights on trade unions that are sufficiently representative.[616] Unlike in the USA, the fundamental principle in the LRA is voluntarism. Hence there is no duty to bargain; neither are parties to bargaining enforced to bargain in good faith. The previous chapter drew on variant views that eased the enactment of the Code. Although good faith provisions are provided exclusively in the Code as guiding principles, other examples supporting them will be drawn from other legislation to broaden its effectiveness and application.

The provisions of this Code are equally applicable to all parties to the negotiating table.[617] The guiding principles in the Code are all important; however, the study focuses broadly on the right to disclosure of information held by employers. This is because the Code provides for disclosure of information as a basic aspect of the duty of good faith regarding collective bargaining.[618] In addition, the right to disclosure of information in South Africa was advanced through the principle of good faith bargaining and Industrial Court decisions regarding retrenchment.[619]

The absence of the right to disclose information by both parties can make collective bargaining exceedingly tricky. Hence, disclosure of information has benefits in the employment relationship. Kahn-Freund's words supported this when he said, '[n]egotiation does not deserve its name if one of the negotiating parties is kept in the dark about matters within the exclusive knowledge of the other which are relevant for agreement'.[620] The right to disclosure of the information is extended in the Code and draws from the Constitution and the LRA.

[615] Steenkamp, Stelzner & Badenhorst op cit note 218 at 953–954.
[616] LRA s12–16.
[617] Schedule 7(1) of the Code.
[618] Schedule 7(2) of the Code. It is also regarded as an integral part of good faith bargaining (see W Gavin 'The Disclosure of Information' (1992) 2(5) LLN at 172).
[619] *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1995) 1 BLLR 1 (AD).
[620] Sir Otto Kahn-Freund *Labour and The Law* 2 ed (1977) 3.

At a foundational level, s 32 of the Constitution provides for the disclosure of information. Section 32(1)(b) provides that employees and their representative unions have constitutional support that their employers must disclose information to exercise and protect their rights. Although this right is provided for in the Constitution, it is not an absolute right. Thus, it can be limited by the law of general application, courtesy of s 36 of the Constitution.

Even under the 1956 LRA, all information reasonably considered relevant to advance a particular position or refuting other claims in the negotiations had to be disclosed.[621] Thus, an unconditional refusal to disclose relevant information is subversive of industrial peace and the subversion of rational collective bargaining, which has various effects, as noted in the Act under an unfair labour practice.[622] Moreover, employees' access to business information is essential to gauge the employer's financial position and ability to meet their demands.[623]

It should still be noted that the level of representation in the workplace still plays a huge role in cases of disclosure of information. As mentioned in chapter 1, the right to disclosure of information as provided in section 16 of the LRA is reserved for majority trade union(s). Thus, the level of representation determines which union gets such a right. Amongst the various provisions in the Act which support the legislative policy choice of majoritarianism is section 16(1) of the LRA.[624] A trade union must be registered and have a majority representation of

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[621] *Burmeister v Crusader Life Assurance Corporation* (1993) 14 ILJ 1504 (IC).

[622] *SACCAWU* op cit note 176; see also *MAWU v Natal Die Casting (Pty) Ltd* (1986) 7 ILJ 520 (IC) at 543D-F*;* and *CWIU and others v Indian Ocean Fertilizer* (1991) 12 ILJ 822(IC) at 826-7.

[623] R van der Walt 'Access to information: information disclosure in some South African organisations' (2007) 38 (1) *South African Journal of Business Management* at 25–36. In addition, s 32(2) of the Constitution provides that national legislation must be enacted to give effect to the right to disclosure of information. This is supported by the Promotion of Access to Information Act 2 of 2000 (PAIA) enacted in 2000.

[624] *Kem-Lin Fashions* op cit note 44, para 19. There 'is *no absolute preclusion of the disclosure of confidential information* to a trade union representative. If the information is confidential, *it may still be disclosed to a trade union* representative or to a representative trade union provided that the employer notifies the union or the representative that the information is confidential. *If the confidential information is private personal information relating to an employee, it may be disclosed if the employer secures the consent of the employee concerned*. If the confidential information is not private personal information relating to an employee, whether it may be disclosed will depend upon whether its disclosure *may cause substantial harm to an employee or the employer*. If the disclosure of confidential information may cause harm, it may not be disclosed. If the disclosure may not cause such harm, then the employer may disclose the information provided that, as I have already said, the employer informs the trade union that the information is confidential' (para 145). See other relevant subsections provided below:

(2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14 (4).

(3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.

(4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.

(5) An employer is not required to disclose information—

the workforce within that workplace to enjoy disclosure of information. Thus, not every trade union will enjoy the right to disclosure of information. However, once a union has this right, the employer must disclose the required information, even without any request from the union.[625] Thus, for a trade union to effectively perform its function as referred to in s 14(4) of the LRA, an employer must disclose all relevant information to a trade union representative.[626]

The employer may disclose information concerning productivity, morale, wages and benefits, safety, company performance, wealth-sharing, and the organisation's future.[627] On the contrary, s 16 (5) prohibits an employer from disclosing certain information.[628] The obligation

(a) that is legally privileged;
(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
(d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.
(6) If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.
(7) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
(8) The Commission must attempt to resolve the dispute through conciliation.
(9) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.
(10) In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.
(11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5)(c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14 (4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.
(12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.
(13) When making an order in terms of subsection (12), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.
(14) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for a period specified in the arbitration award.

[625] Du Toit, Woolfrey, et al *The Labour Relations Act of 1995* 2 ed (1998).

[626] LRA s 16(2). See also LRA s 16(3).

[627] M Grosett 'Management perceptions of the effect of the disclosure of company information to employees: results of an empirical study' (1997) 21 (3) *South African Labour Relations Journal* at 43–58.

[628] This includes information:
(a) that is legally privileged;
(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
(d) that is private personal information relating to an employee unless that employee consents to the disclosure of that information.

to disclose information in s 16 of the LRA must be read with s 189(4).[629] Accordingly, when employers refuse to provide information, employees may refer a dispute to the CCMA.

The provisions for disclosure of information in the LRA are broad and apply widely.[630] Other principles in the Code provide that demands and responses must be reduced in writing.[631] Those new demands may be added to the negotiations if their purpose is to find a settlement, with the other party approving it.[632] Moreover, parties are urged to be prepared to modify demands and responses during negotiations.[633] According to Grosett's research on South African organisations, employers viewed disclosure of information to be having the following benefits:

- It leads to improved employee cooperation because information enhances the employees' understanding of the organisation and its decisions;
- Shared information leads to improved collective bargaining and reduced conflict;
- It increases employee involvement in decision-making because employees have access to relevant information; and
- Increase levels of job satisfaction.[634]

Furthermore, an employer is prohibited from unilaterally altering the terms and conditions of employment during negotiations before the deadlock is reached in terms of any collectively agreed dispute procedure.[635] As the USA shows, any unilateral change of such terms and conditions is bad faith. The prohibition from unilaterally changing the terms and conditions of employment by the employer is also regulated in individual employment law.[636]

The International Labour Organisation (ILO) recommends that the disclosure of information should be part of collective bargaining. Thus, the recommendation of the ILO's International Labour Standards on Collective Bargaining provides that 'measures adapted to national conditions should be taken, if necessary, so that parties have access to the information required

[629] See *De Klerk v Project Freight Group CC* [2014] ZALCCT 44; (2015) ILJ 716 (LC).
[630] See also s 16(4)-(14).
[631] Schedule 7(3) of the Code.
[632] Schedule 7(4) of the Code.
[633] Schedule 7(9) of the Code.
[634] Grosett op cit note 627 at 43–58.
[635] Failing which, when a period of 30 (thirty) days has lapsed after the referral of the dispute to the CCMA or Bargaining Council, or a certificate of non -resolution has been issued (sch 7(5) of the Code).
[636] See *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* 2003 where employees had been dismissed for refusing to accept a proposal to change work shifts.

by meaningful negotiation'.[637] The Code also provides for prohibitions. Amongst the prohibitions lies disruptive and abusive behaviour, of which negotiations should be conducted rationally and courteously.[638]

To avoid inconveniences, parties must attend agreed negotiation meetings.[639] Schedule 7(8) of the Code provides that parties should constructively engage each other and conduct themselves prior to or during negotiations in a manner that has the effect of unreasonably delaying negotiations by failing to agree on dates and times for negotiation meetings, failing to attend agreed meetings, changing negotiators, failing to secure a mandate, or refusing to modify demands. The principles also afford for constant negotiators,[640] conducive collective bargaining facilities,[641] presentation of accurate demands or responses,[642] prohibits undermining the bargaining status of each of the parties,[643] prohibits the employers from bypassing the union representatives,[644] provides for machinery to avoid further conflicts where no mutual agreement is seen,[645] and parties should remain open for negotiations.[646]

The developments of good faith bargaining under the Code aid in ensuring that parties conduct themselves in good faith during negotiations and enter negotiations to seek consensus to benefit all parties' interests.[647] These guiding principles do not entirely act as a barrier for conduct not

[637]International Labour Organisation's (ILO) Collective Bargaining Standards Recommendation 163 (1981).
[638] Schedule 7(6) of the Code.
[639] Schedule 7(7) of the Code.
[640] Schedule 7(10) provides that, parties should endeavour, as far as possible; to ensure that their negotiators remain the same throughout the course of negotiations and that they are properly mandated to modify their demands and responses.
[641] Schedule 7(11) provides that, mandating processes should be conducted in facilities that are conducive to collective bargaining. Employers should assist this mandating process by providing facilities where possible and give time off as per the Act or any collective agreement for trade union officials or worker representatives to meet and, if need be, ballot members as provided for in the Act. If provided, the trade union should not unreasonably refuse to use the facilities and time off.
[642] Schedule 7(12) provides that, without interfering with a trade union or employers' organisation's right to communicate with its members as they consider best, the negotiators should endeavour to present the demands or responses provided by the other side as accurately as possible.
[643] Schedule 7(13) provides that, without interfering with the right of the trade union to communicate with the members of an employers' organisation and an employer with its employees, the trade union or employer should not undermine the bargaining status of union or organisation as the case may be.
[644] Schedule 7(14) provides that, an employer should not bypass a recognised trade union and deal directly with employees before deadlock or a reasonable period after deadlock in respect of the matters that are subject of the negotiations in order to allow the trade union to communicate with employees.
[645] Schedule 7(15) provides that, the parties should consider escalating the negotiations to a higher level of management or union office bearer within their respective organisations to avoid a deadlock and the resort to industrial action through seeking to settle the differences or exploring the possibility of voluntarily referring the dispute to binding or advisory arbitration.
[646] Schedule 7(16) provides that, the parties should remain open to continue negotiations after a dispute have been declared.
[647] Code op cit note 138.

to suffice. However, these principles will assist in resolving disputes relating to good faith bargaining.

Undoubtedly, collective bargaining plays a significant role in maintaining peace and can be used effectively to sustain and develop businesses. It can be achieved by applying the guiding principles of good faith. Through collective bargaining, unionised employees and employers can determine their work conditions. Since these are new principles within the South African labour law, developments in applying these principles are yet to be observed.

3.5. Comparative differences and similarities

The provisions regulating good faith bargaining in these comparative countries are different; they are all regulated by their federal laws. However, NZ and SA have extended Codes as guidelines for good faith bargaining. Federal laws governing good faith bargaining in the USA have been there for the longest, unlike in NZ and SA. The USA and New Zealand have legally binding provisions that address issues arising from good faith bargaining and monitoring the bargaining process.

In the USA, these provisions were provided in the NLRA and later in the LMRA, where significant changes were made. There is a duty to bargain and a duty to bargain in good faith in the USA. However, the NLRA does not protect the collective interests of all categories of employees. The NLRA regulates relations of those involved in interstate commerce. The Civil Service Reform Act of 1978 provides the right to bargain for federal government workers, and the Railway Labor Act applies to workers in the railroads and airlines. In South Africa, the exclusion of various workers can be seen in the LRA. Section 2 of the LRA excludes all workers engaged in essential services, including the National Defence Force, the National Intelligence Agency, and the South African Secret Service.

Good faith bargaining in NZ was realised in the ECA, later the ERA. As noted above, the ERA in NZ regulates good-faith bargains, and a Code extends such regulations through its guiding principles. The Code supplements the legal statute. It lays out several rules for good faith bargaining.[648] The principle of good faith in NZ is applied in both individual and employment law. In SA, the same is applied in contract negotiations to regulate an individual employment

[648] Forsyth & Stewart op cit note 434.

relationship. It is one of the cornerstones of an employment relationship in which an employee has with the employer.[649]

South Africa has also seen development concerning the application of good faith in bargaining matters. Although collective bargaining in the USA and NZ is mandatory, this is not the case in SA. Thus, bargaining is voluntary. Specific to good faith, the Code of Good Practice in collective bargaining was enacted under the espousal of the LRAA. This Code only provides guiding principles that bargaining parties must consider during negotiations. The application of the Code in collective bargaining matters is yet to be seen.

Although these countries have different laws providing for good faith in collective bargaining, it is without a doubt that there are similarities, if not linkages, between them. The USA has a long history of collective bargaining, evidenced by developments. It has also seen other countries enact legislation aligning with the USA's. On the contrary, it has been noted that Australian law provides a much stronger basis for collective bargaining and representation than the laws of other common law countries such as the United Kingdom, Canada, and the United States of America.[650]

In the USA, good faith offers more lessons and experiences. Failure to negotiate in good faith in s 8 (d) of the NLRA is regarded as an unfair labour practice. It is also provided in s 35 (6) of the ERA 2000. In SA, good faith in collective bargaining is reduced into law as guidance on how parties to collective bargaining conduct themselves in the bargaining arena. While collective bargaining matters include other terms and conditions of employment, wage matters have a considerable proportion of judicial precedents support. In most countries, this is so because wages are vital and support why employees offer their services. A discussion on wages as a crucial matter of interest in collective bargaining will be discussed in the following chapter.

[649] See the case of *NUMSA obo Nganezi & Others v Dunlop Mixing and Technical Services (Pty) Ltd & Other where for the first time the court was faced with a matter on* the nature and scope of the duty of good faith in contract of employment.

[650] This includes good faith bargaining requirements law. See Anthony Forsyth 'The impact of "good faith" obligations on collective bargaining practices and outcomes in Australia, Canada and the United States' (2011) 16 *Can Lab & Emp L J.* at 1; and Anthony Forsyth & Sara Slinn 'Promoting worker voice through good faith bargaining laws: The Canadian and Australian experience' in Alan Bogg & Tonia Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (2014) at 163.

In contrast, Thompson accentuates the significance of collective bargaining by stating that it is more than a technique of wage determination or dispute resolution.[651] He views it as integral to a system that civilizes the workplace, provides fair distribution between wages and profits, keeps the economy vibrant and contributes to the wider democratic order.[652] These contentions are supported by the different functions that collective bargaining fulfils, which include:

- Its economic role in the establishment of wages and standards for employees that are reasonable;[653]
- The social function in that it establishes a system of industrial justice that protects employees from arbitrary action by management, and which recognizes their right to human dignity;[654] and
- The fact that it is political nature;[655]
- process of communication,[656] economic,[657] and negotiation;[658] and
- Conflict control mechanism.[659]

[651] Thompson op cit note 69 at 704–705.
[652] Ibid.
[653] Rycroft op cit note 191 at 202. See also Harrison op cit note 32. The latter states that, must also be remembered that no sector of the economy is immune from the effects of collective bargaining. For example, if unions and employers in the steel industry were to collectively agree that the wages of steel workers should be increased, the price of steel too would have to increase, thus affecting the buyers.
[654] Rycroft & Jordaan op cit note 30 at 116.
[655] See Harrison op cit note 32 where the latter states that, it gives employees a say in matters that affect their working lives as well as a right to representation. There can consequently be no doubt that, given the character and nature of collective bargaining, the entire sphere of collective bargaining is especially viable for future dynamic development and readjustment. An increasing need for more effective participation in decision-making is of utmost importance to labour relations in South Africa.
[656] See P S Nel & P H van Rooyen *Worker Representation in Practice in South Africa* (1985) at 93. Collective bargaining is essentially a process of communication, and therefore it displays all the problems usually associated with communication, added to the other inherent problems surrounding collective bargaining (Harrison op cit note at 25). Parties are free to inform each other of all that is expected of each other.
[657] Collective bargaining plays an important role in building up the economy of the country. For example, should bargaining or negotiations fail, the economy can be affected as production declines. Normally labour is withheld (by striking) only as a coercive or persuasive measure, the intention being that labour will be sold and compromise reached (M le Grange *Collective Bargaining in the Public Sector with Specific Reference to the South African Police* (unpublished master's thesis, University of Port Elizabeth 1996). Because of the economic orientation, it is suggested that collective bargaining is an economic market activity such as buying and selling a product by negotiating about the price (Nel & van Rooyen op cit note 152 at 165). See also and Harrison op cit note 32.
[658] Parties negotiate with each other to reach an agreement on the dispute at hand for the collective benefit of all parties. According to *Dubin,* if it is accepted that collective bargaining is an interactive process and that any human relationship has a certain conflict potential, then it is easy to understand why collective bargaining has an element of conflict (Dubin Robert 'Industrial conflict and social welfare' (1957) 1 (2) *Conflict Resolution* at 179.).
[659] The view of collective bargaining as a conflict-control mechanism is probably the most dynamic (Martheanne Finnemore & Roux van der Merwe *Introduction to Industrial Relations in South Africa* 3 ed (1994). It is based on the principle of participation and the proactive regulation of the workplace relationship. Collective bargaining alleviates tension by making employers and employees participate with one another. Collective bargaining, therefore, regulates the relationships at the workplace.

The United States makes it mandatory for bargaining parties to bargain on wages. In this regard, wages are termed mandatory subjects of bargaining. From the definition of collective bargaining, it can be drawn that wages are essential bargaining subjects in both NZ and SA, as provided in both the ERA and LRA. Most importantly, all these comparative countries provide for the disclosure of information. Disclosure in this regard assists in easing effective bargaining. Accordingly, the absence negates, if not makes collective bargaining an exceedingly arduous process.

Collective bargaining in these countries can occur with labour unions representing most of the workforce. In SA, the principle of majoritarianism is applied. Majoritarianism is a principle that entails the rule of the majority.[660] The rationale behind this principle is simple: whatever the majority trade union decides will be taken as a representation of the views of all other employees.[661]

As noted in Chapter 1, article 4 of Convention no. 98 provides that measures shall be taken to promote voluntary negotiation between the parties and their organisations regarding the regulation of employment conditions through collective agreements. This can be captured from the account of the CFA. The latter posit that article 4 places no duty on governments to enforce collective bargaining by compulsory means with a given organisation, and such interference would alter the nature of bargaining.[662] Moreover, the process must be voluntary to achieve collective bargaining objectives and not require recourse to compulsion.[663] However, from the settings above, it can be seen that collective bargaining applies differently.

In addition, it has been emphasised by the supervisory bodies that third party machinery in support of bargaining can be relied on (conciliation, mediation, and arbitration); however, this should also be voluntary and accepted by the parties.[664] The Commission for Conciliation,

[660] *Free Market Foundation* op cit note 52, para 37.
[661] Malan K 'Observations on representivity, democracy and homogenisation' (2010) *TSAR* 4 at 36.
[662] International Labour Organization, Freedom of Association - *Digest* of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (November 2006) International Labour Organisation [927].
[663] Ibid at [926]- [927]. Following this general approach, it cannot therefore be deduced from the ILO's principles on collective bargaining that there is any formal obligation to negotiate or form an agreement, although such an obligation is imposed in certain legal systems (see Bernard Gernigon, Alberto Odero & Horacio Guido *Collective Bargaining: ILO Standards and the Principles of the Supervisory Bodies (*2000).
[664] G Carabetta 'International labour law standards concerning collective bargaining in public essential services' (2014) *Deakin Law Review* 19(2) at 281.

Mediation and Arbitration (CCMA) is responsible for dispute resolution in South Africa. The CCMA draws on the experience of the Australian Industrial Relations Commission, the British Advisory, Conciliation and Arbitration Service (ACAS), and labour arbitration practice in the USA as developed in the South African context by the Independent Mediation Service of South Africa (IMSSA).[665]

3.6. Lessons from the comparative countries

From the discussion above, the study has proved the importance of the duty to bargain in good faith by comparatively analysing the historical development of the good faith bargaining requirement as per country, thus proving that the concept is neither new nor novel. In this part, it is important to provide the lessons drawn from the comparative countries. It is important to note that, despite the broad literature addressing good faith the concept of good faith in individual employment or collective labour law is not defined satisfactorily.[666] It can be seen that this concept defies a clear definition, and courts have struggled to understand and establish its scope and ambit.[667] This doctrine is pervasive in all commercial transactions. Yet, the courts continue to disagree about the application of this duty, its ambit, and remedies for failing to fulfil it.[668] However, as seen in the USA, the courts assess parties' behavior against a 'totality of conduct' standard.[669]

As imposed in both comparative countries, but still facing challenges concerning the establishment and scope of good faith bargaining, a lesson that can be drawn from this is that negotiation in good faith must just be made a norm. In this way, parties will, from time to time, know that they must negotiate in good faith, which may assist with alleviating the backlog of

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[665] B Hepple 'Can collective labour law transplants work the South African example' (1999) *Industrial Law Journal* 20(1) at 2.

[666] See above the various definition in each country. In the USA, see *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939). In NZ The term good faith in collective bargaining has been defined from the stance of contract law and labour law. See *Auckland City Council v New Zealand Public Service Assn Inc* [2004] 2 NZLR 10 at 15.

[667] Aarti Arunachalam *An Analysis of the Duty to Negotiate in Good Faith:Precontractual Liability & Preliminary* (unpublished LLM Thesis University of Georgia, 2002). It is also believed that term good faith operates as an excluder, a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith (Robert S. Summers 'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 VA. L. REV. 195, 201 (1968)). See also Rodrigo Novoa 'Culpa in Contrahendo: A Comparative Law Study: Chilean Law and the United Nations Convention on Contracts for the International Sales of Goods (CISG)', 22 *ARIZ.J. INT'L & COMP.L.* 583, 593 (2005).

[668] Arunachalam op cit note 667.

[669] See Russell Korobkin, Michael L. Moffitt and Nancy A. Welsh 'The Law of Bargaining' in The Negotiators' Fieldbook. See also Katie Shonk 'How to Negotiate in Good Faith' 2020, Harvard Law School Daily Blog, available at https://www.pon.harvard.edu/daily/business-negotiations/negotiate-good-faith/, accessed 12 June 2022.

cases brought within the courts. Thus, imposed or not, bargaining parties expect negotiation in good faith. In the absence of making this a norm, various consequences can follow.

The aim is not just to have the duty to bargain in good faith. Still, parties to the bargaining table need to conduct themselves in a manner that is beneficial for all, including the business sustainability. This is necessary because tensions and arguments are part of industrial relations. As will be seen in chapter 4, they emerge from different goals, interests, and perspectives, which constantly continue; however, reality requires that there must be resolution and compromise of such conflictual differences. More so, collective bargaining and negotiation institutions arise from the need to share scarce resources and conflicting needs, goals, values, ideologies, and perceptions, adding structural imbalances, ambiguities, and lack of coordination.[670]

Looking into the legal framework discussed above, we learn that resolution can be best achieved by good faith. For example, amongst the ERA's major changes, we learn that strict contractualism is an inadequate mechanism to govern employment and that employment is an ongoing relationship that benefits from some guiding principles designed to facilitate its operation.[671] Hence the good faith requirements make it clear that employees are entitled to have their interests considered on an ongoing basis.[672]

Not only is it that employees' interests should take precedence, but also that of the employers. Chapter 4 details the importance of such interests and provides that any approach to the relationship between management and labour is fruitless unless the divergence of their interests is recognised and articulated.[673] Hence, the need to integrate and balance their conflicting interests. Where this is followed, there will be cooperation. This is needed for a productive industrial relationship.

Similarly, where such is recognised, it can promote open dialogue between parties at the bargaining table. Thus, better industrial practices positively improve industrial relations.

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[670] *Specific Outcomes for Negotiation Skills*, available at *https://lms.tuit.co.za/courses/107/files/13906/download?wrap=1*, accessed on 15 October 2018. See also Bendix, Sonia *Industrial Relations in The New Sou*th Africa 3 ed 1996.
[671] Anderson op cit note 496.
[672] Ibid.
[673] Davis P & Freedland *Kahn Freund's Labour and the Law* 3 ed (1983) 58.

Collective bargaining and open dialogue can contribute to productivity and performance in the workplace. As noted above, negotiations are not meant to address only current issues, but this can be extended to future issues. Chapter 5 of the study provides for the importance of social dialogue in the changing world of work.

Furthermore, the author posits that we can also learn of the importance of consultation in the workplace provided in section 4(4)*(c)* of the ERA. The latter provides that the duty of good faith also applies to consultation (whether or not under a collective agreement) between an employer and its employees, including any union representing the employees, about the employees' collective employment interests, including the effect on employees of changes to the employer's business. This is important in that it focuses consultation on employees' collective employment interests and the changes that can be made in the workplace. Despite this, Huang argues that the good faith duty and the obligation to consult are interpreted differently, and the relationship between them remains controversial.[674]

An employer must consult with employees' representative unions before effecting any changes in the employment relationship. We also learn of the importance of consultation from the LMRA of 1947. As noted above, in the USA, an employer who instituted wage increases during a bona fide contract negotiation *without consultation* with the labour union was found to have violated s 8(a)(5) of the Act irrespective of the fact that the change was made in good faith.[675] The lesson around this provision is that an employer is obliged to consult with a representative trade union to effect any changes. Thus, an employer is prohibited from making unilateral changes to work conditions apart from isolated wage changes, as noted above, after consultation with the union. In South Africa, workplace forums functions within the ambit of issues that may be addressed through consultation.

Looking into the ERA, subs (1A) of the Amendment Act significantly strengthened an employer's obligations when consulting with employees about changes affecting their continuity of employment. The lesson that can be captured here is that the ERA makes it clear that the duty of good faith is not a static and reactive requirement but requires a proactive approach.

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[674] Shuguang Huang *Good Faith and Consultation in Employment Law* (unpublished LLM Thesis Victoria University of Wellington, 2003) page 6.
[675] *Williamsburg Steel Prods. Co 126 N.L.R.B.* 288 (1960), enforcement denied, *NLRB v. Katz*, 289 F.2d 700 (2d Cir. 1961), rev'd, 369 U.S. 736 (1962). (My emphasis.)

Furthermore, a lesson from the comparative countries is the realisation that an employment relationship exists along with the power to command and the duty to obey. However, a takeaway is that the power to command and the duty to obey can be regulated.[676] Thus, we need to infuse an element of coordination into the employment relationship.[677] This is important because we learn that the good faith requirement reigns in every aspect of life to harmonise relations. Hence, one of the important objectives of coordination is maintaining a harmonious relationship between the employees and the organization.[678] Coordination helps to avoid conflict between clashing interests.

Where such interests are brought to the table and negotiated in good faith, there will be harmony amongst the parties to grow an organisation based on trust. This can also be proven in the case of NZ relying on section 3*(a)* of the Act, which is focused on building 'productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment and of the employment relationship by recognizing that employment relationships must be built on good faith behaviour;[679] and by acknowledging and addressing the inherent inequality of bargaining power in employment relationships'.[680]

In this way, it is without a doubt that collective bargaining is applied to act as a bridge to harmonise such interests to reach a mutual agreement. Hence, collective bargaining functions satisfactorily when parties negotiate harmoniously.[681] From this background, we can learn that the foundation in which good faith is built is about telling the truth, maintaining good relations, and mutual respect.[682]

It has been noted above that collective bargaining in the USA and NZ is mandatory. Although the Code in South Africa is applicable only as a guide, the likelihood of our courts being burdened to prove bad faith is feasible. Thus, since collective bargaining is voluntary, the only thing left is for the bargaining parties to conduct themselves in good faith. There can be no

[676] Huang op cit note 674, page 17.
[677] Otto Kahn-Freund, Labour and the Law 2 ed, Stevens & Sons London (1972) 9.
[678] Satyendra 'Role of Coordination in the Organization' 2020, available at https://www.ispatguru.com/role-of-coordination-in-the-organization/, accessed on 20 July 2022.
[679] Employment Relations Act 2000, s 3 (a) (i).
[680] The 2000 Act, above, s 3 (a) (ii).
[681] Heald op cit 152.
[682] Huang op cit note 674, page 21.

observance of whether the parties will be negotiating in good faith. The courts will have to go through a searching re-examination of what constitutes good faith bargaining. Applying good faith bargaining principles by trade unions, employers organisations, and the courts in South Africa is yet to be seen. Whether this will be a burden or work towards productive industrial relations is something we are all yet to experience.

From this, we can draw that, as construed by various authors that the duty to bargain in good faith means that it sends union and employer negotiators into the bargaining room and closes the door. Still, it does not examine what happens inside that room.[683] Accordingly, Cox stated as follows:[684]

> It was not enough for the *law to compel the parties to meet and treat without passing judgment upon the quality of negotiations*. The bargaining status of a union can be destroyed by going through the motions of negotiation almost as easily as by bluntly withholding recognition. As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of bargaining without the substance. The concept of 'good faith' was brought into the law of collective bargaining as a solution to this problem.

In addition, Cox posited that:[685]

> In order to distinguish the real from the sham established a subjective test making the employer's state of mind the decisive factor, so much is clear. *The difficult problem is to identify the state of mind precisely.* Such phrases as 'present intention to find a basis for agreement' and 'sincere effort to reach common ground' *suggest that willingness to compromise is an essential ingredient of good faith*. The background of the old National Labor Relations Board opinions which assert the duty 'to match their proposals, if unacceptable, with counter-proposals, and to make every reasonable effort to reach an agreement.' A man *may wish to negotiate an agreement provided that his terms are met but be quite unwilling to compromise; or he may be so anxious to reach an agreement that he is willing to accept whatever terms he can get*. Which state of mind-which of all the intermediate states of mind -is necessary to bargain in good faith?

Lastly, another lesson that can be drawn from NZ is that there are various contentions on duty to bargain in good faith. It is believed that good faith undermines the right of employers to manage their enterprises most effectively and has the effect of challenging the employer's commercial confidentiality in case information disclosure is required.[686] The subject of disclosure of the information is relevant. In South Africa, a majority trade union enjoy such a

[683] Huang op cit note 674, page 21.
[684] Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1412-1413 (1958).
[685] Cox, above, 1414-1415.
[686] See submission of Business NZ to the Transport and Industrial Relations committee on the Employment Relations Law Reform Bill, February 2004.

right.[687] As we learn from NZ, South Africa will still need better processes to support good faith conduct, and there should be consequences for serious breaches of good faith. [688]

3.7. Conclusion

The background above has proven that the effects on the application of good faith bargaining in SA are yet to be practical. This is so because the Code has just been implemented. Also, considering the state of work now, as we are still faced with the pandemic, negotiations are not conducted like they used to. The study proved a general duty to bargain and in good faith in the USA and NZ. However, SA provides for voluntary bargaining. In addition, good faith bargaining contributes to and can increase trust amongst parties and potentially combat unnecessary consequences attached to negotiations that may have detrimental effects on a business. In this way, where good faith is observed in negotiations, it will be easier for parties to put themselves into each other's shoes. Accordingly, this can be achieved by recognising the parties' individual interests in collective bargaining. The subsequent chapter will highlight various conflictual interests of parties to collective bargaining and how these interests must be balanced for the sustainability of the business. Lastly, the study has proved that there are various lessons that can be learned from the comparative countries.

[687] Sections 14, 16 and 18 of the LRA are applicable to majority trade unions. The right to disclosure of information is amongst them.

[688] See submission of the New Zealand Council of Trade Unions to the Transport and Industrial Relations Committee on the Employment Relations Law Reform Bill, 27 February 2004.

Chapter 4: Recognition of parties' interests in collective bargaining

4.1. Introduction

It can be drawn from the previous chapter that bargaining in good faith contributes to productive and effective negotiations. However, negotiations can be viewed as vigorous and conducted in bad faith—probing an examination into the role of parties' interests in collective bargaining. It was held in the ILO High-Level Tripartite Meeting that collective bargaining enables both employees' and employers' interests to be voiced, identify common interests, balance different interests, and negotiate trade-offs.[689] Moreover, collective bargaining benefits workers by receiving a greater share of productivity gains and improves the labour relations climate by providing an institutionalised and agreed way of managing conflict.[690]

This chapter aims to find ways that employers, employees, and their representative organisations can positively contribute to the development and sustainability of the business through the recognition and harmonisation of their interests. Although management and labour might possess conflicting interests. David Weiss has identified four classic common interests in the collective bargaining process: peace, people, productivity, and profit.[691] The chapter will also investigate the consequences of failed negotiations. This is linked to the complexities of overlooking the parties' interests and the overall impact on business sustainability. In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA and Others*, the court held as follows:

> . . . the LRA acknowledges that the interests of parties to an employment relationship more often than not stand in conflict, and that the preferred mechanism to reconcile competing interests is the process of collective bargaining. In a voluntarist system such as that established by the LRA, the courts have no role in determining the merits of any demand made during the bargaining process, nor are they empowered to make any value judgment as to whether a demand promotes or secures the common good of the enterprise.[692]

4.2. The overall interests of parties to collective bargaining

Parties to collective bargaining hold various conflicting and shared interests. The conflict between employers and employees is perpetual. Henceforth, any approach to the relationship

[689] International Labour Organization, Collective Bargaining: Negotiating for Social Justice High-level Tripartite Meeting on Collective Bargaining Geneva, available at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_172415.pdf, accessed on 01 April 2020.
[690] Ibid.
[691] David S Weiss *Beyond the Walls of Conflict: Mutual Gains Negotiating for Unions and Management* (1996).
[692] *Vanachem* op cit note 8, para 19.

between management and labour is fruitless unless the divergence of their interests is recognised and articulated.[693]

In the past, employment relationships were positioned in a master and servant way. Thus, an employee was obliged to serve the interests of the employer. *R v Eayrs*[694] highlights this by stating that the servant is bound to give personal service to the master and refrain from any course of conduct that may injure his master's trade or business.[695]

The same sentiments were held in *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler.*[696] In *casu,* the court held that

> there can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests.[697]

Despite this, a successful partnership between employers and employees exists when there is a mutual understanding of the parties' individual needs and the shared goal of developing a winning business.[698]

Furthermore, the existence of labour law in regulating employment relations is crucial. *Creighton* and *Stewart* posit that it functions on two main philosophies: the protective and market views.[699] The protective view denotes an inherent power imbalance between the employer and employee in an employment relationship. In general, employers are believed to possess more power than their employees. Therefore, labour law functions as protective, of assisting in redressing the imbalance of power to achieve equity and fairness.[700] We cannot deny that South African employment law is established on this ground, with the intention that employers possess more power than employees. Through collective bargaining, power can be curtailed to protect employees.

Currently, employers and employees must work on finding ways in which their conflicting interests may be reconciled. The contention in this regard is that these interests must be

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[693] Freedland & Davies op cit note 673.
[694] (1894) 12 SC 330.
[695] Ibid at 332.
[696] 1971 (3) SA 866 (W).
[697] *Premier* supra at 867H-I.
[698] K W Wedderburn K 'Employees, partnership and company Law' 2002 *ILJ* (UK) at 99. The latter refers to The Partnership at Work Fund: Open for Applications (DTI 2002 Application Form).
[699] Breen Creighton & Andrew Stewart *Labour Law: An Introduction* 3 ed (2000).
[700] Maria-Stella Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work*, (unpublished LLD, University of Pretoria 2005).

considered crucial to the bargaining process for the conclusion of a collective agreement. This study focuses only on the financial interest as a part of companies' sustainability. This is the case because economic justice in corporate law is often overlooked. Therefore, collective bargaining is applied to act as a bridge to harmonise such interests to reach a mutual agreement. Therefore, these conflicting interests must be integrated and balanced for the overall existence of the business.

On the one hand, management is challenged to behave rationally in interacting with workers.[701] On the other hand, workers are challenged to satisfy their needs within the framework of the dynamics of the organisation and in collaboration with management.[702] Responding to these challenges may have an impact on the workforce. In turn, negotiations must then be conducted with caution considering such interests. This way, productive and effective negotiations will be easily led in good faith.

There is a need to explore the component interests of the collective groups, including any competing interests between the group's representatives and the constituents or even among different groups within the constituency, to understand the bargaining strength of parties to a collective bargaining process.[703] The success of a business depends on an effective solid working relationship between employers and employees who depend on one another and are connected to other stakeholders.

This interconnection feature plays a significant role in the sustainability and development of a business. Undoubtedly, parties to collective bargaining may suffer greater loss where the focus is only placed on their interests and exclude others. The shortcoming of this is that negotiations work in contradiction to discovering a shared interest. Accordingly, the overall existence of a company depends on various things. Gliaudys Jr provides an overview of the interdependence of employees and employers concerning the overall existence of a company in this way:

> Bargaining … for labor is about compensation, working conditions and other benefits… while for management it is to uphold their responsibility to maintain production and wage stability without injuring the bottom line of the company's value for the shareholders. It can be a challenge for both especially if there is suspicion on the

[701] P S Nel *South African Employment Relations* 4 ed (2002) at 135.
[702] D S Harrison op cit note 32.
[703] A L Goldman Comparative analysis of labor mediation using bargaining strength model (1993) 82(4), *Kentucky Law Journal* at 947.

> underlying good faith of these two sides in each other about possible underlying agendas not related to labor negotiations itself.[704]

It is submitted that this proves that employers and employees form are an integral part of a business. Various scholars have noted these parties' roles in the workplace. *Botha* posits that employees are valuable assets as they play an essential role in the company's sustainability, long-term growth, and prosperity.[705] Conversely, Barnard notes that collective bargaining does not always result in employees gaining a larger share of the fruits of their labours.[706] However, both employers and employees contribute to the long-term increase of the profits: a social responsibility commitment and attention to the needs of employees and consumers, which benefit shareholders.[707]

When the bargaining process is initiated and parties do not heed the interdependence factor, the process may suffer adversely. Hence, good faith in collective bargaining is key. An enterprise may not run independently. Labour is needed to give services to make profits and for employees to be compensated for such services. Thus, a company cannot run in isolation from its employees and other stakeholders. To sustain the enterprise, employers must not only stress making profits without taking care of their employees. Also, employees must not expect benefits that are beyond achievable. Ultimately, the company depends on its profitability, development, and growth.

Despite parties to an employment relationship being dependent on each other, their conflicting interests cannot be disregarded. The following are discussions on these interests and their impact on the overall existence of a company.

4.2.1. The interests of employers

(a). *The economic factor-profits*

The fundamental interest of employers is reserved for making returns for the development and viability of the company. The profits measure the viability of a business it makes for it to be successful. As will be noted below, this is against the interest of employees in having timeous

[704] George J Gliaudys Jr, Chair of the Board of Trustees at Westcliff University. See also Scheeper op cit note 249.
[705] Botha 'Responsibilities of companies towards employees' (2015) *PER, Potchefstroom* v. 18, n. 2, p. 1-67.
[706] Jacolien Barnard & Monray Marsellus Botha 'Trade unions as suppliers of goods and service' (2018) 30(2) SA *Mercantile Law Journal* at 216 – 250.
[707] E M Dodd 'For whom corporate managers are trustees?' (1932) *Harvard Law Review* 1156.

wage increases. Therefore, employers will show retaliation to safeguard their interests. Although collective bargaining can contribute to the advancement of the interests of all parties, caution must be placed on whether supporting such interests will not impact a company's earnings, profits, or even the net income.

Making profits is the fundamental interest that employers have in business. Therefore, bargaining with trade unions for the provision of economic justice by employers to employees must be done to consider the viability of the business. Similarly, economic justice can be achieved when employers and employees reconcile their conflicting interests favouring the company's bottom line. This is so because an impact on a company's bottom line threatens its existence. The term bottom line refers to any activities that may either decrease or increase the overall business profit. Employers must be cautious when engaging in wage negotiations because the ability of the business to make profits and its long-term survival will make it viable.

This economic line pertains to the economy's capability as one of the subsystems of sustainability to survive and evolve into the future to support future generations.[708] This appears as an essential economic feature in support of the existence of companies. To assist employers with challenges on wage increases, companies may look into provisions supporting the disclosure of financial information during collective bargaining. For example, the study stresses the disclosure of information, as discussed in the previous chapter. This will assist in determining whether the refusal of wage increment is justifiable or not. The object behind harmonising parties' interests is rooted in the development and sustainability of the company for the future.

The general duties of the employer include receiving the employee into service, duty to pay, the equal right to payment, and providing their employees with safe and healthy working conditions. These duties are economically interconnected and may have an impact on the viability of the business if overlooked. However, Visser posits that collective bargaining has a key conflict management function for employers as it provides a process in which disputes of interest may be resolved.[709]

[708] J Elkington 'Cannibals with forks: The triple bottom line of 21st century business' (2000) 23 *Journal of Business Ethics* at 229–231.
[709] Jelle Visser 'What happened to collective bargaining during the great recession?' (2016) 5 (9) *Visser IZA Journal of Labor Policy* at 2.

Various authors posit that employers view the bargaining process as a means of maintaining 'industrial peace'.[710] Collective bargaining is positioned to ensure that the performance of work properly contributes to productive, stable, and sustainable commercial operations. These characteristics are highlighted in detail hereunder:

- Performance of work: Collective bargaining is a process to establish the terms and conditions of employment. It concerns work, working relations, relations between employers and employees, how work is organised, the times at which work is undertaken, etc;
- Productive: Collective bargaining should make enterprises more productive or at least maintain productivity. This is where an enterprise must accumulate profit for the employer for its existence. Therefore, collective bargaining is not operating correctly where it makes a business less productive or less viable;
- Stable: A successful collective bargaining must offer extended periods of strike free, disagreement free, stable operations. One of the benefits of collective bargaining for an employer can and should be securing a period free of disputation, free of industrial action and free of any additional claims. A stable organisation should be able to combat various conducts that may be harmful to the existence of the business;
- Sustainable: The outcomes of collective bargaining for employers must be sustainable. Any collective bargaining system must be properly balanced to ensure that collective bargaining outcomes are consistent with creating collective agreements that contribute to sustainable enterprises; and
- Commercial: Always employers are running commercial businesses in highly competitive markets. The performance of work and how work is organised needs to contribute to these commercial operations. If done well, collective agreements balance employee and employer needs and priorities and lead to more commercially sustainable businesses.[711]

Employers stress on the improvement of productivity and profitability of the business. However, there are challenges in reaching fair deals that contribute to the production and profitability of a company. In this case, Heald argues that companies bargain based on an

[710] Freedland & Davies op cit note 673 at 9. See also Godfrey, Maree, Du Toit et al op cit note 585.
[711] International Organisation of Employers op cit note 301 at 9–10.

implicit business model framework that is not shared, understood, or credible to trade unions and employees.[712] When this model is not shared, all parties' basic fears and concerns (business, trade unions, and employees) remain unaddressed.[713] In turn, employers may want collective bargaining because they feel it to be more respectful of their employees.[714]

In addition, the *King Report II* notes that companies must offer an opportunity to align their expectations, ideas, and opinions with those of other stakeholders on certain issues.[715] This will improve the company's production scale and satisfy other stakeholders' needs, which will assist in sustaining the business. Similarly, *Le Roux* stresses the importance of business sustainability and the achievement of sustainable employment in this way:[716]

> While the best and immediate financial interests of their members will remain at the top of the bargaining agenda for unions, the proposed approach will require all stakeholders to consider not only how the wage bargain can feed into sustainability, but also how the bargaining process can add value to all five capitals [financial, human, social, environmental, and manufactured] ... This may mean including sustainability issues, but more specifically sustainable employment, on the bargaining agenda…The important point is that sustainable employment will require all parties concerned to harness sustainability levels, including 'the self', 'the partnership' (employee/employer relationship) and 'the environment', and to abandon short-term goals for long-term benefits.[717]

Researchers also stress making work decent. This is so because decent work is key to sustainable work. Thus, while businesses are fighting for sustainability, employment sustainability should not be disregarded. Work will be sustainable if it is decent and has an element of longevity or durability.[718] Trade unions are also suitable for advancing the objectives of the International Labour Organisation's (ILO) decent work agenda. To achieve this, trade unions must be 'macro-focused' to improve workers' lives sustainably.[719] The purpose for trade unions to be macro-focused would be 'to set wages at levels that would maximise employment, which is based on the competitiveness of the firms'.[720]

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[712] Heald op cit 152 at 13.
[713] Ibid.
[714] Barnard, Deakin & Morris op cit note 237.
[715] Institute of Directors *King Report on Corporate Governance for South Africa in 2002* (2002)) at 110-111.
[716] Rochelle le Roux 'The purpose of labour law: Can it turn green?' in Malherbe & Sloth-Nielsen (eds) *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (2012) at 242–243
[717] Ibid.
[718] Ibid.
[719] Rosalind Chew & Chew Soon-Beng 'Union responsibility: A necessary public good in a globalized world' (2010) *The International Journal of Comparative Labour Law and Industrial Relations* at 438.
[720] Ibid.

In this way, there is a need to promote the core values of decent work, which include the opportunity to work, the right to freedom of association, social protection, and voice. Accordingly, the rationale for the ILO's decent work and sustainability is captured in this way:

> The world needs more and better jobs, especially in societies suffering from widespread poverty, and these jobs must have the quality of sustainability. Decent work for sustainable development means that in social terms, such jobs must be open to all equally. In economic terms, jobs must be productive and able to compete in a competitive market.[721]

Decent work is founded on the understanding that work is a source of income, personal dignity, family stability, peace in the community, and economic growth that expands opportunities for productive jobs and employment.[722] However, during negotiations, companies still overlook the need to discover what satisfies their employees' fundamental human needs. What they strive for is to maximise their profits.

The idea is based on the fact that an enterprise may not run without generating profits. Disregarding that employees also contribute to the profit gains may have long-term effects on the business. Hence, there is a need to reconcile their conflicting interests. This entails that employers must evaluate their business situation to enable them to give raises accordingly. This way, the latter will invest in the enterprise's growth, development, and sustainability. Although profit is one of the factors for a company's existence and sustainability, Price posits that most of the best businesses today see profit as nothing other than a reward for providing their target market exceptional value for the product or service they offer.[723] However, this may not be equally attributable to employees taking a job to satisfy their human needs. Moreover, today's business failures result from being concerned about turning a profit versus delivering human value to society.[724] Therefore, a collective bargaining system must be perfectly balanced to

[721] ILO *Toolkit for Mainstreaming Employment and Decent Work* 1 ed (2008). According to this toolkit, decent work involves opportunities for work that: is productive and delivers a fair income; provides security in the workplace and social protection for workers and their families; offers prospects for personal development and encourages social integration; gives people the freedom to express their concerns, to organise and to participate in decisions that affect their lives; and guarantees equal opportunities and equal treatment for all.
[722] Tamara Cohen & Luendree Moodley 'Achieving "decent work" in South Africa' (2012) *PER* at 320–569.
[723] Kevin Price 'The reason for a company's existence', *The Price of Business* 6 March 2013, available at *https://priceofbusiness.com/the-reason-for-a-companys-existence/*, accessed on 14 May 2020.
[724] Ibid.

ensure that collective bargaining outcomes are consistent with creating collective agreements that contribute to sustainable enterprises.[725]

4.2.2. The interests of employees

(a). *Economic factor- wages* Collective bargaining is a process used to address the terms and conditions of employment. At most times, employees expect that collective bargaining must support their interests of wage increment. This is one consistent reason for the satisfaction of their human needs. In this regard, employees require and expect that collective bargaining will reach a fair deal on such wages to satisfy their fundamental needs. Heald regards this interest as a human satisfier.[726] The wage interest is economically inclined in that employees can work satisfactorily and increase productivity where they are paid accordingly.

Although wage increment is not the only thing employees may be concerned with, it remains essential. This is so because wages provide for various human needs and sustain employees' personal lives. The interests of employees can be summarised in this way:

> Employees have an interest in the company as it provides their livelihood in the present day (the provision of employment, payment of salaries for services rendered and their overall working conditions) and at some future point (thus the long term growth and prosperity of the company is important for the longer term view of the employees, particularly as concerns pension benefits in the future).[727]

Different authors support the economic factor of payment of fair wages by employers. Botha contends that employees are inclined to companies fulfilling their basic needs such as paying fair wages, providing safe working conditions, job security, and future career opportunities.[728] In this way, collective bargaining is valued by employees in that it meets and supports their aspirations and expectations in life. This extends to their family lives and health.

In addition, Ngcukaitobi, De Bruin, Anstey et al also posit that employees' primary purpose is to receive a fair return for their labour.[729] Therefore, collective bargaining is used for negotiating wage increases. Employees view collective bargaining to maintain certain work distribution standards, rewards, and employment stability.[730] In this case, collective bargaining

[725] International Organisation of Employers op cit note 301.
[726] Heald op cit 152.
[727] Du Plessis Hargovan & Bagaric op cit note 168 at 26. See also C Mallin *Corporate Governance* (2007) at 51.
[728] Botha op cit note 705 at 1–67.
[729] Ngcukaitobi, De Bruin, Anstey et al op cit note 152.
[730] Freedland & Davies op cit note 673 at 69. See also Godfrey S; Maree J; Du Toit D & Theron, J *Collective Bargaining in South Africa* 1 ed (2010); and Du Toit op cit note 157 at 1405-1435.

is employed to find an expedient, mutually acceptable solution that partially satisfies both parties.[731] However, the bargaining process may be affected, for example, when trade unions or their members enter the bargaining arena with unrealistic expectations. This is the reason negotiations are susceptible to destruction. However, this may be alleviated where negotiations are conducted in good faith.

Furthermore, employees expect that collective bargaining will naturally satisfy human needs, alleviate grinding poverty, ensure fair labour practice, and contribute to a better life.[732] Employees will feel powerless when employers and trade unions fail to solve fundamental human needs. This may lead to employees venturing into the usage of disruptive tactics. This is so because they often feel compelled to accept tremendous sacrifices at great human cost and prepare themselves for strike or showdown to compensate for these feelings of disempowerment.[733]

Consequently, tensions are created due to the parties' wholly diverged interests and expectations. Thus, employees' disempowerment and the sense of being taken for granted may lead to more disastrous consequences, which may have detrimental effects on the economy. An example can be drawn from the 2018 wage negotiations between the National Union of Metalworkers of South Africa (NUMSA) and Eskom. NUMSA and its members engaged with Eskom (employer) during negotiations, and there were contentions that Eskom was bargaining in bad faith. NUMSA promised to embark on industrial action even though the economy may be harmed if their demands are not fulfilled even in exercising this right.[734]

In addition, the Marikana massacre is one of the disastrous examples that was followed by devastating consequences due to employees' disempowerment after failed negotiations. The massacre revealed a lack of congruence amongst labour, trade unions, and employers. Although negotiations were underway between employees of the Platinum Mine and the employer (Lonmin), the intervention by the South African police worsened the situation. The massacre

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[731] Johanette Rheeder *'Solidarity for Ever' Can a Union Be Held Liable for Damages during Protest Actions?,* available at *https://www.jrattorneys.co.za/south-african-labour-law-articles/collective-rights-and-strikes/can-a-union-be-held-liable-for-damages-during-protest-actions.html*, accessed on 14 February 2019.
[732] Heald op cit 152 at 13.
[733] Ibid.
[734] *Fin24* 'Numsa: Eskom negotiating in bad faith, we could strike even if disastrous for economy', available at *https://www.news24.com/fin24/Economy/Labour/News/numsa-eskom-negotiating-in-bad-faith-we-could-strike-even-if-disastrous-for-economy-20180809-2*, accessed on 06 June 2019.

events saw a loss in employees' incomes and, most importantly, the tragic loss of lives. Accordingly, the strike is marked as one of the most tragic strikes South Africa has ever seen.

Like in many cases, employees sought salary increments from Lonmin. Despite the violence during these unprecedented events, various scholars have commented on the solidarity shown by workers despite labour being fragmented,[735] how micro-financiers have enslaved Marikana's miners in debt[736] and how the event is a reminder of the apartheid regime.[737] To combat this, the need to recognise the wage interest as a crucial part of the proper functioning of the business arises. However, wages have a significant operational and financial impact on employers.[738] In order to provide a way forward, employers must provide trade unions with relevant financial data supporting the denial of wage increments.

4.2.3. The interests of trade unions

(a). Representation and recognition

One may assume that collective bargaining has its benefits only for employees and employers. However, representative unions have vested interests in business and collective bargaining. From its inception, collective bargaining has been intimately related to the growth and development of trade unionism.[739]

Before discussing other interests, it is essential to note that trade unions possess two faces in negotiations. Flanders noted these two faces as vested interest and sword of justice.[740] The vested interest face is concerned with a union defending and enhancing its members' material interests, pay, working arrangements, and job security.[741] Economists regard this stand as a 'zero-sum game', in which the union's gain equals the employer's loss.[742] The sword of justice face concerns the unions' role in upholding rights, protecting the weak more generally, and a sense of wider social purpose.[743]

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[735] C Chinguno 'Marikana: fragmentation, precariousness, strike violence and solidarity' *Review of African Political Economy* (2013) 40 (138) at 639.
[736] P Bond 'Debt, uneven development and capitalist crisis in South Africa: From Moody's macroeconomic monitoring to Marikana microfinance mashonisas' (2013) *Third World Quarterly* Vol 34, No 4, pp 569.
[737] D MacShane 'Marikana is a reminder of the apartheid years' (2012) *New Statesman* at 13.
[738] D H Autor et al 'The fall of the labor share and the rise of superstar firms' (2017).
[739] Le Grange op cit note 657 at 17.
[740] Allan Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (1970) at 220.
[741] Barnard, Deakin & Morris op cit note 237.
[742] Ibid.
[743] Flanders op cit note 740 at 220.

The interest of trade unions in collective bargaining is tied to representation and recognition in the workplace. A trade union is created to represent, protect, and advance the interests of its members. As noted above, these employees' interests conflict with the employer's. Bellace supports this contention by saying that it is commonly known that trade unions operate on the assumption that there is always a conflict of interest between an employer and its employees.[744] However, this conflict can be resolved only through collective bargaining. Trade unions play an essential role in articulating and pressing demands for higher wages, including representing workers' collective interests and facilitating an exchange between workers and their employers on various aspects of the working life.[745]

In addition, Heald provides that trade unionists use collective bargaining to build their careers.[746] In some cases, trade unions are concerned only with improving the benefits of their members and demand higher wages at the expense of employment levels, thereby overlooking the effect of their actions on other workers and society.[747] A solution for this can be captured from Barnard, Deakin & Morris et al, which requires that trade unions demonstrate a sense of social purpose above and beyond the self-interest of their members.[748] The cases of *SATAWU and Another v Garvas and Others*[749] and *FAWU v Ngcobo N.O. and Another*[750] highlight that trade unions are responsible for workers and society at large. They are essential agents representing workers and promoting stability in and outside the work environment.[751]

Furthermore, certain unions look for alternative outcomes such as paying market wages and increasing productivity, resulting in a *win-win* situation.[752] Besides, trade unions should also seek labour peace and engage in joint and meaningful consensus-seeking processes.[753] This is because trade unions have enormous social, economic, and political power. Therefore, the latter need to be responsible when negotiating because they are entrusted with a huge responsibility

[744] Bellace op cit note 105.
[745] Freeman & Medoff op cit note 70.
[746] Heald op cit 152.
[747] Chew & Soon-Beng op cit note 719 at 436.
[748] Barnard, Deakin & Morris op cit note 237.
[749] *SATAWU* op cit note.
[750] *Food and Allied Workers Union v Ngcobo N.O. and Another* (CCT 50/13) [2013] ZACC 36; 2013 (12) BCLR 1343 (CC); (2013) 34 ILJ 3061 (CC); 2014 (1) SA 32 (CC); [2013] 12 BLLR 1171 (CC) (9 October 2013).
[751] S B Gericke 'Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' (2012) *Journal of Contemporary Roman-Dutch Law* at 566–585.
[752] Chew & Soon-Beng op cit note 719 at 436.
[753] Rheeder op cit note 268.

to care about the terms and conditions of employment and bargain from a sustainability perspective.[754]

Collective bargaining has been founded on social justice and workplace fairness principles.[755] In the ILO's liberal social logic context, justice is guaranteed where trade unions are present. This assists in tilting the balance in power in favor of employees as it is simply captured in the phrase 'labour is not a commodity'.[756] This is supported through the principal purpose of labour law: to regulate, support, and restrain the power of management and organised labour.[757]

Despite this, labour unions have not attracted much attention from South African labour law experts despite the crucial role played during the apartheid era and in the advent of the democratic dispensation.[758] The extent to which labour rights have been entrenched in the South African Constitution is probably unique. It reflects the determination of the drafters that was built to avoid a repetition of the abuse to which trade unions were subjected during apartheid.[759] In contrast, trade unions are said to lack the capacity to perform their duties as assigned by law.[760]

In some cases, South African trade unions failed to present their members' interests successfully. This is so because those trade unions used to be political vehicles, and they find it challenging to shift from this mode.[761] In addition, Heistein's opinions on the flaws of the current system of labour unionisation in South Africa are worth noting. The latter notes the following:

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[754] M M Botha 'Responsible unionism during collective bargaining and industrial action: Are we ready yet?' (2015) *De Jure* 341.
[755] Jeffery G Reitz & Anil Verma 'Immigration, race, and labor: Unionization and wages in the Canadian labor market' (2004) 43(4) *Industrial Relations* at 836.
[756] Sandrine Kott 'ILO: Social justice in a global world? A history in tension (2019) 11 (1) *International Development Policy, Revue internationale de politique de développement*, at 21-39. See also Treaty of Versailles of 28 June 1919, Part XIII, Annex, Section II, Article 427, *available at https://avalon.law.yale.edu/imt/partxiii.asp*, accessed on 06 October 2020.
[757] Kahn-Freund op cit note 620 at 4.
[758] B Hepple 'Trade unions and democracy in transitional societies: Reflections on Russia and South Africa' in K D Ewing et al (eds) *Human Rights and Labour Law: Essay for O'Higgins* (1994); and S A Scheepers 'The challenge facing trade unions in South Africa' in J A Grey (Coetzee ed) *Industrial Relations in South Africa* (1976). See also Mpfariseni Budeli *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* (unpublished PhD thesis, University of Cape Town, 2007) at 15.
[759] John Grogan *Collective Labour Law* (2010) at 12-13.
[760] Evance Kalula, Ordor Ada Okoye & Fenwick Colin 'Labour, Law Reforms that Support Decent Work: The Case of Southern Africa ILO Sub-Regional Office for Southern Africa' *Issue paper* No. 28.
[761] Employment Relations Exchange *Do Trade Unions Have a Future in South Africa?*, available at *https://www.erexchange.co.za/trade-unions-future-south-africa/*, accessed on 16 August 2019.

- First, unions consist of a poor working class led by a rich elite. This centralisation of power leads to abuse, and the financial and lifestyle benefits of being at the top incentivise trade union leaders to work in their interests and not in the worker's interests.
- Secondly, the establishment of trade union leadership is not democratic, union leadership is elected, but the voting system is so convoluted that the majority opinion of the union's membership is not what determines who will be their leader.
- Thirdly, the financial profits made by unions give them the incentive to compete against one another for membership instead of working together towards a common goal for workers.[762]

This proves that trade unions are still fighting to find a foot in the employment world. Hence, their role is criticised. Amongst critical issues that need to be addressed is the lack of basic negotiating skills and trust between partners, the power of negotiators to influence and educate their constituencies, turnover of negotiators, and lack of access to information and resources.[763] Moreover, Kaufman posits that although unionism contributes to increased efficiency in organisations, other workplace institutions are said to have the potential to perform better.[764]

In establishing their roles, trade unions are still faced with the reality of reconciling their members' interests against the employers. Depending on the nature of the matter, trade unions sometimes vow for management instead of employees, as seen in the Marikana massacre. Where trade unions are suspected not to be fostering the employees' interests, detrimental consequences may suffice. The Marikana massacre is one example that shows how a trade union may lose its representation capacity if bad faith is suspected in negotiations. In this case, a majority trade union (National Union of Mineworkers —NUM) lost its majority representation to a minority trade union (Associated Mineworkers and Construction Union-AMCU).

[762] Pierre Heistein 'Are unions honestly representing workers?', available at *https://www.iol.co.za/business-report/opinion/are-unions-honestly-representing-workers-1779376,* accessed on 16 August 2019.
[763] Renee Grawitzky 'Collective bargaining in times of crisis: a case study of South *Africa' International Labour Office, Industrial and Employment Relations Department* - Geneva: ILO (2011), available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_175009.pdf*, accessed on 18 September 2018.
[764] Kaufman BE 'What Unions Do: Insights from Economic Theory' (2004), page 374. The author gives examples such as a works council, employee representation plan, legally binding employee handbook, or labor court.

Whereas employees in other countries choose to eliminate their representative unions through decertification, this choice is not offered to employees in South Africa. The only way left for employees is to withdraw from being represented by the trade union, which will lose its majority representation, as in Marikana. Labour law in the United States of America is based on the belief that employees have the right to bargain through their chosen representative unions, and when the latter has received its majority status, an employer is obliged to recognise this right.[765] However, employees also had the right to decertify a representative union as a bargaining agent, acting on their behalf in the bargaining process. Hence, the Wagner Act was amended by Congress in 1947 to provide a means by which employees can continue with decertification.

Decertification is defined as a process by which employees can have a special call for an election to remove their representative union by the NLRB. To succeed, many of the employees must vote against a representative union. However, decertification will not succeed within the first year a representative union has been certified.[766] This will also not be allowed within the first three years in which a collective bargaining agreement has been reached, subject to other provisions.

Trade unions must contribute to the broad sharing of productivity gains. This is so because trade unions are also responsible for producing wealth. Various authors believe that trade unions may contribute to efficient workplace governance while correcting the monopsony power of employers in imperfect labour markets.[767] Accordingly, American research carried out in the 1970s and 1980s suggested that unions and collective bargaining are consistent with prominent levels of productive efficiency.[768]

Despite this, the institution of collective bargaining has been criticised in the United States. Collective bargaining in the United States gets blamed for its contribution to society's ill, which has detrimental consequences on the economy. These include business bankruptcies,

[765] Section 7 of the National Labor Relations Act 29 U.S.C. § 157 (1976). The principle that the will of the majority controls is set out in s 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1976).
[766] Janice R Bellace 'Union decertification under the NLRA' (1981) *Chicago-Kent Law Review*, 57(3), 643-696 for a full discussion on Union decertification in the USA prior to 1981.
[767] Charles Brown & James Medoff 'Trade Unions In The Production Process' (1978) 86 *J Pol Econ* at 355; and Kim B Clark 'The impact of unionisation on productivity' (1980) *33 Indus & Lab Rel Rev* at 45.for a discussion on potential productivity gains. For a discussion on the monopsony charge, see Lloyd G Reynolds *Labor Economics and Labor Relations* 7 ed (1978); Daniel J Chepaitis 'The National Labor Relations Act, non-paralleled competition, and market power' (1997) 85(4) *California Law Review* at 769–820; John Litwinski 'Regulation of labor market monopsony' (2001) 22 *Berkeley J Emp & Lab L at* 9; Ralph K Winter Jr 'Collective bargaining and competition: The application of antitrust standards to union activities' (1963) 73 *Yale Law Journal*.
[768] Freeman & Medoff op cit note 70 and (1985) 38(2) at 244-263.

government budget deficits, unreasonably high expectations about wages and benefits, the coddling of bad workers, undue political influence, corruption, and disdain for its spillover effects on the rest of the economy.[769] However, recent studies provide that trade unions and collective bargaining are associated with better working conditions and compliance with labour standards.[770] Moreover, collective bargaining can fill regulatory gaps within domestic contexts.[771]

Although trade unions in South Africa have faced challenges throughout the years, the movement represents a source of inspiration to organised labour globally.[772] In light of this, the 1998 findings of a survey conducted by the Congress of South African Trade Unions (COSATU) also proved levels of internal solidarity amongst representative trade unions.[773] Trade unions in South Africa eliminated the apartheid regime and fought for employees' rights in the past. Although previous unions had internal organisational effectiveness, it is unclear whether new trade unions have the same degree of militancy and commitment as previous unions during the struggle years.[774] Lastly, it has been held that the courts should interfere, especially when the union does not show that it had any legitimate interest of its members in mind.[775] Below is a discussion on the trade union representation principle of majoritarianism and sufficient representation.

(i) The principle of majoritarianism

It is through representation that we see the importance of trade unions. As noted above, representation is the principal interest of trade unions. To effectively represent employees in the workplace, trade unions in South Africa must have majority representation. The LRA favours voluntary bargaining amongst employers and employees through their representatives.

[769] William G Fletcher Jr *They're bankrupting us and 20 other myths about unions* 8, 28, 38, 58, 65, 79, 121 (2012).
[770] Alison Morantz 'The elusive union safety effect: toward a new empirical research agenda' (2018). See also Dionne Pohler & Chris Riddell 'Multinationals' Compliance with Employment Law: An empirical assessment using administrative Data from Ontario 2004 to 2015' (2019) 72 (3) *ILR Review AT* 606–35; and Weil David *Turning the Tide: Strategic Planning for Labor Unions* (1994).
[771] Luisa Lupo & Anil Verma *Labour Standards Compliance in the Global Garment Supply Chain: Evidence from ILO's Better Work Program on the Role of Unions and Collective Bargaining* (2020), page 5.
[772] Geoffrey Wood & Pauline Dibben 'The challenges facing the South African labour movement: Mobilization of diverse constituencies in a changing context' (2008) 63 (4) *Relations Industrielles / Industrial Relations*.
[773] G Wood & C Psoulis 'Globalization, democratization, and organized labor in transitional Economies' 28 (3), (2001). *Work and Occupations*, at 293–314.
[774] Geoffrey Wood 'South African trade unions in a time of adjustment' (2001) 4 *Labour / Le Travail* at 150.
[775] *Jumbo Products v NUMSA 1996* ILJ 859 (W) 878.

The principle of majoritarianism favours union(s) representing most employees and granting them all organisational rights.[776]

The principle of majoritarianism entails the rule of the majority.[777] The principle allows an inclination towards 'what behoves the strongest' or the 'will and preferences of the majority', notwithstanding its bearing on the minority.[778] The rationale behind this principle is simple: whatever the majority trade union decides will be taken as a representation of the views of all other employees.[779] It fosters the approach that the views of the minority are equally shared and similar interests to that of the majority.[780] It simply does not matter if the application of the principle of majoritarianism prejudices the rights of minorities.[781] The superseding aim is to satisfy the welfare of the majority.[782]

A dominant feature of the LRA collective bargaining framework is that it strongly favours majority trade unions.[783] The case of *Police & Prisons Civil Rights Union v Ledwaba NO & others* confirmed this dominant feature.[784] This principle is firmly established in the labour market regulatory system.[785] It is the subject matter that symbolises the dominance of majority trade unions in the workplace.[786] Moreover, the principle finds application within the international legal framework.[787] The Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA) hold that majoritarianism is attuned to freedom of association.[788] These committees also posit that these majority unions might have exclusive privileges to bargaining rights as long this does not

[776] *Police & Prisons Civil Rights Union v Ledwaba NO & others (*2014) 35 ILJ 1037 (LC) (POPCRU).
[777] *Free Market Foundation* op cit note 52, para 37.
[778] Malan op cit note 661 at 436.
[779] Ibid.
[780] Beenzu *A Demarcation of Majoritarianism within the South African and German Labour Law* Context (unpublished mini-dissertation, North-West University, 2016).
[781] Snyman S 'The principle of majoritarianism in the case of organisational rights for trade unions — is it necessary for stability in the workplace or simply a recipe for discord?' (2016) ILJ 865; *POPCRU v Ledwaba* 2014 JDR 1450 (LC) para 47 and *United Transport and Allied Trade Union /SA Railways and Harbours Union v Autopax Passenger Services* (SOC) Ltd 2014 35 ILJ 1425 (LC) para 51.
[782] *Ramolesane v Andrew Mentis* 1991 12 ILJ 329 (LAC) 335.
[783] Temogo Geoffrey Esitang and Stefan van Eck 'Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and ILO Conventions' (2016) 37(4) *Industrial Law Journal* at 763–778.
[784] (2014) 35 ILJ 1037 (LC) (POPCRU).
[785] Organised Labour, Organised Business and Government 2013, available at *www.goldwagenegotiations.co.za* accessed 22 June 2018.
[786] J Kruger & C Tshoose 'The impact of the labour relations act on minority trade unions: A South African perspective' (2013) 16 (4) *PELJ* 289 / 487.
[787] *Free Market Foundation* op cit note 52, para 58.
[788] See T Cohen 'Limiting organisational rights of minority unions: POPCRU v Ledwaba 2013 11 BLLR 1137 (LCT)' (2014) *PER/PELJ* 2220 and Esitang Van Eck *'Big Kids on the Block Dominating Minority Trade Unions: Reflections on Thresholds, Democracy and ILO Conventions* at 23.

pre-empt minority trade unions from operating and representing their members in individual disputes.[789]

In South Africa, the LRA unapologetically endorses this principle.[790] In *Kem-Lin Fashions CC v Brunton,*[791] the Labour Appeal Court (LAC) held that this principle is one of the legislature's policies to establish orderly collective bargaining and democracy in labour relations.[792] Even where a substantial number of persons place rational arguments for their interests, these would be disregarded because the majority's will has to be upheld.[793] Therefore, majority trade unions are essential in representing the entire workplace irrespective of minority union(s). Majority unions in this regard are deemed to formulate resolutions on relevant disputes to benefit the majority of employees.[794] Collective agreements are an expression of the majoritarian principle.[795]

In addition, the judiciary may not restrict the bargaining process in a manner not provided for by the LRA.[796] The preference of this principle is that agreements emerging in this regard ought to be prioritised over the LRA.[797] In this way, the activities and rights of smaller unions are limited. Opponents refer to majoritarianism as 'mob rule' or the 'tyranny of the majority', whereas adherents assert that majority decision-making is intrinsically democratic.[798] It is evident from these settings that the larger the union, the more power it has over its rivals. Therefore, majoritarianism plays an essential role within the legislative framework of trade unions.[799] This idea is also supported by the Labour Relations Act as amended in 2014. Many commentators view it as favouring larger unions and conferring distinct advantages on unions with majority support at the establishment or industry level.[800]

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[789] Ibid.
[790] *NUMSA Obo Members v Transnet Soc Ltd* (P88/16) 2016 ZALCPE 14 (13 May 2016) para 27; Snyman op cit note 781*; United Transport and Allied Trade Union /SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd* (2014) 35 ILJ 1425 (LC) para 50; Johan Kruger & Clarence Itumelang Tshoose 2013 PER/PELJ 286/ 87; and Esitang & van Eck op cit note 783 pages 763-778.
[791] *Kem-Lin Fashion* op cit note 44.
[792] Ibid para 19.
[793] *Ramolesane v Andrew Mentis* 1991 12 ILJ 329 (LAC); Grant 1993 ILJ 313.
[794] *Fakude v Kwikot (Pty) Ltd* 2013 34 ILJ 2024 (LC) para 24; *United Transport and Allied Trade Union /SA Railways and Harbours Union v Autopax Passenger Services (SOC) Ltd* (2014) 35 ILJ 1425 (LC) para 51.
[795] Cohen op cit note 788.
[796] *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation and Arbitration* 2013 34 ILJ 2217 (LC) para 25.
[797] *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council* 2001 ZALC 83 para 13; *SA Breweries v Commission for Conciliation, Mediation and Arbitration* 2002 23 ILJ 1467 (LC) para 12; The Code op cit note 138 also stipulates that collective agreements are to be afforded prevalence of legislative provisions.
[798] André van Niekerk 'Extending agreements, Labour Court, Missions, Power plays' (2014) LRL 6.
[799] Beenzu op cit note 780.
[800] Ian Macun 'Does Size Matter? The Labour Relations Act, Majoritarianism and Union Structure (2009.

These settings show that minority trade unions were excluded from enjoying other organisational rights in the past. It has been noted that the proverbial big kids on the block can prevent newcomer trade unions from getting a foot in the door.[801] Conversely, this status changed in 2014 through the Labour Relations Amendment Act (LRAA). The LRAA seeks to redress this challenge because it affords employees with two instances in which trade unions may be able to apply for organisational rights despite the existence of s 18 collective agreement and where there is no trade union with majority status. This way, a trade union may be allowed to apply for all organisational rights.[802] Currently, a trade union is afforded the following rights:

- The right to access the workplace;[803]
- The right to deduct trade union subscriptions;[804]
- The right to elect trade union representatives;[805]
- The right to leave for trade union officials; [806] and
- The right to disclose information for collective bargaining.[807]

These rights promote the principle of majoritarianism in an unblinking fashion.[808] A majority trade union must represent more than half of the workforce (50+1).

(ii) Sufficient Representation

Sufficient representation forms part of the representation of employees within the workplace. Unfortunately, when the LRA was negotiated, the major players could not agree on the percentage threshold that would entitle a registered trade union to seek some of the five organisational rights.[809] It was then decided to 'fudge' the issue and use the expression

[801] Esitang & van Eck op cit note 783 at 736. See also M Brassey *Employment and Labour Law: Commentary on the Labour Relations Act* (2006) at 3-21, L Corazza & E Fergus 'Representativeness and the legitimacy of bargaining agents' in B Hepple, Rochelle le Roux & Silvana Sciarra *Laws against Strikes: The South African Experience in an International Comparative Perspective* (2015) at 88.
[802] See LRA s 21(8A) (a) and (b).
[803] LRA s 12.
[804] LRA s 13.
[805] LRA s 14.
[806] LRA s15
[807] LRA s16.
[808] Brassey op cit note 801 at A3–23. See also the case of *United Association of SA & another v BHP Billiton Energy Coal SA Ltd & another* (2013) 34 ILJ 2118 (LC) 2127 paras 47-8 where the court confirmed that the principle of majoritarianism underlies South Africa's collective policy choice. However, E Fergus & S Godfrey 'Bidvest and beyond: Legal and political challenges to organising across the value chain in South Africa' posit that this principle has been criticised by others for 'suppressing the rights of minority unions (and their constituencies) at times. See also Kruger & C Tshoose 'The Impact of the Labour Relations Act on minority trade unions: A South African perspective' (2013) 16 (4) *PELJ* 289 / 487. See also Esitang & van Eck op cit note 783 at 4.
[809] Available at https://www.gilesfiles.co.za/category/thought-leaders/anton-myburgh/, accessed on 15 June 2019.

sufficient representivity.[810] The term sufficient representivity is not defined in the LRA. This is also the case with a minority trade union. Concerning sufficient representation, it is generally assumed that 30 percent membership in a workplace would be sufficient; however, this is left to the CCMA to decide.[811] Initially, a minority trade union may not even acquire organisation rights to exercise the right to strike.[812]

Sufficient representation is applicable where a union does not have a majority representation. However, it does become merely 'sufficiently' representative. In this way, a trade union that is sufficiently representative has the right to access to the workplace, deduction of union subscriptions, and leave for union activities as per the LRA. This concept aims to allow a union without majority representation to find a foot in the workplace.

A registered trade union that has 50 +1 per cent representation may set the threshold with the employer to discourage rival trade unions.[813] Macun argues that denying smaller unions organisational rights based on administrative reasons such as proliferation is unfavorable.[814] Moreover, a union that does not reach the threshold is prevented from having a representative.[815] Although majority union thresholds and collective agreements enjoy preference, the LRA contains provisions such as ss 20 and 21, which allow smaller unions to obtain organisational rights.[816] This is necessary not to deprive them of their freedom of association.[817] Again, this entails that employees in the minority or sufficiently representative union cannot be represented in disputes because their right to choose a representative is tied to the threshold requirement.[818]

Although there is no duty to recognise a trade union within the workplace, the CCMA can compel an employer to grant these organisational rights.[819] Section 21 of the LRA provides

[810] Ibid.
[811] Ibid.
[812] *National Union of Metalworkers of SA & others v Bader Bop* supra.
[813] Ibid. *Category: Employment Relations, available at https://www.gilesfiles.co.za/category/topics/labour-relations/employment-relations/*, accessed on 02 June 2019.
[814] Macun *Law, Democracy and Development* (1997) at 81. See also *United Association of SA v BHP Billiton Energy Coal SA Ltd* 2013 34 ILJ 2118 (LC): the court went to the extent of holding that majority unions have the right amend their agreements to set the threshold even higher (where necessary). In simple terms, the aim is to allow order to prevail by curbing over crowdedness and creating an environment where only a handful of larger trade unions can operate (Macun *Law, Democracy and Development* (1997) at 70). If they do not grow (Baskin & Satgar *New Labour Relations* 12) they deteriorate (*Du* Toit, Godfrey & Cooper *op* cit note 203 at 39).
[815] Esitang & Van Eck op cit note 783.
[816] Beenzu op cit note 780.
[817] Ibid.
[818] Ibid.
[819] Stephen Kirsten 'Granting organisational rights to a trade union' 09 March 2017.

steps and documentation relevant to a trade union acquiring organisational rights. The provision allows a trade union that seeks to exercise any of these rights to inform the employer, in writing, of their intention by way of a notice.[820] The party seeking organisational rights is required to attach the following documentation to the notice:

- a certified copy of the union's certificate of registration;[821]
- the workplace in which the union seeks to exercise the rights;[822]
- the representativeness of the trade union within the workplace (percentage of employees who have joined the union);[823] and
- the stop order forms and the rights that the union seeks to exercise within the workplace.[824]

After all, this has been achieved in ss 21 and 22 of the LRA. The employer must meet with the trade union within 30 days and endeavour to conclude a collective agreement that will regulate how the union will exercise its rights.[825] Should the parties fail to conclude a collective agreement, either party may refer a dispute to the CCMA.[826] The CCMA must resolve the matter through conciliation. If conciliation fails, referral through arbitration can be made in terms of ss 27(1) of the LRA. A union may also have an option to embark on a strike (after notice of intention has been served). Where the right to strike is elected, the union is precluded from referring the same dispute to arbitration for 12 months from the date of notice to strike.[827] Where the union refers the matter to arbitration, the arbitrator will consider various factors when deciding whether to grant organisational rights to the union, including:

- the nature of the workplace;[828]
- the nature of the organisational rights the union seeks to exercise;[829]
- the nature of the sector in which the workplace is situated;[830] and
- whether there was any organisational history within the workplace.[831]

[820] LRA s 21 (1).
[821] LRA s 21 (2).
[822] LRA s 21 (2) (a).
[823] LRA s 21 (2) (b).
[824] LRA s21 (2) (c).
[825] LRA S 21 (3).
[826] Kirsten op cit note 819. See also ss 21 (1) and 21 (4) of the LRA. Rights to a Trade Union' 09 March 2017.
[827] Ibid.
[828] LRA s 21 (8) (b) (i).
[829] LRA s 21 (8) (b) (ii).
[830] LRA s 21 (8) (b) (iii).
[831] LRA s 21 (8) (b) (iv).

A commissioner determining a dispute on organisational rights will also have to consider the general composition of the workforce at the particular organisation (this will include considering the extent to which employees are employed in non-standard forms of employment, such as through a temporary service provider or on a fixed-term contract).[832] A commissioner will be given the discretion to award organisational rights, referred to in s 14 and s 16, in certain circumstances where a trade union is not, in fact, the majority trade union.[833] However, this is subject to the following provisions:

- The trade union must already be entitled to rights in terms of section 12 (access to the workplace), section 13 (the deduction of union dues), and section 15 (leave for trade union activities);[834] and
- There must be no other trade union in the workplace that already has section 14 or sec 16 rights.[835]

The amendments allow the CCMA to award organisational rights that traditionally require majority membership to minority unions with substantial membership.[836] These rights depend on whether the trade union is the most representative in the workplace. The amendments have increased the discretion of a commissioner when granting organisational rights.[837] This is so where a union is sufficiently representative in terms of the LRA's current s 21(8A). The significant aspect of the amendments is that the commissioner has to balance the rights of the union seeking organisational rights and the majority unions in the workplace.[838] This implies that a commissioner's decision would prevail over the threshold established in the workplace where such prejudices other unions.[839]

In addition, certain rights that were only available to majority unions can now be extended to minority unions.[840] Furthermore, the coverage or scope of collective bargaining might just be broadened because now smaller unions are granted the opportunity to have access to the

[832] LRA s 21 (8) (b) (v).
[833] LRA s 21 (8A).
[834] LRA s 21 (8A) (a) (i).
[835] LRA s 21 (8A) (a) (ii).
[836] Faan Coetzee & Samantha Kelly 'Giving unions' greater access to organisational rights' (2013) *HR Pulse Newsletter* 9 May 2013.
[837] Memorandum of Objects 2012, available at *www.labour.gov.za, accessed 22 July 2020.*
[838] Ibid.
[839] See 2.4.6 on the amendments on acquisition of organisational rights.
[840] Van Niekerk et al op cit note 31 at 376.

workplace.[841] One of the concerns about the amendments is whether the LRA still upholds majoritarianism.[842] There is a reasonable belief that irrespective of this preference, one must not brush away from the existence of s 18, as this can arouse conflict between ss 18 and 21.[843] In addition, unrepresentative trade unions have to negotiate for organisational rights, while representative unions already have them at their disposal. [844]

For example, *Professional Transport and Allied Workers Union obo members / Professional Aviation Service*[845] dealt with the entitlement of organisational rights in ss 12 to 16 of the LRA. After acquiring majority representation at only a single branch of an employer, even though the trade union only represented a fraction of the employer's total national workforce. In *casu*, the employer, an international company with a workforce of about 380 employees throughout the country and only 18 employees in its Bloemfontein branch, claimed that the branch is not a separate workplace.

As a result, the respondents were not entitled to any organisational rights.[846] The Commissioner considered s 21(8) of the LRA, which sets out factors that a Commissioner must consider when resolving a dispute about whether a trade union is a representative trade union, and held that a key consideration in such matters is the principle of majoritarianism. The Commissioner found that the branch in Bloemfontein was, in fact, the 'workplace'. Furthermore, by having recruited 12 of the 18 employees, the trade union has secured more than 50% of the workforce as members. Thus, it is a majority trade union.

4.2.4. The interests of employers' organisations

(a). Representation

The interests of employers' organisations are not deliberated. Thus, although employers' organisations engage in collective bargaining to foster their interests, their fundamental interest

[841] Coetzee and Kelly (2013), available at *http://www.hrpulse.co.za*, accessed on 22 May 2021.
[842] Geoff Esitang & T G Stefan S van Eck *Big Kids on the Block Dominating Minority Trade Unions: Reflections on Thresholds, Democracy and ILO Conventions*, 1-10; Snyman 2016 ILJ 865 at 1–10.
[843] Ibid. See also Snyman 2016 ILJ 865; Esitang & Van Eck op cit note 783 are of the view that scrapping off s 18 would have rectified the problem. However, it can be argued that this might be too drastic and lead to the downfall of majoritarianism.
[844] *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); 2003 24 ILJ 305 (CC) para 66.
[845] [2016] 4 BALR 421.
[846] Jacques van Wyk, Andre van Heerdent & Staci Jacobs *Is a Trade Union Entitled to Organisational Rights in Terms of the LRA after Acquiring Majority Representation at a Single Branch*.

lies in representation. An employer's organisation is defined as 'any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions'.[847] They are the employer's counterpart to a trade union, and their main function is to represent employers. Much is not said about employers' organisations because their members are the bearers of power in the employment relationship and are therefore not marginalised.

Officials of employers' organisations may represent employers in the Labour Court and arbitration proceedings.[848] Employers' organisations have a right to function, be affiliated with other bodies, and be funded by them.[849] An employers' organisation does not necessarily need to be registered with the Department of Labour. Much as trade unions represent labour to voice their interests, employers are represented by employer's organisations.[850]

4.3. Consequences preceding failed negotiations

It is without a doubt that there are consequences following failed negotiations. In this regard, employers, employees, and trade unions may suffer greatly following such consequences. These ramifications are discussed in detail below.

4.3.1. The right to strike v the recourse to lock-out

This study is essential to discuss the right to strike and the recourse to lock-out to provide how they fit into the consequences following failed negotiations. The right to strike is guaranteed in law as a fundamental human right. The recognition of the right to strike is central to the collective bargaining framework.[851] The right to strike is recognised in international law as fundamental to protecting workers' rights and interests.[852] Despite being recognised by the ILO, a definition of a strike is not provided in any of the ILO's binding instruments.[853]

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[847] Labour Relations Act 66 of 1995 s 213.
[848] Grogan op cit note 189.
[849] Available at *https://mywage.co.za/decent-work/legal-advice/employers-organisations,* accessed on 29 November 2018.
[850] Danie de Wet *The Importance of Collective Bargaining in the South African Context,* available at *https://ceosa.org.za/importance-collective-bargaining-south-african-context/*, accessed on 29 November 2018.
[851] See *South African Police Service v Police and Prison's Civil Rights Union* 2011 (6) SA 1 (CC*)*, Para 30.
[852] See the International Convention on Economic, Social and Cultural Rights of 1996; the European Social Charter of 1961 and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights 1988.
[853] Jorge Andrés & Leyton García 'The right to strike as a fundamental human right: Recognition and limitations' in International Law (2017) 44 (3) *Revista Chilena de Derecho* at 783. In 2012, the employers' group launched a challenge on the status of the right to strike positing that the ILO conventions make no provision for a right to strike and that ILO supervisory bodies do not have the power to interpret conventions in such a way as to impose binding obligations on member states in regulating such a right (Darcy du Toit *Recognition of the Right to Strike*).

The ILO constituents have recognised a positive right to strike inextricably linked and an inevitable corollary of the right to freedom of association.[854] Without the right to strike, there cannot be genuine collective bargaining. This means collective bargaining will be nothing else but collective begging.[855] Patel also believes that trade unions become pathetic, powerless bodies without the right to strike, and the rule of management is absolute.[856]

From an international landscape to national, the right to strike is broadly protected. Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') *expressly* protects the right to strike and provides that it must conform to the national law. Moreover, the Freedom of Association and Protection of the Right to Organise Convention 1948 (no. 87) and the principles of freedom of association applied by the Governing Body's Committee on Freedom of Association (CFA) also provide protection broadly drawn notion of the right to strike.[857]

The terms strike and industrial action are coterminous.[858] The terms will be used interchangeably to mean strike as defined by South African laws in this study. Recognition of the right to strike is found in ss 23(2)(c) of the Constitution of the Republic of South Africa, 1996, and in s 64(1) of the Labour Relations Act 66 of 1995 (LRA). Therefore, a strike is defined in s 213 of the LRA as:

> the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.

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[854] Janice R Bellace 'The ILO and the right to strike' (2014) 153 (1) *International Labour Review* 29–70

[855] Roger Blanpain *Labour Law, Human Rights and Social Justice, Liber Amicorum in Honour of Prof.Dr. Ruth Ben Israel* (2001) at 190.

[856] Ebrahim Q Patel (ed) *Workers Rights: From Apartheid to Democracy–What Role for Organised Labour* (1994) at 22.

[857] ILO *Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, 69th Session, 1983, Report III Part 4B, [200] (1983). See also ILO, Freedom of Association and Collective Bargaining: *General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, 81st Session, 1994, Report III Part 4B, [147]–[151] ('1994 General Survey') and ILO *Giving Globalisation a Human Face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008*, 101st Session, 2012, Report III Part 1B, [117] ('*2012 General Survey*').

[858] See Breen Creighton, Catrina Denvir & Shae McCrystal Defining industrial action' (2017) 45*Federal Law Review* for a broader definition of the term 'industrial action'. See also William Breen, Creighton, Andrew Stewart, et al *Creighton and Stewart's Labour Law* 6 ed (2016) at [26.20]– [26.27] and Shae McCrystal *The Right to Strike in Australia* (2010) at 112–9, 242–3.

It is important to note that the right of a workman to strike is an essential element in the principle of collective bargaining.[859] It is the process of bargaining what an engine is to a motor vehicle.[860] Therefore, if the workers could not collectively refuse to work as a last resort, they could not bargain collectively.[861] In addition, the Committee of Experts posits that the right to strike is one of the essential means available to workers and their organisations to protect their economic and social interests.[862] Therefore, union members have the power to threaten an employer with a strike. In the absence of this leverage, collective bargaining slips back into a form of powerless consultation.[863] Although the right to strike is connected to collective bargaining and freedom of association, it is an individual right that a collective of employees can only exercise.

No single employee may embark on a strike action alone.[864] These employees must have a common purpose: remedy a grievance or resolve a dispute regarding a matter of mutual interest between the parties.[865] Despite this, the right to strike can be waived by a collective agreement courtesy of s 65(1)(a) of the LRA. The latter s provides that '[n]o person may take part in a strike [if] that person is bound by a collective agreement that prohibits a strike … in respect of the issue in dispute'. Moreover, an individual agreement to waive the right to strike is prohibited.[866]

The right to strike becomes a powerful economic weapon in the hands of employees.[867] Again, the operation of collective bargaining would be undermined if trade unions did not have the power to pressure employers or employers' associations to enter into collective agreements on

[859] *SA Chemical Workers Union v SASOL Industries (Pty) Ltd and another* (1989) 10 ILJ (IC) at 1046 (I-J).
[860] *Bader Bop* op cit note 67 para 67.
[861] Kahn-Freund op cit note 620.
[862] Breen Creighton *Rights of Association and Representation*, available at *http://www.iloencyclopaedia.org/part-iii-48230/labor-relations-and-human-resource-management/21/rights-of-association-and-representation*, accessed on 14 August 2019.
[863] Janice R Bellace 'Back to the future: Freedom of association, the right to strike and national Law' (2016) (2016) 27 (1) *King's Law Journal* at 24–35.
[864] *Schoeman & another v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) at 1367. See also *SA Breweries Ltd v Food and Allied Workers Union* (1990) (1) SA 92 (A) at 100*; Ceramic Industries* op cit note 14 and *Lebowa & others v Trevenna* (1990) 11 Industrial Law Journal 98 (LC).
[865] *SASTAWU & Others v Karras t/a Floraline* (1999) 10 BLLR 1097 (LC), para 29.
[866] See also s 65(1)(b) (c) & (d).
[867] The court in *Ex parte Chairperson of the Constitutional Assembly* op cit note 24, para 65 held that 'the effect of including the right to strike does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers'. As it will be seen in the discussions below, an employer may also lock out its employees.

reasonable terms.[868] Because collective action is the means of equalising the employer's power and it is the most important and effective way that employees have to express their concerns, it can thus be said that 'strike action is the corollary of collective bargaining'.[869]

Even though employment law recognises the right to strike, this right must be exercised lawfully. In this case, a strike can either be protected or unprotected. Since[870] the right to strike is not absolute, it can be limited.[871] The good about a protected strike is that employees and trade unions are immunised from civil claims for damages courtesy of s 67(2) to (6) of the LRA. Moreover, these employees are further guaranteed protection against dismissals as provided in s 187(1)(a) of the LRA. Therefore, any dismissals following a protected strike will be automatically unfair.

Despite the essential role of strikes in the law, it is important to note the detrimental effects of strikes on business, employers, government, and society. Strikes in South Africa have also been on the rise. According to the Industrial Action Report (IAR), strikes had increased by 25%, recorded as 3.5 times more than in 2014.[872] In addition, strike actions also give rise to multiple misconducts, which impact the production of the business. In the end, employers will retaliate by dismissing employees or even apply the *no work, no pay principle* where employees have downed their tools. This leaves the impression that South African strikes are synonymous with violence.

As noted in chapter 1, a strike initially protected may lose its protected status. Despite this, it has been found 'that violent and unruly conduct is the antithesis of the aim of a strike, which is to persuade the employer through the peaceful withholding of work to agree to the union's demands'.[873] In addition, Rycroft contends that 'there is an inseparable link between strikes and functional collective bargaining'. Accordingly, the Labour Court in *National Union of*

[868] Catherine Barnard A Proportionate response to proportionality in the field of collective action' (2012), 37 (2) *E L Rev* at 117–135at 121.
[869] Ibid.
[870] A protected strike is defined in s67(1) as 'a strike that complies with the provisions of this Chapter [of the LRA'. A protected strike is a strike that complies with the requirements in the LRA, where the subject matter of the strike is legitimate and procedural requirements are complied with prior to the strike commencing.
[871] See LRA s 65 for the limitations.
[872] Department of Employment and Labour 'Strikes in 2018 reaches a high in the past five years', available at *http://www.labour.gov.za/strikes-in-2018-reaches-a-high-in-the-past-five-year-%E2%80%93-department-of-employment-and-labour*, accessed on 14 June 2021.
[873] *NUFBWSAW* op cit note 98 para 30.

Food Beverage Wine Spirits & Allied Workers v *Universal Product Network (Pty) Ltd* had adopted Rycroft's functionality test, which entails that the Labour Court could assume the power to alter the protected status of a strike to unprotected if there is violence instigated.[874] On the contrary, van Eck and Kujinga criticize this contention. The latter posits that:

> It is submitted that both Rycroft and *Universal Product Network* may have sought to reach a bridge too far by linking the falling away of the 'underlying reason for a strike', which according to the Constitutional Court justifies the alteration of the protected status of a strike, to violence as a strategy to enforce a demand. Our argument is simply this: In an instance where workers demand higher wages in an attempt to establish a more equitable distribution of profits, and their attempts by peaceful means are unsuccessful, the reason for the strike could remain the same irrespective should the workers' actions turn to violent means. There is, in other words, no unseverable link between the grievance in dispute, and the mechanism by means of which it is attained. This does not make violent strike action acceptable, but it does not alter the fact that the demand has not been withdrawn, or that the grievance had been resolved.'

A critical case discussing the nature of a strike losing its protected status is the case of *Tsogo Sun Casinos (Pty) Ltd t/a Monte Casino v Future of South African Worker's Union and Others.*[875] *In casu,* the court held that

> when the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.[876]

It has been noted that such protection should be forfeited where violence engaged during a strike renders it dysfunctional to collective bargaining.[877] Additionally, the level of violence must be weighed against 'the efforts of the trade union to curb it in order for a court to determine whether a strike's protected status is still functional to collective bargaining'.[878]

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[874] Ibid para 32.
[875] (2012) 33 ILJ 998 (LC).
[876] Supra para 13.
[877] *Tsogo Sun Casinos t/a Montecasino v Future of SA Workers Union*.
[878] Van Eck and Kujinga 'The Role of the Labour Court in Collective Bargaining: Altering the Protected Status of Strikes on Grounds of Violence in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd*' (2016) 37 ILJ 476 (LC) 2017 20 *PER/PELJ* 17. See also Tenza, Mlungisi 'The effects of violent strikes on the economy of a developing country: a case of South Africa' (2020) Obiter, 41(3), 519-537. There are also new developments made in the LRA. For example, section 150A makes provision for a deadlock breaking mechanism for a protracted and violent strike in the form of compulsory arbitration undertaken by a statutory advisory arbitration panel. In terms of this section, there are thus three grounds in which the action can be triggered: (i) if the strike is no longer functional to collective bargaining because it has continued for a protracted period of time and no resolution appears to be imminent; (ii) there is an imminent threat that constitutional rights that may be or are being violated by strikers or their supporters through the threat of use of violence or the threat of or damage to property; or (iii) if the strike causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society.

While employees may act collectively to threaten an employer into providing for their human needs, the latter has the recourse to lock-out such employees. A lock-out takes place in response to strike action against employees by the employer. Like strike, the recourse to lock-out is provided in s 64(1) of the LRA. Section 213 of the LRA defines lock-out as an exclusion by an employer of employees from the employer's workplace to compel the employees to accept a demand in respect of any matter of mutual interest between the employer and the employee, whether the employer breaches those employees' contracts of employment during or for that exclusion.

As will be seen below, this is not the only way employers may deal with employees who have downed their tools in support of industrial action. The employer may also rely on the principle of *no work- no pay*. Locking out employees is one of the reasons that fumes employees when a strike action has ensued. Moreover, the violence seen during strikes is also propelled because the employer would have locked-out employees. These misconducts can also extend to non-striking employees and replacement labour. However, like the right to strike, the recourse to lock-out is not absolute.

The limitations in s 65 of the LRA for a strike are equally applicable to lockouts. An employer may only lock-out employees who are party to a dispute and with whom the employer has attempted to conciliate.[879] Accordingly, s 64(1) of the LRA provides that the recourse to lock-out employees may be exercised when the employer has referred the matter to a council or the Commission for Conciliation, Mediation and Arbitration (CCMA). In the case of *PUTCO*,[880] the employer had locked out union members, not a party to the bargaining council, after a deadlock was reached in negotiations with other unions in the council. The Lockout was unlawful because employees of the non-member union were not in dispute with the employer. Again, the recourse must also align with other provisions outlined in s 67 of the LRA.

As seen below, the right to strike and the recourse to lock-out are tied to various consequences. Where misconducts arise owing to this, the sustainability of the business may be affected or its

[879] Cliffe Dekker Hofmeyr *Employment Strike Guideline*, available at *https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Employment-Strike-Guideline.pdf*, accessed on 03 December 2018.
[880] *PUTCO* op cit note 45.

productivity. Below are discussions on the consequences following strikes and lock-outs. This is limited to strike violence, *no work, no pay*, dismissals, and trade union liability. In addition, the discussions below will provide perceptions on how these ramifications will affect various stakeholders, the economy, and the business.

4.3.2. Strike violence

The readings above provided the importance of strikes and examples of consequences that may follow failed negotiations. Indeed, the right to strike can be associated with illegal conduct. In this regard, such misconduct may have broad adverse effects on everyone. Strike violence remains one of the enormous ramifications that may affect the economy, business production, employment, and society. According to Mlungisi, the past few years saw South African employees trying to heighten the impact of their strikes by using tactics that negatively impact the lives and property of other people.[881]

The term strike violence is not defined in South African employment law. However, it is regarded as a technique used by the protesters to scare away replacement labour or temporal staff, non-strikers, and the employer into a settlement or bring it to its knees to make the violent strike more effective.[882] South Africa is no exception when it comes to persistent violent strikes. In this regard, these violent strikes have led employers in the workplace to seek for the right to strike to be outlawed.

Despite this, labour movements believe that outlawing threatens the right to strike as the only weapon employees may use against the employer. Hence, it is understood that strikes have been crucial in shaping South Africa's economic and political system.[883] The same contention is supported by the strikes during the apartheid era. These strikes included the white mineworkers' strike in 1922, which lasted three months. In the white mineworkers' strike, companies cut operating costs by decreasing wages and weakening the colour bar to promote racially cheapened black miners to skilled and supervisory positions.[884]

[881] Tenza Mlungisi 'An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions' (2015) 19 *Law, Democracy and Development* at 211–231.
[882] Anton Myburgh 'Interdicting protected strikes on account of violence' (2018) 39 *ILJ* 703.
[883] Edward Webster 'Marikana and beyond: New dynamics in strikes in South Africa' (2017) 8(2) *Global Labour Journal* at 141.
[884] Available at *https://www.sacp.org.za/docs/history/fifty3.html, accessed on* 15 June 2021.

In addition, South Africa saw the African mineworkers strike in the Witwatersrand in 1946 on unequal pay between black and white miners. According to *O'Meara*, the strike ensued due to the rejection of various demands made by the African Mine Workers Union (AMWU).[885] This strike saw 1,248 workers wounded and 9 killed. Moreover, the strike highlighted the growing urbanisation of African workers, and Afrikaner nationalists used this tragic moment by threatening, intending to win the 1948 general elections, which they contested on a programme of white domination.[886] This strike led to an alliance between black labour and African nationalism, culminating in the formation of the Congress Alliance in 1955.[887] Furthermore, the 1973 Durban strike. During this strike, underpaid black African workers in various sectors intentionally suspended work to demand higher wages and better working conditions.[888] This strike involved 60 000 black Africans, affecting more than 100 firms.[889]

The consequences that follows is that, the first three months saw 61 000 employees downing their tools, which increased to 90 000 by the end of the year. Shifts amounting to 229 000 were lost, seven times more than the number lost through African strikes in the past eight years.[890] As noted above, all of these strikes are examples of what led to change in negotiations by shaping the country's economic and political system.

Strikes coupled with violence continue to be a common occurrence in South Africa. *Freund* et al also note that violence has been used to achieve an acceptable result.[891] In most cases, the property had been damaged, lives had been lost,[892] and employees had been dismissed.[893] In addition, such violent strikes impact the national economy of countries.[894] It must be

[885] O'Meara D 'The 1946 African mine workers' strike and the political economy of South Africa' (1975) 13(2) *Journal of Commonwealth and Comparative Politics* at 146–173.
[886] Ibid.
[887] Ibid.
[888] S Buhlungu F Moccio & M Kaminski 'The rise and decline of the democratic organisational culture in the South African labour movement' (2009) 34 (1) *Labour Studies Journal* at 91–111. See also A Lichtenstein 'We do not think that the Bantu is ready for labour unions: Remaking South Africa's apartheid Lichtenstein workplace in the 1970s' (2017) 69 (2) *South African Historical Journa*l at 215–235
[889] Maree, Johann 'The emergence struggles and achievements of black trade unions in South Africa from 1973 to 1984' (1985) 18 (2) *Labour, Capital and Society* at 278–303.
[890] Steven Friedman *Building Tomorrow Today: African Workers in Trade Unions, 1970-1984* 1 ed (1987). NOT IN THE REFERENCES.
[891] Freund, Le Roux & Thompson *Current Labour Law* (2012).
[892] News24 '181 killed in strike violence in 13 years', available at *https://www.news24.com/Archives/City-Press/181-killed-in-strike-violence-in-13-years-20150430*, accessed on 14 February 2019.
[893] *Dunlop Mixing and Technical Services (Pty) Ltd and Others v National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others* [2016] ZALCD 9 (11 May 2016).
[894] B Hepple, Rochelle le Roux & Silvana Sciarra *Laws against Strike: The South African Experience in an International and Comparative Perspective* (2015).

remembered that the right to strike is not an end in itself. As noted above, it is not absolute and can be limited.

When the right to strike is used to support illegal acts, the protection granted diminishes. Consequently, the employer may institute legal proceedings against the parties by claiming damages and compensation.[895] Where it is contended that the strike action amounted to misconduct, the employer may dismiss strikers;[896] or obtain an interdict from the court to prevent the strike action from taking place.[897] Moreover, s 158 of the LRA grants the Labour Court powers to order an interdict if the strike does not comply with the provisions of the LRA or the Constitution.[898]

In *SACWU v Afrox LTD*, employees were dismissed despite participating in a protected strike.[899] The court revealed two instances where employees may be dismissed despite the protected status of the strike. Firstly, where violence is used during the strike[900] and if the strike needs to be stopped due to 'economic foundations' of the employment relationship.[901] In addition, the court in *National Union of Food Beverage Wine Spirits & Allied Workers & Others v Universal Product Network (Pty) Ltd* made an order declaring a strike unprotected because it was no longer conducive to collective bargaining due to the level of violence.[902] The broad impact that strikes violence has on various stakeholders has been noted in this case as follows:

> …it is regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike ... Strike related misconduct is a scourge and a serious impediment to the peaceful exercise of the right to strike ... it is a denial of the rights of those at whom violence is directed, typically those who elect to continue working and suppliers of those employers who are the target of strike action, and poses serious risks to investment and other drivers of economic growth.[903]

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[895] LRA s 68(1)(a). See also P A K Le Roux 'Defining the limits of the right to strike' (2004) CLL 91 and Du Toit, Godfrey & Cooper op cit note 203 at 358.
[896] Labour Relations Act s 68 (5), read in conjunction with Item 6(1) of the Code of Good Conduct: Dismissal.
[897] LRA s 68 (1) (a). See also Le Roux op cit note 895 and Du Toit et al op cit at 625.
[898] See also s 68(1)(a) of the Labour Relations Act, which grants the Labour court has exclusive powers to grant an interdict to any person from participating in a strike.
[899] (1998) 19 ILJ (LC) para 63.
[900] *SACWU v Afrox* supra paras A–B.
[901] Supra paras C–D.
[902] (2016) 37 ILJ 476 (LC). See also *National Union of Food Beverage Wine Spirits & Allied Workers & Others v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC) at 39.
[903] Supra para 37.

Furthermore, a protected strike can transmute to an unprotected strike. It is a violation of the constitutional right to strike if striking employees use the protected strike as leverage to achieve objectives other than those in respect of which a strike could legitimately be taken.[904] Similarly, a strike will also be declared unprotected on account of levels and degrees of violence, which seriously undermine the fundamental values of our Constitution.[905] As noted above, this was confirmed earlier in *Tsogo Sun.*[906]

Although the LRA has been decriminalised, it makes no provision for criminal sanctions in unprotected strikes.[907] However, the same cannot be concluded for unlawful conduct in a protected or unprotected strike.[908] In this regard, the LC can order 'just and equitable compensation' for any loss ascribed to unprotected strikes.[909] In addition, the LC must also consider whether the strike was in response to unjustified conduct by the employer and whether 'the interests of orderly collective bargaining' were advanced.[910]

In turn, strike violence frustrates labour peace, economic development, and other important purposes of the Act.[911] By its nature, strike actions are primarily disruptive to the employer, employees, and sometimes the public.[912] In the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*, the court found that good faith is a sub-component of public policy, and applying the principle of good faith is in the public interest.[913] Without this, such disturbances will damage business productivity, employment and the economy.

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[904] *NUFBWSAW* op cit note 98.
[905] *Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits and Allied Workers and Others* [2015] ZALCJHB 421.
[906] *Tsogo Sun Casinos (Pty) Ltd t/a Monte \Casino v Future of South African Worker's Union and Others* (2012) 33 ILJ 998 (LC).
[907] Stefan van Eck S & Tungamirai Kujinga op cit note 878.
[908] Code of Good Practice on Picketing.
[909] LRA s 68(1)(b).
[910] LRA s 68(1)(b)(i)-(iv).
[911] *Ceramic Industries* op cit note 14 at 701H-702G-H.
[912] *Ibid. In Mawethu Civils (Pty) Ltd & another v National Union of Mineworkers & others (2016) 37 ILJ 1851 (LAC),* it was held that 'It is important for employees to be aware of protected and unprotected strikes beforehand to enable them takes conscious decisions and not just find themselves unknowingly, in the middle of an unprotected strike and having to deal with its serious consequences'.
[913] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA) 318 (the court note the shift here from the previous position where it was held that public policy required the enforcement of agreements and deference to the doctrine of freedom of contract.'

Despite this, it has been noted that employers are akin to accepting employees' demands, most likely, where there is violence and in other cases where the strike continues for a very long time.[914] *Myburg* also contends that strike violence scares the employers to come into a settlement to prevent the continuation of violence.[915] Thus, strike violence typically forces the employer into a settlement to protect the company image, malicious damage to property, and production of the organisation.[916]

In contrast, the Labour Court in 2018 denounced strike violence in *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & others.*[917] In *casu,* the court held that the way employees conduct themselves during a strike directly affects the employment relationship. Therefore, it will be hard for an employer to overcome the resentment towards employees when striking employees burn down a part of its factory. Moreover, strike violence is an abuse of the constitutional right to strike. This may lead to a loss of profits, effectively decreasing investment and growth. In addition, this can lower productivity growth and affect workers, as employers across most sectors will inevitably turn to technological advancements to reduce the need for a large workforce.[918]

The high strikes in South Africa threaten companies' sustainability, if not more than the latter, the country's economy. South Africa is one of the countries with the highest industrial actions.[919] The high number of strikes and the violence inflicted during industrial action has led to different appeals for radical bargaining changes in South Africa.[920] Moreover, the 2017 strike monitoring report by the Department of Employment and Labour showed a significant increase in labour strikes in South Africa.[921] According to the report, 125,000 employees were

[914] eNCA 'Some of the longest strikes in SA', available on *https://www.enca.com/south-africa/longest-strikes-in-south-africa*, accessed on 14 February 2019. This provides for the longest strike actions coupled with violence in South Africa, where employers' hands were forced to agree to employees demands,
[915] Anton Myburgh 'Interdicting protected strikes on account of violence' (2018) 39 *ILJ* 703
[916] *Ibid.*
[917] *KPMM Road and Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & others*, (2018), 39 ILJ 609 (LC).
[918] Leppan, Govindree & Cripps op cit note 69.
[919] Natasha Odendaal 'SA one of the world's most violent, strike-prone countries', available at *https://m.miningweekly.com/article/sa-one-of-the-worlds-most-violent-strike-prone-countries-2014-08-06/rep_id:3861*, accessed on 11 April 2020.
[920] John Brand *The Future of Collective Bargaining in South Africa; Time for a Different Approach?* (2015), available at *https://www.conflictdynamics.co.za/Files/121/The-Future-of-Collective-Bargaining-in-South-Africa--Time-for-a-different-approach-.pdf*, accessed on 28 November 2019.
[921] Department-of-Employment-and-Labour, available at *http://www.labour.gov.za/strikes-in-2018-reaches-a-high-in-the-past-five-year-%E2%80%93-department-of-employment-and-labour*, accessed on 10 July 2020. See

involved in strikes across all industries. These strikes cost the economy about R251 million in lost earnings.

4.3.3. The principle of no work, no pay

The principle of 'no work, no pay' is one of the consequences following strikes due to failed negotiations. It also has drastic consequences on the satisfaction of human needs. The principle is simple: any withdrawal of employees' services denotes that no compensation will be made on the employer's part. It is an age-old rule governing the relation between labour and capital of a 'fair days wage for fair day labor', and it remains the basic factor for determining employees' wages.[922] It contemplates a 'no work' situation where the employees voluntarily absent themselves from work.[923]

Application of this rule can be seen mostly in instances following strike action. Although the right to strike is recognised by law in South Africa, employees are not paid to strike but tender their services to the employer. Therefore, employers have the right to exercise this principle when employees have downed their tools. In the end, employees may suffer financial strain due to this.

Manfred Weiss posits that where payment is made during industrial action, this has the propensity of endangering the parity of bargaining power between the parties embroiled in an industrial conflict.[924] This is regarded as the sphere theory, which entails that, since employees will benefit from the industrial action, they should equally bear the detriment of the disadvantages that come with it.

It is a way of punishing employees- an employer's response to employees who have downed their tools. Consequently, an employer may replace its employees with replacement labour to continue production. However, it has been noted that hiring scab labour under such fragile conditions provokes striking employees, and the latter use every opportunity to fight

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also Theto Mahlakoana 'SA experienced highest rise in labour strikes in 2017', available at *https://www.timeslive.co.za/news/south-africa/2018-07-10-sa-experienced-highest-rise-in-labour-strikes-in-2017/*, accessed on 10 July 2020.

[922] *Aklan Electric Cooperative Incorporated v. NLRC, Retisto,* GR No. 121439 25 January 2000.

[923] *Republic of the Philippines v. Pacheco*, GRNo.1778021, 25 January 2012 cited in *Protective Maximum Security Agency, Inc. v Fuenter*, G.R. No. 169303 11 February 2015.

[924] Manfred Weiss 'Labor law and industrial relations in Germany' in *International Encyclopedia for Labor Law and Industrial Relations* at 202.

replacement workers.[925] Conversely, the principle of no work-no pay lays a solid foundation for industrial peace and harmony in the long run.[926]

The employer who exercises this privilege may gain, while employees will be affected. An employer in this position does not feel obliged to commit faithfully to resolve the issues between it and the trade union as it suffers little or no harm if production continues.[927] Therefore, allowing employers to take into service replacement workers to continue production during a strike weakens the effectiveness of strike action, leaving employees with little or no voice.[928] Due to this position, striking employees indulge in other misconducts that accompany strike-like violence, as noted above.

It is prudent to note that employees tend to suffer more than employers will ever. Hence, when employees feel disempowered, they rely on violence and malicious damage to property and sometimes, threaten replacement labour. These parties consider their actions just. *Tenza* provides several ways in which these may be resolved.[929] He notes that there is a need for the courts to be empowered to stop violent strikes; parties must be compelled to end protracted disputes, and changes must be made to the labour legislation to include ballot requirements. The solution for the ballot requirement has been fulfilled and is discussed in detail below.

The experiences of the COVID-19 extraordinary crisis affected both employers and employees. In *Macsteel Service Centres SA (Pty) Ltd v National Union of Metal Workers of South Africa and Others,*[930] the applicant brought an urgent application to the Labour Court against a strike that the NUMSA planned on wage dispute. Regrettably, this application was dismissed by the court. The latter clearly said that the employer is under no obligation to pay the employees for services not rendered when the country was under a hard lockdown.

In contrast, the court in *Mhlonipheni v Mezepoli Melrose Arch and Others* found that an employer is obliged to pay its workers even though these employees did not render their

[925] *SATAWU* op cit note 82 and *Mahlangu v SATAWU, Passenger Rail Agency of SA & Another* (2014) 35 Industrial Law Journal 1193 (GSJ).
[926] R. Devarajan 'No work, no pay' (2006) *Online edition of India's National Newspaper*, available at *https://web.archive.org/web/20131006041613/http:/www.hindu.com/op/2006/07/30/stories/2006073000031400.htm*, accessed 16 June 2021.
[927] Mlungisi op cit note 881 at 211-231.
[928] Ibid.
[929] Ibid at 223–230.
[930] [2020] ZALCJHB 129; [2020] 8 BLLR 772 (LC); (2020) 41 ILJ 2670 (LC).

services.[931] Consequently, because of its inability to pay its employees, the company underwent forced business rescue. The approach by the court in *Macsteel* is proper in that, owing to measures implemented because of the Covid-19 outbreak, it was not legally permissible for such employees to render their services. However, the decisions by the courts differed even though the cases were decided on the same day. The *Macsteel* approach was reduced in this way:

> The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employer's control, like the global Covid-19 pandemic and national state of disaster, are not entitled to remuneration and the Applicant could have implemented the principle of 'no work no pay.

In this circumstance, an employer's contractual obligation of remunerating employees may be suspended owing to the impossibility of rendering the services by employees based on an occurrence that the employer does not control. If no services were rendered from these settings, an employer might exercise its powers not to compensate relevant employees.

4.3.4. Dismissal for collective misconduct

An additional consequence that may arise is dismissal for misconduct. This is when the employer terminates an employment contract against the will of the employee. Dismissal is the most severe disciplinary penalty as employees may be left destitute. Henceforth, employees' right to pay diminishes when they are dismissed. This threatens the employees and their families as they rely on these employees, leading to poverty.

Section 186(1) of the LRA provides a broad definition of dismissal. In addition, the LRA provides that misconduct is one of the justifications for dismissal by the employer.[932] Therefore, nothing prohibits an employer from dismissing employees engaged in illegal conduct. For example, employees who acted as a collective following a strike were marred with violence and damage to the property. An employer has the liberty to dismiss such employees. However, employees cannot be dismissed without sufficient evidence that links

[931] See also *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another; Nyoni v Mezepoli Nicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another* [2020] ZAGPJHC 136; (2021) 42 ILJ 600 (GJ).

[932] Schedule 8(2)(2) of the LRA, Code op cit note 138. Incapacity and operational requirements also form part of the legitimate grounds by which an employment relationship can be terminated.

them to a violent strike.[933] Despite the accused employees' participation in the violent strike, they still have a right to fair labour practices.[934]

An employer must be aware of the procedures required for a legal dismissal. This entails that a dismissal must be preceded by a fair procedure and for a fair reason. Procedural fairness is the measure by which employers' pre-dismissal actions are measured.[935] A dismissal that is not automatically unfair is unfair if the employer does not prove that the dismissal was based on the fair procedure.[936]

In South Africa, the court placed a high premium on procedural fairness, where compensation and reinstatement had sufficed due to deficiencies in pre-dismissal procedures, even where there appeared to exist satisfactory reasons for dismissal.[937] Significant in this study is collective misconduct, which occurs when employees are involved in the same misconduct. It can be that the employees acted collectively in the act of misconduct, or an employee has witnessed participation in the misconduct.

This implies that several types of misconduct may lead to the dismissal of employees, whether as a collective or as individuals.[938] One form of misconduct is 'common purpose misconduct'. This type of misconduct was pronounced in the case of *Leeson Motors* in that 'when two or more people associate themselves with the perpetrator but, by choice or design, the others do not physically perform the actions which bring about the criminal result'.[939] In this case, it is

[933] *Food & Allied Workers Union obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2012) 33 ILJ 1779 (LAC).
[934] "Every employee has the right not to be unfairly dismissed and subjected to fair labour practice", Labour Relations Act 66 of 1995 s185.
[935] John Grogan *Workplace Law* 12 ed (2017).
[936] Labour Relations Act 66 of 1995 s 188(2)*(b)*.
[937] Grogan op cit note 935.
[938] Another form of misconduct is common purpose misconduct. This type of misconduct was described in the case of *Leeson Motors* in 1998, as 'when two or more people associate themselves with the perpetrator but, by choice or design, the others do not physically perform the actions which bring about the criminal result'. It is necessary that the others share the perpetrator's 'guilty state of mind', but it is not necessary to show that each performed a specific act of misconduct although an active involvement in the actions of the perpetrator must be proved. It was also held in *SACCAWU obo Madika & 4 others v Pep Stores* [Case No.NP1848-01] "*that each member of the group is held individually liable for his or her own actions as a member of the group acting in furtherance of a common purpose*". Despite this, the court in *NUMSA obo Reginald Chuene & 5 others v Irene Village Fuel Station t/a BP Irene (MIPT16735), "in NSGAWU v Coin Security (*1997) 1 BLLR 85 (IC) cautioned that the doctrine of common purpose is not to be used as an excuse for imposing collective punishment, or to be confused with the concept of collective guilt.
[939] *Chauke & Others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC). Also reported at [1998] JOL 3076 (LAC).

essential that the others share the perpetrator's 'guilty state of mind', but they don't need to show that each performed a specific act of misconduct. However, active involvement in the perpetrator's actions must be proved.

In addition, the court has made it clear in *SACCAWU obo Madika & 4 others v Pep Stores*[940] that each group member is held individually liable for their actions as a group member acting in furtherance of a common purpose. Despite this, the court citing *NUMSA obo Reginald Chuene & 5 others v Irene Village Fuel Station t/a BP Irene*[941] in *NSGAWU v Coin Security*[942] cautioned that the doctrine of common purpose is not to be used as an excuse for imposing collective punishment or to be confused with the concept of collective guilt.

It is known that an employer can only act against employees who have been proven to have committed the misconduct.[943] However, the application of the principle of derivative misconduct is different. In South Africa, derivative misconduct has been commonly applied in strike action disputes where there is a breach of picketing rules, where an employer wishes to act against the employees who fail to report breaches by their fellow employees of the picketing rules.[944] This concept was introduced in an old case of *Leeson Motors*[945] and later confirmed in *Dunlop Mixing and Technical Services (Pty) Ltd and others v NUMSA obo Nganezi and others.*[946]

Employees who refuse to assist with relevant information align themselves with the guilty employees, violating the employment relationship trust. Here, an employer is concerned with the deliberate failure to report misconduct by other employees. Such conducts violate the trust upon which the employment relationship is founded. In these occurrences, an employer may dismiss a whole group of employees who are not prepared to help the employer identify parties of misconduct. Thus, an employee can be held accountable when they withhold information that will assist the employer in identifying wrongdoers. However, limited studies address this type of misconduct, especially following failed negotiations and where a strike has ensued.

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[940] [Case No.NP1848-01].
[941] (MIPT16735).
[942] (1997) 1 BLLR 85 (IC).
[943] *CEPPWAWU v NBCCI & Others* [2011] 2 BLLR 137 (LAC), para 20.
[944] Hugo Pienaar & Nomlayo Mabhena 'Employment practice: Collective disciplinary inquiries – A new norm?', available at *https://www.labourguide.co.za/most-recent/2529-collective-disciplinary-inquiries-a-new-norm* accessed on 03 December 2018.
[945] (1998) 19 ILJ 1441 (LAC). A*lso reported at [1998] JOL 3076 (LAC).*
[946] [2016] 10 BLLR 1024 (LC).

The support behind dismissal for derivative misconduct appears from the setting that an employee is bound implicitly by a duty of good faith towards the employer and breaches that duty by remaining silent about any knowledge of the employer's business interests being improperly undermined.[947] Accordingly, any damage to the employer's business interests contributes to the company's injury. Consequently, a breach of the duty of good faith justifies a dismissal. This implies that while employees enjoy exercising their right to strike, unlawful violent and non-peaceful strikes can leave employees without work.

In most South African strikes, employers and employers reconcile their interests for business' sake without dismissals. However, if dismissal is to be imposed, an employer must hold a collective disciplinary enquiry before dismissing relevant employees for collective misconduct. In addition, the law protects the identity of the witnesses who may tender evidence of the alleged misconduct.[948]

The Labour Appeal of Court in *Chauke* held that an employer might dismiss all employees on the shop floor who has experienced suffering owing to continuous industrial sabotage perpetrated by unidentified employees where the damages occurred. This is because these employees must have known the perpetrators and failed to come forward and identify them. Although this principle is said to give rise to difficulties especially considering the principle of fairness, it is justified in *Chauke* that for fair dismissal in such circumstances where an employee is part of the group of perpetrators, is under a duty to assist the employer in bringing the guilty to book.

In addition, although dismissal is reserved for the perpetrators of the original misconduct, the justification is wide enough to encompass those innocents of it who, through their silence, make

[947] *Dunlop Mixing and Technical Services (Pty) Ltd and others v National Union of Metalworkers of South Africa (NUMSA)obo Nganezi and others* [2016] 10 BLLR 1024 (LC). See also SA*CCAWU obo 93 others v Massmart T/a Jumbo Cash & Carry (Pty) Ltd (GAJB29113-14) and Dunlop Mixing and Technical Services (Pty) Ltd and Others v National Union of Metalworkers of SA* on behalf of Khanyile and Others.

[948] For application and relevant requirements, see the case of *National Union of Mineworkers and Others v Deelkraal Gold Mining Co Ltd* (2) (1994) 15 ILJ 1327 (IC). See also *SAMWU obo Abrahams v City of Cape Town* 2011 11 BLLR 1106 (LC) for ground rules for derivative misconduct, collective misconduct, team misconduct and culpable non-disclosure and *NUM v Besent, Grogan v RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* 2010 ZALAC 12, *NUM v RSA Geological Services (A Division of De Beers)* 2004 25 ILJ 410 (ARB) and *RSA Geological Services (A Division of De Beers) v Grogan* 2008 29 ILJ 406 (LC).

themselves guilty of a derivative violation of trust and confidence.[949] Moreover, the consequences following this are that reinstatement would not even be a competent remedy where dishonesty is involved as it generally results in the irretrievable breakdown of the trust relationship rendering continued employment intolerable.[950]

4.3.5. Trade union liability on employees' conducts

One key passage quoted by the court in the 2013 case of *In2Food (Pty) Ltd v Food & Allied Workers Union & Others*,[951] as amplified, endorsed and adopted by the Labour Appeal Court, said that:

> The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members... [The LRA] makes it extremely easy to go on a protected strike, as it should be in a context where the right to strike is a constitutionally protected right. However, that right is not without limitations.

From this passage, it is clear that a trade union may be held accountable for the conduct of its members. In most cases, the liability of trade unions had been seen to occur following violent strike actions and in the instance where there has been malicious damage to property. A trade union's responsibility is to make amends that the strike is protected from its inception to reach an amicable agreement with the employer. As a matter of principle, a trade union has a duty to curb unlawful behaviour by its members.[952]

As discussed above, strike action is nothing short of consequences where illegal actions are conducted. Section 23 of the Constitution of the Republic of South Africa, 1996, provides for the right to fair labour practice. This right is equally applicable to both employees and employers. Hence, while employees may exercise their rights conferred by legislation, they should do so while not harming the employer's business interests. In the same line, Scheepers posits that the right to strike should not be perceived as sacrosanct or more significant or

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[949] Supra *Chauke* para 33.

[950] Chuks Okpaluba 'Reinstatement in contemporary South African Law of unfair dismissal: The statutory guidelines' (1999) 116 SALJ provides for detailed reflections on this topic. See also Archibald Rycroft 'The Intolerable Relationship' (2012) 33 *Industrial Law Journal* at 2271–2287.

[951] (2013) 34 ILJ 2589 (LC). In *casu*, the Labour Court imposed a fine of R500 000 against a union for contempt of a court order.

[952] *In2Food (Pty) Ltd v Food & Allied Workers Union & Others* (2013) 34 ILJ 2589 (LC). See also *FAWU v Ngcobo NO & Another* (2013) 34 ILJ 3061 (CC).

valuable than any other fundamental rights entrenched in the South African Constitution.[953] The aphorism is 'there are no rights whatever…without corresponding duties'.[954]

According to common law principles, an employer may have a delictual claim against a trade union or the employees for damages caused during strike action.[955] This implies that a representative union's responsibility can be extended when union members gather to embark on strike. An example can be drawn from the case of *South African Transport and Allied Workers Union v Garvis & others,*[956] where the court was faced with determining the validity of s 11(2) of the Regulation of Gatherings Act 205 of 1993 (RGA) to establish whether a trade union would escape liability for damage resulting from the actions of its members who vandalised and looted shops during a gathering. In *casu*, Cape Town Street vendors had claimed damages for losses against union members in a riot that ensued in 2006.

When the case was referred to the Constitutional Court, the latter held that the RGA was designed to ensure that public protests and demonstrations are confined within legally recognised limits with due regard for the rights of others.[957] This is unfortunate because, although s 17 of the Constitution protects the right to assemble and demonstrate, the court held that s 11(2) of the RGA limited that right. The limitation was held reasonable and justifiable. Thus, s 11(2) of the RGA was constitutional. Following this, the court confirmed that the victims of violence that ensued owing to the union's effort to mobilise its members during a strike could institute damages claims in the High Court against the union in terms of s 11(2) of the RGA.

In addition, a trade union can be held accountable for any loss occasioned by a strike where the union ignored an interdict and failed to take reasonable measures to persuade its members to

[953] Johann Scheepers Damages Due to Unprotected Strike – SA Labour Court: TU & Members Liable for Damages - R 1,4 Million Ordered in Damages Unlawful Conduct? (2014), available at *https://www.linkedin.com/pulse/strike-violence-sa-judicial-johann-scheeper*s/, accessed on 22 June 2021.
[954] *Samuel Taylor Coleridge 'English poet and man of letters; Ottery St. Mary, Devonshire; one of the most brilliant, versatile, and influential figures in the English romantic movement',* a*vailable at https://encyclopedia2.thefreedictionary.com/Coleridge%2c+Samuel+Taylor, accessed on 22 June 2021.*
[955] P A K le Roux 'Claims for compensation arising from strikes and lockouts' (2013) 23 (2) *Contemporary Labour Law* at 11.
[956] [2011] 12 BLLR 1151 (SCA).
[957] *SA Transport and Allied Workers Union v Garvis (City of Cape Town as Intervening Party and Freedom of Expression Institute as amicus curiae)* 2012 ILJ 1593 (CC), para 46.

resume work.[958] However, it should be noted that trade union liability is not automatic. Take, for example, a situation where employees defy the lead of their representative unions. Where a trade union has made amends to monitor and control its members' conduct but fails, the trade union will not be liable for any obligations that may arise later. The vast responsibility of trade unions towards their members is reduced in this way:

- The trade union should ensure that its members do not directly or indirectly endanger the property of the employees of the employer.
- Should inform or alert its members to stop any acts of intimidation.
- To stop its members from engaging in any acts that could potentially physically harm members of the public or non-striking employees.
- Prohibit its members from obstructing the entrance of nun-striking employees.[959]

The liability of trade unions must be proven. For example, in *Mondi Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union*& Others,[960] the court held that liability for damages during a protected strike could not readily be attributed to the trade union. However, one must prove the vicarious liability of the trade union. This case confirms the principle of vicarious liability in that a principal cannot be held vicariously liable for the unauthorized acts of his agent even if the act was ancillary to carrying out the mandate.[961] The Labour Court in *Heatons Transport (St Helens) Ltd v Transport & General Workers Union*[962] concurred with this case. It confirmed that the requirements for a union's liability as a principal rest on proof that an agent acted within his authority on behalf of the principal.[963]

Several remedies can be granted in cases where the court has found against a trade union, including, amongst others, compensation, interdict, etc. Where compensation may be granted, the court must maintain the concept of 'just and equitable'.[964] To succeed in a claim for damages against a trade union arising from unlawful conduct during a protected or unprotected

[958] *Algoa Bus Company (Pty) Ltd v Transport Action Retail and General Workers Union (Thor Targwu) and another* [2015] 9 BLLR 952 (LC).
[959] *Gri Wind Steel South Africa v AMCU and Others* [2017] ZALCCT 60; [2018] 3 BLLR 273 (LC); (2018) 39 ILJ 1045 (LC) (23 November 2017).
[960] (2005) 26 ILJ 1458 (LC), Para 20.
[961] Supra para 37.
[962] *Heatons Transport (St Helens) Ltd v Transport & General Workers Union* [1972] 3 All ER 101 (HL).
[963] Ibid.
[964] LRA s 68.

strike, the claimant must prove on a balance of probabilities that the union or its members involved in unlawful conduct are liable for delictual damages.[965]

As noted, employees resort to strike action to inflict economic harm on their employers so that the latter will accede to their demands. However, the increased abuse of such power by trade union members has become disturbing to employers and innocent third parties. Lawlessness should not be allowed to infiltrate and pollute the right to strike. Accordingly, it is up to trade unions to ensure that their members conduct themselves properly during strikes, whether protected or not.[966] An organisation would escape liability only if the act or omission that caused the damage were not foreseeable.

It is submitted that South Africa has a track record of violent strikes. The call for trade unions and their members' liability is addressed in law: however, no one wants to take responsibility for such misconduct even in such cases. Thus, although union leaders regret the violence, it is regarded as an inevitable consequence of worker frustration.[967] In the end, this may affect production and employment.

4.4. The new norm: Introduction of the secret ballot requirement

In the past, it was believed that the absence of the secret ballot in South Africa was one of the reasons behind violent stained strikes. In response to combatting the abuse that tainted the legal exercise of the right to strike and its generated violence, the LRA was amended, introducing the ballot requirement. As already noted above, violent strikes in South Africa are the norm. Themes of democratic accountability and the minimisation of unnecessary industrial action commonly go with global debate about balloting requirements for strike action.[968]

Strikes legitimately test the marketplace's strength, and when tainted with violence and other misconducts, it may affect production. Where production is affected, the cycle of noticeable challenges to business sustainability, employment, poverty and economic instability will emerge. Owing to the coerciveness of the violence, it was about time for intervention by the

[965] *Mondi Ltd (Mondi Kraft Division) v CEPPAWU* 2005 ILJ 1458 (LC) para 57.
[966] E Manamela & M Budeli 'Employee's right to strike and violence in South Africa' (2013) 46 (3) *CILSA* at 336.
[967] M Brassey 'Labour law after Marikana: Is institutionalized collective bargaining in SA wilting: If so, should we be glad or sad' (2013) 34 (4) *Industrial Law Journal* at 829.
[968] In the context of Australia see Breen Creighton & Shae McCrystal 'Strike ballots and the law in comparative perspective' (2016) 29 (2) *Australian Journal of Labour Law* at 154.

legislative authority. It has been noted that legislators and policymakers in the UK and Australia intervene in the balloting arena. Legislative intervention is justified in that there are alleged democratic deficits within trade unions[969] and because of industrial action's economic and social impact.[970]

South African law on secret ballots can be traced under s 65(2)(b) of the Labour Relations Act 28 of 1956. This Act was also known as the Industrial Conciliation Act, 1956 (ICA). According to *Trident Steel (Pty) Ltd v John NO & others*[971] , the ICA encouraged both employers and employees to try to settle disputes by negotiation before resorting to industrial action. However, its regulation under the ICA had failed. The ICA failed to serve the purpose of democratizing the right to participate in a strike and to allow members of a trade union for their voices to be heard in decisions of embarking on a strike.[972] Accordingly, failure occurred because a strike was inseparable from political violence.

In 1994 South Africa became a democratic country, and in the preceding years, the Labour Relations Act 55 of 1996 was enacted, diminishing this political violence and repealing the ICA. Currently, the law requires a secret ballot to be conducted before engaging in strike action. Recent developments have been made in the Labour Relations Amendment Act of 2018 (LRAA). The law enables trade unions to determine whether strike action is supported by most employees. This implies that whether employees will embark on a strike or not will be determined by the secret ballot.

A secret ballot is defined as a set of democratic institutions in which freedom of speech, freedom of association, universal suffrage and due process of law are designed to foster competitive and legitimate democratic elections.[973] A secret ballot must be conducted, and a trade union's members must vote in favour or against a proposed strike. Once a secret ballot has been conducted, a certificate will be issued by the Commission for Conciliation, Mediation

[969] For Australia see Creighton, Denvir & McCrystal ibid at 154; and Commonwealth of Australia, Productivity Commission *Workplace Relations Framework*: *Final Report* (2015) 871. In the United Kingdom, see Green Paper *Democracy in Trade* Unions (Cmnd 8778) (1983) where the need for strike ballots to overcome alleged democratic deficits was asserted.
[970] S Auerbach *Legislating for Conflict* (1991) 117–8.
[971] (1987) 8 ILJ 27 (W).
[972] Mlungisi op cit note 881.
[973] Conor M Dowling, David Doherty & Seth J Hill et al 'The voting experience and beliefs about ballot secrecy' (2019)14(1) PloSOne.

and Arbitration (CCMA) or a council to the effect that it has been properly conducted- as proof that a union has complied with the provisions relating to ballots.[974]

Developments in applying the secret ballot requirement in collective labour law through case laws are yet to be seen. According to s 19, a Registrar is empowered to provide for balloting requirements in both the constitutions of a trade union or an employer's organisation. Moreover, in interpreting this s, careful consideration must be made to s 95(5)(p) and (q) of the LRA. To understand the dynamics behind these provisions, the recent case of the *National Union of Metalworkers of South Africa (NUMSA) and others v Mahle Behr SA (Pty) Ltd and Another*[975] is worth noting.

In *casu,* the respondents sought interdicts from the Labour Court (LC) to prevent NUMSA and its members from striking. The LC found that the strikes were unprotected and interdicted the appellants from engaging in the strikes on the ground that no secret ballot as envisaged in s 19 of the LRAA had been conducted. In contrast, the case was referred to the Labour Appeal Court (LAC) in *NUMSA and Mahle Behr and NUMSA and Foskor with AMCU as amicus curiae*. The LAC had to determine whether the absence of compliance with the transitional provisions of the LRAA would lead to interdicting a trade union where a secret ballot was not conducted. The court stated that the

> duty cast upon the trade union is not to amend its constitution in a manner it deems fit in order to comply with the new definition of "ballot" in section 95(9) of the LRA, but to comply with the Registrar's directive as to the appropriate means, period and procedures to amend the constitution.[976]

In addition, the registrar had not been consulted and issued a directive to NUMSA as required by s 19 of the LRAA. Although in interpreting s 19 of the LRAA, the Registrar of Labour Relations must issue a directive after consultation with the relevant unions to amend their constitution within a certain timeframe, it is through the same s that we found that the absence of such a directive does not place a union under an obligation to hold secret ballot vote.
Furthermore, the existing constitution of NUMSA did not provide for a secret ballot and was therefore supposed to be applied as it is. Therefore, NUMSA did not have to conduct a secret

[974] J V du Plessis & M A Fouché *A Practical Guide to Labour Law* 7 ed (2012) 387.
[975] *National Union of Metalworkers of South Africa (NUMSA) and Others v Mahle Behr SA (Pty) Ltd and Another; National Union of Metalworkers of South Africa (NUMSA) and Others v Foskor (Pty) Ltd and Another* (DA08/2019; DA09/2019) [2020] ZALAC 30.
[976] Supra para 14.

ballot. Moreover, NUMSAs constitution was compliant with s 95 of the LRA, despite the absence of a secret balloting provision. In conclusion, the court held that NUMSA was entitled to rely on s 67(7) of the LRA, which provides that:

> The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out.

Owing to the absence of an obligation for NUMSA to amend its existing constitution per the directive of the registrar, the court found no basis for the interdicts. The secret ballot requirement is in line with the principles of freedom of association. In applying this, the ballot method, the quorum, and the majority required should not be such that exercising the right to strike becomes exceedingly difficult or even impossible in practice.[977]

Like in South Africa, the Australian Fair Work Act 2009 (Cth) (FW Act) requires that a secret ballot be conducted before engaging in strike action. For employees to embark on a protected strike, there is a need to conduct a secret ballot, and the majority of the members must vote in favour of the strike. Moreover, the law requires that, where a union wants to conduct a ballot on its members, the former must get permission from the labour tribunal[978] in the form of a 'protected action ballot order' (PABO).[979] Once this has been achieved, a strike must also be legally conducted and in line with the provisions of the FW Act.

In the United Kingdom, the secret ballot requirement is a prerequisite for union members' protection against liability in civil claims in case of strike actions. The Conservative Government's introduction of the quorum requirement in 2016 ensured that union leaders were subjected to greater 'democratic' control and that strikes were the last resort.[980] *Creighton et al.* posit that, according to unions, the need for the ballot has led to a higher priority of direct engagement between unions and their respective members.[981] It is without a doubt that secret

[977] International Labour Conference *Freedom of Association and Collective Bargaining, General Survey of the Reports on the Freedom of Association and Right to Organise Convention (No. 87), 1948 and the Right to Organise and Collective Bargaining Convention (no. 98) 1949,* Report of the Committee of Experts on the Application of Conventions and Recommendations, 81st Session, Report III (Part 4B), Geneva, 1994, [170].
[978] Regulation 5(4) in terms of Industrial Relations (Pre-Strike Ballots) 1997.
[979]Fair Work Act 2009 Part 3-3, Division 8.
[980] Trade Union Act 2016 (UK).
[981] Breen Creighton, Catrina Denvir, Richard Johnstone et al 'Pre-strike ballots and collective bargaining: The impact of quorum and ballot mode requirements on access to lawful industrial action' (2019) 48 (3) *Industrial Law Journal,* at 347.

ballots in industrial relations were introduced to combat unnecessary strike actions that may not be supported by the majority of members of a trade union.

4.5. A way forward: Interest-based bargaining

The discussion above proves a need for Interest-Based Bargaining (IBB). However, the IBB requires a drastic mindset. From the collective bargaining settings in South Africa, it is evident that the dominant strategy used is adversarial or positional.[982] However, employers and trade unions in South Africa have realized that using the IBB strategy is beneficial. The most effective way to advance their interests while avoiding unnecessary frictions or strike action is to participate in progressive mutual gains bargaining.[983] The IBB is set to achieve optimal results in the shortest time and reduce strike incidents.[984]

It must be remembered that employment relationships are based on long-term goals, and principled negotiation is efficient in building long-term relations. Considering this, the IBB is focused on a deal that will benefit all parties. This type of bargaining is based on four basic tenets: separating the person from the problem, focusing on the common interests, generating ample options, and relying on objective criteria.

IBB is generally accepted as a viable approach to mutual interest negotiations and collective bargaining. It is further recognised by the US Federal Mediation and Conciliation Service (FMCS) as follows:

> When everyone understands the interests and concerns that lead a person or group to take a position on an issue, they often find that some of those interests are mutual, that both sides at the table are trying to achieve the same goal, just taking different approaches. And they frequently discover that what at first appear to be competing interests are not really competing at all. Dealing with each other in this way makes it possible to generate and consider options to satisfy interests that may never have been considered before.[985]

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[982] Mncedzi Vusile Ngomane *A General Overview of Collective Bargaining in South Africa: The Commonly Used Strategies and Their Impact on Employment Relations* (research assignment presented in partial fulfilment of the requirements for the degree of Master of Business Administration at Stellenbosch University,2018).
[983] Brand op cit note 93.
[984]General Public Service Sector Bargaining Council *The Legislative Framework of Public Service Labour Relations Globally*, available at *http://www.psc.gov.za/conferences/2013/Oodit%20GPSSBC%20Presentation%20-%20PS%20Conference%202013%20-%2023%20October%202013.pdf*, accessed 10 January 2020.
[985] Ibid.

As opposed to positional bargaining, IBB allows negotiators to become joint decision-makers instead of riding through the arena of a loss, which is a win for the other. In positional bargaining (distributive bargaining), there is little room for consideration of the other party's needs and requirements or the long-term effects of the deal.[986] Consequently, there is a greater risk of injured relationships, wounded egos, and frustrated parties with little or no desire to continue the professional relationship.[987]

In supporting IBB, it is submitted that corporations are no longer shareholder orientated because shareholders are no longer primary stakeholders alone. This implies that companies should carry out their duties considering the importance of morality with other stakeholders. This is so because companies are active members of society and communities in which they operate and must act socially responsible towards society by exercising Corporate Social Responsibility (CSR).[988]

CSR is a self-regulating business model that helps a company be socially accountable—to itself, its stakeholders, and the public.[989] Corporate citizenship is the practice of CSR. In industrial relations, CSR can also be seen through ethical labour practices. Thus, when employees are treated fairly and ethically, companies demonstrate their social responsibility. [990] King IV supports the notion of corporate citizenship.[991] This term refers to the acceptance by a business that it has a responsibility toward various stakeholders resulting from its business operations, and as a result of this responsibility, it can be held accountable if it neglects to act responsibly.[992]

Accordingly, the company's employees' interests (internal stakeholders) must be considered in the decision-making process. Therefore, corporations are viewed as members and integral part of the societies within which they exist and operate and can only secure their licence to

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[986] Chester Karrass 'The key elements of principled negotiation', available at *https://www.karrass.com/en/blog/principled-negotiation,* (2019) accessed 21 April 2020.
[987] Ibid.
[988] Botha op cit note 705 at 1–7.
[989] James Chen & Gordon Scott 'Corporate social responsibility (CSR)', available at *https://www.investopedia.com/terms/c/corp-social-responsibility.asp*, accessed on 17 June 2020.
[990] Skye Schooley 'What Is corporate social responsibility?', available at *https://www.businessnewsdaily.com/4679-corporate-social-responsibility.html*, accessed 17 June 2020.
[991] *King IV* at 25.
[992] H J Kloppers 2013 (16) 1 *PER/ PEL.*

continue operating if they live up to the social expectations.[993] In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd & Others,*[994] the court highlighted one of the characteristics of good corporate governance as social responsibility and stated that:

> A well-managed company will be aware of and respond to social issues, prioritising ethical standards. A good corporate citizen is increasingly seen as non-discriminatory, non-exploitative, and responsible regarding environmental and human rights issues. By considering those factors, a company is likely to experience indirect economic benefits, such as improved productivity and corporate reputation.[995]

Furthermore, governance is essential for the sustainability and survival of all organisations.[996] One of the characteristics of good governance is social responsibility.[997] The *King Report on Corporate Governance for South Africa* requires the governing body to consider 'the legitimate and reasonable needs, interests and expectations of all material stakeholders'.[998] As stated above, the corporation's role has changed from the conventional view that the corporation primarily operates to advance the interests of its shareholders to a view that the corporation should operate to benefit a wider range of constituents.[999]

On the one hand, the benefits of the IBB entail that management will gain flexibility, labour peace, increased chances of implementing difficult proposals such as multiskilling and pay for performance, and security of labour supply.[1000] Trade unions will also gain increased employment stability for the membership, skills upgrading, a greater voice in decision making, and enhanced employability of its members.[1001]

4.6. Conclusion

A contract of employment may not satisfy the interests of employees solely. The background above proves that employers and employees are linked through the company. However, these parties are different interest groups. While both may have the business wellbeing and profitability at heart, their conflicting interests may affect these features. In the absence of reconciling such conflicting interests, the overall existence of a company may be affected.

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[993] Vanessa Rockey *The CSI Handbook* (2001).
[994] 2006 (5) SA 333 (W).
[995] Paragraph 16.9.
[996] Philna Coetzee, Rudrik du Bruyn, Houdini Fourie et al, *Advanced Internal Audit Topics* 4 ed (2016).
[997] *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* 2006 5 SA 333 (W).
[998] *King IV™* at 25.
[999] John F Olson 'South Africa moves to a global model of corporate governance but with important national variations' (2010) *Acta Juridica* at 221-222.
[1000] Brenda Louise Kennedy *Interest-based Collective Bargaining: A Success* (1999).
[1001] Ibid.

Where strikes emerge, there is a potential for a decline in productivity, dismissal, and liability for unions and their members for misconduct. This may affect other stakeholders (families, consumers, and customers), the country's economy, and measures to alleviate poverty will still be far from being achieved.

There is a need for the parties to see that they are both mutually dependent despite their separate interests. Consideration must be placed on the need for good industrial relations, where all parties cater to each other interests. The secret ballot requirement can address the consequences of strike violence. However, the effectiveness of the ballot requirement cannot solely assist in alleviating the violence that precedes strikes. Thus, we can only remain hopeful of the positive contribution the LRAA has made by introducing secret ballots through the directives of the Registrar. However, trade unions and their members may conduct secret ballots, and employees may still be engaged in illegal conduct during strikes. Thus, the impact of strike ballots on collective labour law is yet to be seen.

In the hope of advancing the interests of all stakeholders, the following chapter aims to investigate the role of technology in the changing world of work. The chapter introduces various challenges connected to these parties' interests.

Chapter 5: The role of collective bargaining in digitisation and the future of work

5.1. Introduction

The previous chapter has proven that recognition of the interests of parties to collective bargaining plays a significant role in collective bargaining. It has been shown that reconciliation of these interests will assist in building sustainable businesses and alleviate various ramifications that may follow failed negotiations. This chapter integrates the role of workplace forums as a complement to collective bargaining and focuses on the changes generated by technology. It does so by analysing the role of workplace forums and the role that can be played by collective bargaining in digitisation. It also provides for opportunities and challenges of technology in the workplace and how they can be addressed to benefit the future of work.

The author posits that this chapter complements the preceding chapter. Thus, it is the decisions about new technology that will determine how the interests of employers, employees, unions, and the broader society will be affected when new technologies are introduced.[1002] In this way, collective bargaining and industrial relations systems or relationships that provide a role for employee representatives at earlier stages of planning and decision-making processes are expected to produce both a smoother adaptation to new technologies and a better accommodation of the interests that workers, employers, and society bring to these decisions.[1003]

Various authors have persuasively argued that introducing new technologies serves as an opportunity for decision-makers to unfreeze existing employment practices and arrangements in ways that will fundamentally alter the nature of an employment contract.[1004] Technology interacts with changes in the environment, business strategies, and human resource practices

[1002] Thomas A Kochan and Boaz Tamir 'Collective Bargaining and New Technology: Some Preliminary Proposition' in New Technology (Routledge Revivals): International Perspectives on Human Resources and Industrial Relations, Greg Bamber and Russel Lansbury (eds), 2013 at 62.
[1003] Ibid.
[1004] Walton R.E 1982 'Social Choice in the development of advanced information technology', Human Relations vol 35 pp1073-84; Pava C 1985 'Managing new technology: Design or default', in R.E Walton and P.R Lawrence (eds) Human Resources Management: Trends and challenges (Boston: Harvard Business School Press) pp 69-102; Salzman H 1985 'The new Merlins on Taylor's automation? The impact of computer technology on skills and workplace organization', Boston University Center for Applied Social Science Working Paper, 85- 5,8 May. See also Zuboff S 1985 'Technologies that informate: Implications for human resource management' in R.E Walton and P.R Lawrence(eds), Human Resource Management: Trends and Challenges (Boston: Harvard Business School Press) pp 103-39 and Osterman P 1985 'Technology and White Collar employment: A research strategy', paper presented at the Winter Meetings of the Industrial Relations Research Association.

to pressure unions and employers to expand collective bargaining and integrate it with changing practices at the workplace and the strategic levels of industrial relations.[1005]

Where firms have introduced new technology to expand market opportunities and have been able to avoid major labour displacements or offer adjustment assistance to those adversely affected, collective bargaining has been generally successful in producing negotiated solutions.[1006] In this regard, collective bargaining can still be used to find ways to respond to developing technological advancements in the world of work. Thus, collective bargaining helps ensure that all workers and companies reap the benefits of technological innovation, organisational changes, and globalisation.[1007]

5.2. The importance of workplace forums addressing matters falling outside the collective bargaining sphere

The provision of workplace forums in South Africa is one of the major innovations of the LRA. Workplace forums were created and designed to facilitate the shift from adversarial collective bargaining on all matters to joint problem-solving and participation relating to certain aspects of the workplace.[1008] They are divided into four forms, including a bargained workplace forum based on a collective agreement that was entered into between the representative trade union and the employer,[1009] a workplace forum with a bargained constitution,[1010] a workplace forum constitution by a commissioner of the CCMA,[1011] and a trade union-based workplace forum.[1012] The LRA has foreseen three forms of participation rights by workplace forums that are exercisable against the employer: consultation, joint decision-making, and information-sharing.[1013]

[1005] Kochan and Tamir op cit note 1002 at 69.
[1006] Somers GG, Cushman E.L and Weinberg N (eds) 1963 *Adjusting to Technological Change* (New York: Harper and Row).
[1007] Cazes, Garnero, Martin op cit note 2.
[1008] See the *Explanatory Memorandum to the Labour Relations Bill,* 1995 by the Ministerial Task Team 1995 ILJ 310.
[1009] Section 80(7) of the LRA.
[1010] Section 80(9) of the LRA.
[1011] Section 80(9) of the LRA.
[1012] Section 80(10) of the LRA.
[1013] Olivier M 'Inchoate Regulation of Worker Participation in South Africa: The Quest for an Alternative Approach' in Höland A et al (eds) *Employee Involvement in a Globalising World: Liber Amicorum Manfred Weiss* (BWV Berlin 2005) at 453. See also Slabbert et al Managing Employment Relations 5-148 - 5-149.

Workplace forums are designed to perform functions that collective bargaining cannot easily achieve, thus the joint solution of problems and resolving conflicts over production.[1014] More so, the LRA envisages a 'clear and strict institutional separation' between workplace forums and collective bargaining 'to keep distributive bargaining and cooperative relations apart, to allow the latter an opportunity to develop'.[1015] Section 79 of the LRA provides for the functions of a workplace forum.[1016]

Although workplace forums play a huge role in seeking to promote the interests of all employees in the workplace, in this study, as noted in chapter 1, collective bargaining is still preferred because it deals broadly with matters of mutual interests, wages, and other conditions of employment and covers larger sector issues while forum functions are only reserved in a specific workplace. Thus, if viewed holistically within the national context, including the LRA, workplace forums are meant to promote 'the narrowest form of a dialogue between labour and capital at the level of the workplace'.[1017] In addition, there are also challenges when it comes to workplace forums, including the size of the workplace and majoritarianism.[1018]

Parties to collective bargaining are required to negotiate in good faith; which is a characteristic of cooperation amongst the parties. Collective bargaining can be used as a tool in sectors to address issues that arise from technological changes. The author argues that it will be easier to deal with common issues experienced on a sectoral level, and such may be easier to notice than the ones in the workplace. The public sector accounts for about 55% of employees covered by bargaining councils.[1019] Moreover, the public service bargaining councils make up almost half of all those covered by the bargaining council system; if the local government bargaining council is included, the proportion rises to over half.[1020] This proves the growing weight in the public sector.

It is known that workplace forums do not replace collective bargaining but deal with matters suited to resolution through consultation rather than through collective bargaining, which may

[1014] Ministerial Task Team 1995 ILJ 310. See also Godfrey, Hirschsohn and Maree 1998 LDD 86.
[1015] Ibid at 316. See also Klerck 1999 *Transformation* 14.
[1016] See also section 80 of the LRA for the establishment of a workplace forum.
[1017] Davis D and Le Roux M op cit note 6.
[1018] Section 80 of the LRA. For a broad discussion on the challenges faced by workplace forums, see Botha op cit note 5 at 1812-1844.
[1019] Conradie op cit note 63 page 53.
[1020] Conradie op cit note 63 page 53.

include the restructuring of production and the introduction of new technologies.[1021] Thus, section 84(1)(a) of the LRA provides that a workplace forum is entitled to be consulted by the employer about proposals relating to restructuring the workplace, including introducing new technology. As will be seen below, this chapter also focuses on education and training, as recognised in section 84(1)*(i)*. However, there is less case law addressing issues that arise from technology, education, and training.[1022] Hence, the author's inclusion of technology in this study serves as an extension of collective bargaining through workplace forums and argues that technology become a subject matter to collective bargaining.

Although it is essential for workplace forums to meet with employers regularly to consult on workplace issues such as technological changes, it might be a losing game if they are not akin to such changes. The author uses this because workplace forums are intended to create a 'second channel' of industrial relations[1023] or representation,[1024] to act not as an alternative to collective bargaining but rather as a supplement to it.[1025] In this way, it is safe to say that there is a relationship between workplace forums and collective bargaining.

Although the LRA allocates certain matters for consultation and joint decision-making between employers and workplace forums, this does not mean that there is a rigid demarcation between this process and collective bargaining.[1026] Hence, the LRA provides interaction between workplace forums and collective bargaining.[1027] Even though trade unions tend to view participatory structures as a potential threat, an instrument that employers may use to marginalize unions and avoid collective bargaining, workplace forums can only exist if the majority trade unions wish them to exist and can be dissolved at their behest.[1028] Accordingly, they are regarded as creatures of trade unions and collective bargaining rather than that of the

[1021] See South African Government 'Establish a workplace forum', available at https://www.gov.za/services/trade-unions/establish-workplace-forum, accessed 23 July 2022. See also Ministerial Task Team 1995 *ILJ* 315 and Klerck 1999 Transformation 14.
[1022] In relation to education and technology, see the case of *Transnet Limited v Commission for Conciliation Mediation and Arbitration and Others* [2001] ZALC 44 para 20. Recently referred to in *Eskom v Marshall & others* (2002) 23 ILJ 2251 (LC) para 23.
[1023] Van Niekerk A 'Workplace Forums' 1995 CLL at 32.
[1024] Mtayi F 'Workplace Forums under the Labour Relations Act' 1997 *JBL* at 98.
[1025] Botha op cit note 5 at 1812-1844.
[1026] Available at https://www.westerncape.gov.za/text/2004/4/know_your_lra_chap6.pdf, accessed 23 July 2022.
[1027] Ibid. Firstly, a bargaining council may decide that certain matters are best referred to workplace forums to deal with rather than left to collective bargaining and may refer these issues to such forums; secondly, the Act makes provision for a representative trade union and an employer to conclude a collective agreement giving the forum the right to be consulted or to participate in joint decision-making on other matters. The agreement can also remove any issue from the joint decision-making list in the Act. See also section 84(2) of the LRA.
[1028] Darcy Du Toit op cit note 20 at 1547.

statute.[1029] This makes it important to discuss the role of workplace forums as a complement to collective bargaining and how it extends to new technologies.

5.3. The role of collective bargaining and technology in the changing world of work

Research shows several positive effects result when unions are allowed to bargain over implementing new technology.[1030] Examples include union consultation in the expansion of job design and the enhancement of skills through multiskilling.[1031] In collective bargaining and new technology, Kochan and Tamir explored the ability of collective bargaining to accommodate technological changes to the interests of the parties in employment relationships.[1032] These authors suggest a need for full empirical testing of the responsiveness of collective bargaining to the challenges posed by new technologies- which require comparative data from countries with different industrial relation structures, processes, and institutional traditions.[1033]

In business sustainability, it is important to note that technological developments are set to bring about enormous improvements in efficiency and productivity.[1034] However, as will be seen below, these developments also threaten the prospects of employment in the current workforce. Thus, technology is competing with employees, and the future of work is yet to be determined. However, it is fallacy to denote that humans can compete with technology.

The 2018 World Economic Forum report suggests that focus should be placed on 'human' skills.[1035] This implies that there are certain areas in which technology will require human interactions. For example, workplaces will always need human brilliance, judgment, ingenuity, and skills within the 4IR.[1036] However, according to the 2018 Organisation for Economic Co-operation and Development (OECD) report, South Africa lacks in these areas. People, their skills, and their mindset are an organisation's strategic differentiator to unlock the promise of

[1029] Ibid.
[1030] Bart D. Finzel and Steven E. Abraham 'Bargaining over New Technology: Possible Effects of Removing Legal Constraints' Journal of Economic Issues 30, no. 3 (1996) page 791.
[1031] Ibid.
[1032] Kochan and Tamir op cit note 1002 at 60.
[1033] Kochan and Tamir op cit note 1002 at 61.
[1034] Mari Sako 'Artificial intelligence and the future of professional work' *Communications of the ACM* (2020) 63(4) at 25–27.
[1035] World Economic Forum *The Future of Jobs Report* (2018), available at *http://www3.weforum.org/docs/WEF_Future_of_Jobs_2018.pdf*, accessed on 20 August 2020.
[1036] World Economic Forum *The Fourth Industrial Revolution Is about Empowering People, not the Rise of the Machines* (2017), available at *https://www.weforum.org/agenda/2017/06/the-fourth-industrial-revolution-is-about-people-not-just-machines*, accessed on 22 December 2020.

the 4IR.[1037] While developing the economy, productivity can be maintained, and stakeholders can be engaged in conversations about how the future of work can be made feasible to secure employment, alleviate poverty, and reduce the high unemployment rate.

In this way, introducing new technologies does not only become a threat to the current labour force but works as a way to propel skills development. Therefore, collective bargaining can be used to bring issues surrounding technological changes to the bargaining table to find ways to address them. Federal labour laws encourage the use of collective bargaining agreements to limit labour market strife and disruption.[1038]

This study also shows the importance of skills development, training and education. Workers are bound to have the necessary skills for development in the future. Inevitably, changes in this regard will impact all workers: from the shop floor to executive employees. Since the new normal is here, we need to find ways in which the existing force is not left behind while preparing for a swift transition for the next generations. It is equally important for employers to also provide employees with long-life learning opportunities that will upgrade their skills, and allow them to participate effectively in the changing world of work.

In the present world of work, employees require technical and soft skills to survive in the workplace. There is a need for multi-stakeholder collaboration: from governments to companies, trade unions, and educational institutions. These key role-players may collaborate to find ways to address the challenges faced in the changing world. This is so because negotiations can happen from different levels, and the agreement's benefits are ripped by all. There is also an urgent call for digital skills to be introduced at an early age.[1039] Covid-19 has made these workplace changes more feasible.

Below is a discussion of the advantages and disadvantages of technology. In addition, the study provide ways in which social partners may engage each other to cater to these changes and find ways to support future generations in attaining working skills needed in the workplace. In South Africa, education, training and skills development can be attained through various

[1037] White Paper 'Leading through the Fourth Industrial Revolution: Putting People at the Centre' (2019), page 11. World Economic Forum in collaboration with Accenture.
[1038] Thomas W Dunfee, Janice R Bellace & Arnold J Rosoff *Business and Its Legal Environment* 2 ed (1987).
[1039] Shekhawat, S Enhancing employability skills of engineering graduates in Kuldip Singh Sangwan & Christoph Herrmann (eds) *Enhancing Future Skills and Entrepreneurship. Sustainable Production, Life Cycle Engineering and Management* (2020).

organisations, Sector Education and Training Authorities (SETAs), educational institutions (universities of technology, universities, schools, and Technical Vocational Education and Training (TVET) colleges) and government initiatives.

5.4. The advantages and disadvantages of technology in the workplace

The role and impact of technology in the world of work cannot be disregarded. More so, economic growth is dependent on the recognition of technological advancements. However, it is submitted that the current workforce's challenge is that these technological changes can beat existing agreements in the world of work. To harmonise this, the principle and practice of collective bargaining can be used to negotiate new terms and conditions aligned with these technological advancements. Thus, new worker voice and representation models will be required to match the needs and interests of the modern economy and workforce.[1040] Below is a discussion of several benefits and shortcomings of technology in the labour market.

5.4.1. Advantages of technology in the changing world of work

There is increasing evidence supporting the stance that while technological change will displace some jobs, it will create more jobs. It may also have positive effects on workers who remain at work and recruits.[1041] Currently, the traditional employment relationship has changed in that employees can render their services virtually, and employers do not have to set up business offices for employees. Thus, technology has changed how employees may render their services to their respective employers. The Covid-19 pandemic has made this a reality. Work arrangements have shifted and are now technologically inclined, and thus, employees are now working remotely.

In South Africa, remote working has increased dramatically.[1042] In essence, the pandemic had brought about uncertainties and significant shifts in the labour market. However, South African companies are experiencing astonishing benefits from remote work, thus planning for a

[1040] Thomas A Kochan 'Challenges and opportunities facing ILER and our field' in Dong-One Kim & Mia Ronnmar *Global Labour and Employment Relations: Experiences and Challenges* (2020) at 74.
[1041] Christos A Makridis & Joo n Han *Future of Work and Employee Empowerment: Evidence from a Decade of Technological Change* (2020).
[1042] Michael Page Dramatic Increase in Remote Working in South Africa, available at *https://yiba.co.za/dramatic-increase-in-remote-working-in-south-africa/#:~:text=Remote%20working%20increased%20dramatically&text=According%20to%20the%20study%2C%20only,of%20the%20respondents%20worked%20remotely*, accessed on 20 January 2020.

'blended' model.[1043] South Africa has various sectors that contribute to the growth of the economy. Three key sectors are banking, mining, and retail outlets. These sectors have embraced technological opportunities and are applying these advancements. Most banking services are provided online, mining sectors use advanced machines instead of hard human labour, and retail stores provide online purchases. This gigantic marketplace is set to make it easier for buyers and sellers to connect.[1044]

Furthermore, these increasing technological advances enable a more personalised marketing strategy, largely overcoming the cultural and regulatory barriers which standardised marketing fails to address fully.[1045] Moreover, Some firms benefiting from adopting such comprehensive global marketing strategies are 'born globals'.[1046] Purely internet-based companies have also shown that it is possible to capitalise on the global market through the Internet.

Recent experiences have seen many technological benefits for employees and employers. Generally, remote working in Africa has been said to be beneficial because it saves expenses, leads to improved productivity, and lower staff turnover.[1047] Organisations such as Capitec Bank in South Africa have had tremendous benefits in that remote working saw a marked decline in sick days among its employees.[1048] In addition, most employees see the benefits of remote work because it allows them more family time and avoids traffic and early mornings.[1049]

[1043] Garth Theunissen 'SA companies are seeing surprising benefits to remote work - and now plan for a 'blended' model' (2020).
[1044] Andrew Stewart & Jim Stanford 'Regulating work in the gig economy: what are the options?' (2017) 28(3) *Economic and Labour Relations Review* at 2.
[1045] T C Melewar & Caroline Stead 'The impact of information technology on global marketing strategies' (2002) 27 (4) *Journal of General Management.*
[1046] Gary A Knight & S Tamar Cavusgil 'The Born Global Firm: A Challenge to Traditional International Theory'(1996) 8 *Advances in International Marketing* at 11-26.
[1047] Louis Schoeman 'How and why remote working is booming in A*frica',* available at *https://www.sashares.co.za/how-and-why-remote-working-is-booming-in-africa/#gs.r62col,* accessed on 20 January 2020.
[1048] See Helena Wasserman 'Thousands of rules that don't make sense': Capitec CEO slams SA's Covid regulations *Business Insider SA*, available at *https://www.businessinsider.co.za/capitec-ceo-lockdown-2020-8*, accessed on 20 January 2020.
[1049] Prabashini Naicker 'Remote working eating away from family time' *SABCNews*, available at *https://www.sabcnews.com/sabcnews/remote-working-eating-away-from-family-time/*, accessed on 20 January 2020.

Technology is an opportunity to reignite growth and job creation.[1050] The need for technological advancements in South Africa is propelled by the high unemployment rate and the substantial decline in economic growth. This is so because the Gross Domestic Product (GDP) growth rate has declined by 43 per cent over the past 12 years (2006-2018).[1051] In the wake of the pandemic, the economy was further damaged. In addition, the GDP contracted by 8.2 per cent in 2020, resulting in a decline in construction, transport and communication, manufacturing, and mining.[1052] Therefore, increased digitisation and a faster pace of technology implementation could significantly boost South Africa's future economic prosperity.[1053]

The South African National Development Plan 2030 is also worth noting. The plan was published by the Department of Higher Education and Training (DHET) in 2019. This plan supports using science and technology to solve some of the biggest challenges in education. The plan provides that technology aid in distributing educational materials, which can be delivered electronically to remote villages.[1054] Currently, technology in the education sector has proven effective in that students are taught online instead of traditional classroom teaching. However, expenses, connections, demographics, and lack of resources (computers and phones) may impact access to education. In this way, South Africa must sharpen its innovative edge and continue contributing to global scientific and technological advancement.[1055]

New technologies have the potential to create new industries and new job opportunities in skilled and knowledge-based sectors.[1056] There are newly-established companies in the South African transport sector such as Uber, Bolt, Indrive and Didi. In some sectors, key challenges lie in managing workers' transitions in declining industries, job quality and ensuring the quality of nonstandard work.[1057] Hence, most of the jobs that we have today and those that we will

[1050] Magwentshu *et al* 'The future of work in South Africa - Digitisation, productivity and job creation, page 7, available https://www.mckinsey.com/~/media/mckinsey/featured%20insights/middle%20east%20and%20africa/the%20future%20of%20work%20in%20south%20africa%20digitisation%20productivity%20and%20job%20creation/the-future-of-work-in-south-africa.ashx, accessed 12 November 2020.
[1051] See African Development Bank *South Africa Economic Outlook,* available at *https://www.afdb.org/en/countries/southern-africa/south-africa/south-africa-economic-outlook,* accessed on 09 July 2021.
[1052] Ibid.
[1053] Magwentshu Rajagopaul, Chui et al op cit note 1050.
[1054] *The National Development Plan 2030: Our Future - Make It Work at 23.*
[1055] Ibid.
[1056] UNIDO *Industrial Development Report 2020: Industrializing in the Digital Age* (2019) at *v.*
[1057] OECD *OECD Employment Outlook 2019: The Future of Work* (2019).

have soon will require specific skills, including a combination of technological, problem-solving, critical thinking, and soft skills.[1058] As above, evidence supports that some jobs will disappear, and others will also emerge. The issue can be about technology changing the world of work and how we facilitate such change for the benefit of the current workforce and for generations to come. The aim is to bend these changes to be human-centered. In this way, we will recognise the interests of all humans in this technologically inclined world.

Unfortunately, workers focus on the destructions that accompany technology more than jobs created and the need to upskill the current labour force to benefit from these technological advancements. According to the World Economic Forum, at least 54 per cent of all employees will require major upskilling in specific areas such as analytical thinking and innovation, active learning and learning strategies, technology design and programming skills and human skills such as creativity, originality and initiative, critical thinking, persuasion and negotiations, attention to detail, resilience, flexibility, and complex problem-solving.[1059]

In some cases, reskilling will be required to allow flexibility in employment. Technology requires flexible workers. These are workers who can use their skills and knowledge to contribute to continuous improvements in quality, efficiency, and technological and product innovation.[1060] Technology can offer employees the opportunity to increase their employability skills. These skills are needed and can be taken from one work contract to another.[1061] The *White Paper* also suggests that employees need to keep an open mind when confronted with changes and commit to continuous learning for them to remain relevant and improve employability.[1062] In that case, this will allow them to unleash their potential in the changing world of work.

Technology contributes to developing skills and knowledge required in the current world of work. In this regard, the focus is on how these changes can contribute to sustainable businesses, economic growth, and development while creating decent and sustainable work opportunities

[1058] World Bank *World Development Report 2019: The Changing Nature of Work (*2019) at *vii*.
[1059] World Economic Forum 'The Future of Jobs Report', at 9, available at http://www3.weforum.org/docs/WEF_Future_of_Jobs_2018.pdf, accessed 20 August 2020.
[1060] Hugh Collins 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17 at 24.
[1061] Joellen Riley 'Who owns human capital? A critical appraisal of legal techniques for capturing the value of work' (2005) 18 *Australian Journal of Labour Law* at 1.
[1062] World Economic Forum op cit note 1037.

for all. This is because a sustainable business can save jobs, reduce the high unemployment rate, and alleviate poverty.

In this case, we cannot forget the work of the Global Commission on the Future of Work. The Commission's landmark report provides several steps needed to achieve a future of work that provides decent and sustainable work opportunities for all.[1063] The Commission's work can be seen through the International Labour Organization's (ILO) Future of Work Initiative. This initiative was based on four centenary conversations, including work and society, decent jobs for all, work and production organization, and work governance. All these conversations contribute toward building sustainable businesses. The Future of Work Initiative is premised on understanding transformations in the world of work and developing ways of responding to these challenges. Though proposed in 2013, this initiative was launched in 2015 with a series of National Dialogues. It was followed by the report of an independent Global Commission, culminating in adopting the Centenary Declaration on the Future of Work in 2019.[1064]

Although the Declaration is not binding, it is intended to have a wide application and contain symbolic and political undertakings by the Member States. Specific to this study, this Declaration provides various opportunities and challenges tied to technology and the need to acquire new skills. Accordingly, by investing in people, we will compensate for a just and sustainable future. Investments must be made in jobs and skills to develop sustainable businesses. The economic growth of South Africa depends on this.

It has been noted that traditional economic factors such as monetary capital, physical labor, and raw material are becoming less important than the capability to add value through knowledge development, improvement, and innovation.[1065] In this study, the concern is placed on how the institution of collective bargaining can be applied to negotiate better terms and conditions of work while enhancing productivity, expanding the knowledge and competency of employees. In a knowledge economy, knowledge sharing is becoming increasingly important and is a key driver of production.

[1063] International Labour Organisation Global Commission on the Future of Work *Work for a Brighter Future* (2019), available at *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf accessed 22 October* 2020.
[1064] ILO *Future of Work* (2019), available at *https://www.ilo.org/global/topics/future-of-work/lang--en/index.htm*, accessed on 29 June 2020.
[1065] Drucker, 1993 as cited in Kessels & Poell, 2004 at 147.

The knowledge economy is a consumption and production system based on technology and the knowledge acquired by the workers or intellectual capital.[1066] A knowledge economy will be achieved where knowledge is disseminated amongst people. Knowledge sharing is a set of behaviours that involves exchanging information or providing assistance to others.[1067] Chua described the process of knowledge sharing as how individuals collectively and interactively refine a thought, an idea, or suggestion in the light of their experiences.[1068] Knowledge sharing is an important strategy for developing an organization's competitive advantage.[1069]

Technology makes it possible for employees to attain relevant skills and training on developing technologies that will assist them in conducting work. Technological advancements can allow employees to upskill themselves to expand their capabilities in the changing world of work. However, this also depends on employers' determination to partake in this movement. An important question that may arise is: Why are we concerned with the employers' determination? It is simple in that training and development of employees on new technological developments may be regarded as an expensive initiative. However, when businesses consider training and developing their employees, they invest in their organisations' sustainability.

As the previous chapter has noted that employers are interested in the development and sustainability of the businesses through returns, it is also fair to say that employers aim to ensure that investments in training will provide maximum returns. Unfortunately, the extent to which the transfer of skills learned in training is applied to the workplace has been shown to be somewhat limited.[1070]

Furthermore, the concern is how employers and employees will respond to these changes. Ideally, it is evident that technology is taking over (though other jobs will still require workers), and we need to respond to such changes positively. Employees may resist change simply

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[1066] Adam Hayes 'Knowledge economy', available at *https://www.investopedia.com/terms/k/knowledge-economy.asp*, accessed on 28 June 2021.
[1067] C E Connelly & E K Kelloway 'Predictors of Employees' Perceptions of Knowledge Sharing Cultures' (2003) 24 (5) *Leadership and Organisation Development Journal* at 294–301.
[1068] A Chua *'Knowledge sharing: A game people play'* (2003) 55 *Aslib Proceedings* at 117–129.
[1069] S K McEvily, S Das & K McCabe 'Avoiding competence substitution through knowledge sharing' (2000) 25 (2) *Academy of Management Review* at 294–-311.
[1070] T T Baldwin & J K Ford 'Transfer of training: A review and directions for future research' (1988) 41 *Personnel Psychology* at.63-105. See also M L Broad & J W Newstrom *Transfer of Training: Action-Packed Strategies to Ensure High Payoff from Training Investments* (1992).

because they believe machines will replace them. However, changes in this regard will, from time to time, require human resources for support. Hence, it has been contended that these technological changes must complement existing organisational knowledge bases and skills that employees have to produce improved processes and product outcomes.[1071] In this way, companies ought to offer their employees meaningful worker protection to facilitate trust.

In addition, a question worth noting is whether trade unions still play an essential role in this technology-inclined era? It is without a doubt that the fundamental role of trade unions is representation. However, trade unions will still be required to represent their members in disputes of interest. To respond to these technological changes, trade unions play an essential role of representation in negotiations. Furthermore, the internet provides trade unions with great opportunities to improve their services and attract more members.[1072] It bridges the gap between an increasingly heterogeneous and individualistic workforce and the collective activity and solidarity at the heart of trade unionism.[1073] Labour organisations have sought to engage with the gig and platform-based workers at times as a strategy to expand representation to incorporate non-standard workers more broadly.[1074] In cases where labour unions fail to exploit such opportunities due to organisational rigidities, other organisations such as internet recruitment firms, occupational associations, ethnic or gender-based groups are expected to accomplish this mission.[1075]

To safeguard those gains brought out by technological progress, they must be distributed equitably. According to the ILO *Report on World Employment and Social Outcomes*, policy-makers must balance their technology and innovation strategies with a strong focus on improving infrastructure, access, investments and knowledge in rural areas.[1076] Therefore, policies and programmes should be adopted to alleviate possible adverse impacts of technology on job losses or income inequality, including urban-rural disparities.[1077]

[1071] Makridis & Han op cit note 1041 at 6.
[1072] Wayne J Diamond & Richard B Freeman 'Will unionism prosper in cyberspace? The promise of the internet for employee organization' (2002) 40 (3) *British Journal of Industrial Relations* at 570.
[1073] Ibid.
[1074] International Organisation of Employers *IOE Brief: Understanding the Future of Work* (2016)
[1075] Diamond &Freeman op cit note 1072 at 570.
[1076] International Labour Organization (2020) *World Employment and Social Outcomes: Trends 2020* at 56.
[1077] Ibid.

In sustaining businesses, the contribution must be made to the development of the economy, secure employment, alleviate poverty, reduce the high unemployment rate and manage the risks that these changes may bring about. Research also suggests that employees may have become conditioned to take increased insecurity and instability as the new norms for work.[1078] Therefore, it is imperative to highlight the challenges that the world of work will be conditioned to and its impact on the future of work.

5.4.2. Disadvantages of technology

Despite the opportunities that come with technology, the world of work is also congested with conversations on how technological changes will affect work. In the changing world of work, the digital revolution has its way of opening up new opportunities in which a truly humane labour regime can be achieved; however, it also poses risks.[1079] In 2016, Kolbjørnsrud, Amico & Thomas warned that technological developments would cause disruptions and change the dynamics of human work tasks by 2020.[1080] Covid-19 has made this a reality. In this way, work arrangements were bound to change. The transition of the current labour force into the world of work that is technologically advanced brings about further challenges.

Labour law is rooted in an industrial model currently undermined by technological and economic changes on a global scale.[1081] These dramatic changes will in the future affect employees, managers and consumers.[1082] Empirical evidence also suggests that technology

[1078] Thomas A Kochan, Duanyi Yang, William T Kimball et al 'Worker voice in America: is there a gap between what workers expect and what they experience?' (2019) 72 (1) *ILR Review* at 3–38 for a discussion on voice gap in the United States workplaces.
[1079] Alain Supiot 'The tasks ahead of the ILO at its centenary' (2020) 159 (1) *International Labour Review* at 119. The latter also raise the need for socio-environmental responsibility.
[1080] Vegard Kolbjørnsrud, Richard Amico & Robert J Thomas 'How artificial intelligence will redefine management' (2016) *Harvard Business Review*, available at *https://hbr.org/2016/11/how-artificial-intelligence-will-redefine-management*, accessed on 12 July 2021.
[1081] Alain Supiot The transformation of work and the future of labour law in Europe: Multidisciplinary perspective *International Labour Review* (1999) 138(1) at 31.
[1082] Wayne F Cascio The Changing World of Work' (2009), available at *https://www.researchgate.net/publication/286755025_The_Changing_World_of_Work/citations*, accessed 22 June 2021 where there is a discussion on how technology and e-commerce affect the global dispersion of work.

significantly affects the labour market,[1083] organisations,[1084] and the nature of work.[1085] Accordingly, these technological changes have led to a digital or gig economy in which Information Technology (IT) platforms using algorithms can now replace managers, workers are no longer employees (where labour law often does not apply), and full-time, stable employment is disappearing.[1086]

In the wake of the pandemic, work arrangements have shifted from traditional to technologically inclined. Although these changes in the world of work suffice now, other countries have been changing in line with this. Unfortunately, as government and geographical location also impact work arrangements, changes may not be identical. Thus, whereas other countries are easily inclined and can adapt to these changes, others will still be left behind.

There would be challenges for countries 'economic growth in a technologically inclined world of work, where robots or machines have replaced labour. The law on the regulation of such machines will be complex. Hence, it is unclear whether existing regulations apply to gig workers and whether they can be effectively enforced in the digital economy.[1087] In this case, the government may also lose the tax paid by the employees that have been replaced by machines. There are current arguments in support of and against robot tax. Currently, South Korea remains the only country with robot tax.

Such technological advancements will also occur at the expense of vulnerable communities. In the end, it defeats the purpose of the government to alleviate poverty and unemployment. Thus, these changes will impact families' dependent on the government for support grants, health facilities, and other services. This is so because most of these services are funded through the tax paid by employees. In this regard, where does this place government in the provision for

[1083] David H Autor, Lawrence F Katz & Alan B Krueger 'Computing inequality: Have computers changed the labor market?' (1998) 113(4) *Quarterly Journal of Economics* at 1169–1213; David Autor & David Dorn 'The growth of low skill service jobs and the polarization of the U.S. labor market' (2013) 103(5) *American Economic Review* at 1553-1597.
[1084] Bresnahan Timothy, Brynjolfsson Erik & Hitt Lorin 'Information technology, workplace organization and the demand for skilled labor: firm-level evidence' (2002) 117(1) *Quarterly Journal of Economics*,339–376; and Nicholas Bloom, Raffaella Sadun & John van Reenen 'Americans do IT better: US multinationals and the productivity miracle' (2001) 102(1) *American Economic Review* at 167–201.
[1085]Erik Brynjolfsson, John J Horton, Adam Ozimek et al *COVID-19 and Remote Work: An Early Look at US Data* (2020).
[1086] Janice R Bellace 'Back to the future: Workplace relations and labour law in the 21st century in the Asia Pacific context' (2018) 56 *Asia Pacific Journal of Human Resources* at 433.
[1087] Stewart & Stanford op cit note 1044 at 2.

the livelihoods of individuals? In South Africa, the government is not even feasible to provide a grant for unemployed graduates, and social security researchers have been gunning for this to come to pass. Amid the high unemployment rate, poverty and inequality: the future of work is yet to be determined.

In addition, employees whose labor is no longer strategically valuable will lead to job displacement.[1088] Labour displacement by machines is not new in this era, as it has been happening in the past. For example, mechanical looms replaced artisans, and computers diminished the need for typists.[1089] Accordingly, various authors contended that the 4IR technologies are expected to be the biggest disruptive force for all industries globally and will put different kinds of jobs at risk, other than the mechanical automation of previous years.[1090]

Despite this, employees that face the need to adjust their traditional patterns of life turn to their unions and through them, to the collective bargaining process, seek protection from the disruptions inherent in change.[1091] Accordingly, job security has ranked historically as a dominant goal of trade unions in collective bargaining, and in recent years, the need for employment security has received renewed emphasis as a bargaining issue because the pace of dislocations arising from technological change and automation has accelerated.[1092]

In addition, although it has been noted above that remote working is workable, it may also create challenges. Thus, challenges such as connectivity and geographical locations of employees may pose a threat to remote working. Moreover, time management and consistency challenges may also emerge. This extends the burden on businesses to find ways in which remote working can be workable for all. In this case, there is a need for working administration programmes, emails, telephones, and software (Zoom, Microsoft Teams, Skype, etc.). This may be costly, whether as a company or an individual's expense.

There is evidence that some jobs will disappear. This is without a doubt, especially looking into the banking sector. Tellers are no longer required as much, as most of the work can be

[1088] David H Autor & Anna Salomons 'Is automation labor share-displacing? Productivity growth, employment, and the labor share' (2018) (1) *Brookings Papers on Economic* at 1–87.
[1089] G Singh & S S Debasish 'Jobs in the era of automation' (2016) *The Journal of Indian Management* at 70–78.
[1090] Kolbjørnsrud Amico & Thomas 'How Artificial Intelligence will redefine Management' (2016).
[1091] Fryer J.F and Fryer J.L op cit note 112 page 412.
[1092] Ibid.

done on automated teller machines (ATM) or online banking Apps. In addition, clothing and food stores have retail Apps where customers can make purchases online. This can potentially reduce jobs, especially for waiters and retail support staff members.

The fear that technology has the potential to render labour redundant is real. Hence, the ILO's Global Commission on the Future of Work requires the usage of technology to support decent work and a 'human-in-command' approach to technology.[1093] Accordingly, this requires including humans in the decision taken that may impact their lives. Therefore, to eradicate poverty, there is a need for access to decent work. Most importantly, work must generate income above poverty levels to qualify as decent, and the "*working out of poverty*" path will remain intact.[1094]

South Africa has sought to address poverty and inequality with various initiatives aligned with global development agendas.[1095] Accordingly, the Reconstruction and Development Programme (RDP) (1994) provides that 'no political democracy can survive and flourish if the mass of our people remains in poverty, without land, without tangible prospects for a better life…attacking poverty and deprivation must therefore be the first priority of a democratic government'.[1096] Accordingly, this is reiterated in the National Development Plan (NDP) (2012). The NDP aims to eliminate poverty and reduce inequality by 2030. 2030.[1097] However, where the country's economy is impacted, the threat of poverty is extended to the broader society. In this case, the government may not be able to provide various services such as social grants (for children, old age, and the disabled), no-fee schools, housing, free health care, and basic services (water and sanitation).

Technology is also set to affect employees in different ways. The labour force is divided into three types of employees who suffer differently: compliant, good faith, and flexible employees.[1098] In essence, the compliant employee belongs within the range of low-skilled workers. These workers are prone to be affected mostly by these technological advancements

[1093] ILO (2019) 'WORK FOR A BRIGHTER FUTURE', available at https://www.ilo.org/infostories/en-GB/Campaigns/future-work/global-commission#intro, accessed 22 October 2020.
[1094] ILO *Working out of Poverty; Report of the Director-General, International Labour Conference, 91st Session* (2003).
[1095] William B Hurlbut *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018).
[1096] Ibid at 24.
[1097] Ibid.
[1098] Collins op cit note 1060 at 17–48.

because they are low-skilled. In this way, job security or protection is needed as there is little avenue for improving their employability.[1099] Studies also prove that new technologies have long-term effects on the wage of middle-skilled workers.[1100]

As noted above, flexible workers may benefit widely from the changes that the world of work continues to be exposed to. Moreover, the good faith workers may also be affected by these changes. These are those cooperative workers who perform the job according to the terms and conditions of employment. These employees' rights may be limited in that they simply run things by the book. Accordingly, they may be prone to believe that whatever the employers believe in is in the company's best interest.

In addition, changes to forms of business organisation, the decline of the vertically integrated firm, and increases in business networks and supply chains have led to a substantial reduction in the number of workers engaged in long-term employment for a single firm.[1101] Online services may increase the chances of fraud, less product quality, delays, and lack of consumer interaction. All these challenges may also raise criminal conduct.

In the previous chapters, collective bargaining has proven to be critical in securing lasting and enforceable workplace gains. However, changes in employment patterns and the growing gig and platform work phenomenon also pose new organisational challenges to the union movement.[1102] This may overwhelm the institution of collective bargaining. These rapid technological changes and increased unemployment have changed the focus of collective bargaining.[1103] However, collective bargaining finds its application in this way.

[1099] Johanna Howe, Esther Sãnchez & Andrew Stewart 'Job loss' in Matthew W Finkin & Guy Mundiak (eds) *Comparative Labor Law'* (2015) at 268–295.
[1100] Autor David H & David Dorn 'The growth of low-skill services jobs and the polarization of the US labour market' (2013) *American Economic Review*, 103(5) at 1553–1597.
[1101] Hugh Collins 'Independent contractors and the challenge of vertical disintegration to employment protection laws' (1990) 10 *Oxford Journal of Legal Studies* at 353. See also Judy Fudge, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* at 295.
[1102] Hannah Johnston and Chris Land-Kazlauskas (2018) *Organizing* on-*demand: Representation, Voice, and Collective Bargaining in the Gig Economy* at 5.
[1103] M Weiss 'The role of neutrals in the resolution of interest disputes in the Federal Republic of Germany' (1989) *Comparative Labor Law Journal* 10 (3) at 341.

In addition, changes in the labour market are set to adversely affect job satisfaction and employees' well-being.[1104] Thus, technological innovations have drastically altered markets and the organisation of production in many industries around the world.[1105] This has led the workplace to become fissured.[1106] However, such predicaments prove that employees must effectively upgrade their skills to participate in this changing world of work. Employers must be willing to assist in this regard.

Furthermore, the rise of the gig economy is praised as a response to the wishes of a more entrepreneurial generation. However, it is posited that this might be driven by the concerns of businesses to lower wages, benefit costs, and reduction in employers' vulnerability to unfair dismissal lawsuits.[1107] While employers may benefit from this; employees are left destitute. In some industries, employees may fail to adapt to the changing world of work. For example, safety and security companies are investing in technological devices and infrastructure that increase the safety of properties. In this way, these technological developments will, in the future, displace security officers. These disruptive technologies can be expected to dramatically change the patterns of consumption, production, and employment; therefore, this will require proactive adaptation by corporations, governments, and individuals.[1108]

Collective bargaining will have to be constantly used to address emerging challenges that affect the workplace and provide a way forward by looking at past challenges as learning lessons. Hence, where transgressions have been experienced, be rest assured for history not to repeat itself. The future of work lies in the hands of the present generation for a better tomorrow. We cannot shy away from the fact that innovation is our daily bread. Emerging challenges in the world of work require engagements by various stakeholders for developed sustainable companies and employment security. This may take decades to transform the world of work; however, involvement by various stakeholders will assist in finding ways to respond to these challenges. Collective bargaining and social dialogue can be useful institutions aiding companies to respond to the demographic and technological changes by allowing them to adjust

[1104] European Commission (2001) *Employment in Europe 2001: Recent Trends and Prospects*.
[1105] Verma, Anil, Thomas A Kochan & Russell Lansbury *Employment Relations in the Growing Asian Economies* (1995).
[1106] David Weil *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (2014) *Press*.
[1107] Gerald Friedman 'Workers without employers: shadow corporations and the rise of the gig economy' (2014) 2 (2) *Review of Keynesian Economics.*
[1108] R Samans & K Schwab *The Future of Jobs: Employment, Skills and Workforce Strategy for the Fourth Industrial Revolution' Global Challenge Insight Report* (2016).

wages, working time, work organisation, and tasks to new needs in a more flexible and pragmatic manner than through labour regulation while remaining fair.[1109]

5.5. Skills development, education and training in the workplace

5.5.1 Government initiatives supporting skills development

The development and growth of the country's economy can be achieved by developing people skills that can be used in the changing world of work. The government can contribute towards achieving the future of work that we are all imploring. In South Africa, contribution by the government can be seen through the skills development of the current workforce, prospective future workers, and students.

Technological changes worldwide will affect different countries differently depending on their mechanisms to respond to these changes. The Center for Inclusive Growth launched the African Leapfrog Index (ALI), which provides insights on the key drivers accelerating digital inclusion across the African continent, focusing on Egypt, Ethiopia, Kenya, Nigeria, Rwanda, and South Africa. According to ALI, it was found that only Kenya showed the greatest digital change over the last decade and enjoyed a high potential to leverage this to its advantage to leapfrog its African counterparts economically.[1110]

On a global scale, skills development has taken on a new significance as countries and organisations compete to attract, develop, and retain the highest skilled workers.[1111] Accordingly, the driving forces behind this new approach include globalisation, technology, speed, changing customer needs, and focusing on people as a competitive advantage.[1112] In addition, advanced democratic countries may experience greater disruption and find it more difficult to form the consensus necessary to devise new policies and laws for supporting workers.[1113] Although this will be different in various countries, the main fact remains that there is a need to push towards achieving the benefits of technology that is workable for all.

[1109] OECD Employment Outlook op cit 1057.
[1110] Center for Inclusive Growth *Getting Lions to Leapfrog: Understanding the Role of Technology in Promoting Inclusive Growth in Africa* (2019).
[1111] M Raftopoulos S Coetzee& D Visser 'Work-readiness skills in the Fasset Sector *South African Journal of Human Resources* (2009) 7 (1) at 1–8.
[1112] Ibid.
[1113] Bellace op cit note 1086 at 433–449.

It has been suggested that national and regional governments must proactively support and invest in the development of workers' skills rather than waiting for worker displacement and unemployment to occur.[1114] The South African government plays a crucial role in attaining required skills. In this way, the government has enacted laws to support the skills development of employees in the workplace. In this regard, the Skills Development Act 97 of 1998 (SDA) is the primary legislation supporting skills development in South Africa. This Act's key aim is to expand knowledge and competencies of the labour force to improve productivity and employment.

In addition, the Act aims to improve workers' quality of life, their work and labour mobility prospects, productivity in the workplace, the competitiveness of employers, and the delivery of services. Moreover, the Act aims to increase the levels of investment in education and training in the labour market and improve the return on that investment. To achieve these aims, various institutional and financial frameworks have been established, including the Sector Education and Training Authority (SETAs) which is essential in this study.[1115]

A SETA is a body whose primary purpose is to contribute to the improvement of skills by achieving a more favourable balance between demand and supply and by ensuring that education and training:

- Acknowledges and enhances the current workforce's skills (in addition to ensuring that new entrants to the labour market are adequately trained);
- Meets agreed standards within a national framework;
- Is provided subject to validation and quality assurance; and
- Where appropriate, it is benchmarked against international standards.[1116]

In this way, companies may fund the skills development of their employees. Funding for skills development is given to current and prospective employees through learnerships.[1117] This is

[1114] World Economic Forum op cit note 1037 at 13.
[1115] Others include the National Skills Authority (NSA); the National Skills Fund (NSF); institutions in the Department of Labour; a skills development levy-financing scheme as contemplated in the Skills Development Levies Act, provincial offices of the department; labour centres of the Department, accredited trade test centres, skills development institutes, the Quality Council for Trades and Occupations, a skills development forum for each province and a national artisan moderation body, and Productivity South Africa.
[1116] Available at *https://www.skills-universe.com/2012/06/06/what-is-a-seta/*, accessed on 30 June 2021.
[1117] See M I Maake-Malatji 'The law and regulation of internships in South Africa' in Andrew Stewart, Rosemary Owens, Niall O'Higgins et al *Internships, Employability and the Search for Decent Work Experience* (2020) in which the latter highlight the opportunities given to students after completing their studies by way of internships.

provided as a way to respond to alleviating the high unemployment rate and the development of skills in South Africa. Moreover, companies can claim government incentives, such as the Skills Development Levy (SDL). An SDL is a levy imposed to encourage learning and development in South Africa. The funds are to be used to develop and improve employees' skills.[1118] The employer may claim for any funds used in relation to skills development.[1119] This may include the cost of training, venue, course fees and material from their respective SETAs.

The crucial role of the government in the development of the skills of employees can also be seen in the Infrastructure Development Act 23 of 2014. The Act lists the function of the Council of the Presidential Infrastructure Coordinating Commission as to *"*promote the creation of decent employment opportunities and skills development, training and education, especially for historically disadvantaged persons and communities, women and persons with disabilities, in so far as it relates to 'infrastructure and any strategic integrated project'.

In 2011, the South African New Growth Path aimed to create five million jobs by 2020. This ambition has been impacted by the developments in the changing world of work and worsened by the Covid-19 pandemic. The current unemployment rate in South Africa increased from 32.5 per cent in the fourth quarter of 2020 to 32.6 per cent in the first quarter of 2021.[1120] This may be worsened by the current challenges experienced across the country, with people looting and burning properties, impacting economic growth and increasing the high unemployment rate. Although there are conflicting contentions as to the motive, it is also believed that people live in poverty, are unemployed, and other contentions are based on politics in support of the release of the former president of South Africa, Jacob Zuma. This may have detrimental effects on the economy, which may not be easily recovered. The pandemic contributes to these consequences. It is therefore urgent that humans develop their skills to participate effectively in the changing world of work.

[1118] South African Revenue Service *Skills Development Levy*, available at *https://www.sars.gov.za/types-of-tax/skills-development-levy/*, accessed 19 August 2021.
[1119] Ibid.
[1120] Statistics South Africa, available at *http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q1%202021.pdf*, accessed on 05 June 2021.

Despite this, there are success stories to be told. Several commitments for training and skills development were set up in the National Skills Accord. Although this is not an exhaustive list, these commitments included expanding the level of training, making internship and placement opportunities available within workplaces, and most importantly, improving the funding of training and the use of funds available for training and incentives for companies to train.[1121] Zwelinzima Vavi highlights the importance of this Accord in this way:

> A key pillar of the apartheid regime was to deny our people access to quality education and skills. This Accord goes some way to addressing that by expanding workers' access to genuine work based and transferable skills. We can only achieve these goals by strengthening our training institutions through an approach that involves all of the social partners.[1122]

In addition, the government has various programmes that support the development of the labour force and employment creation. An example can be drawn from the government's Expanded Public Works Programme (EPWP) established in 2004. The EPWP is a nationwide government-led initiative aimed at drawing a significant number of unemployed South Africans into productive work that will enable them to gain skills and increase their capacity to earn an income that will contribute to the development of their communities.[1123] The EPWP contributes to the Government Policy Priorities regarding decent work and sustainable livelihoods, education, health, rural development, food security and land reform and the fight against crime and corruption.[1124]

The purpose of the EPWP is to provide essential services and infrastructure facilities to disadvantaged communities, including skills development and training opportunities for the unemployed.[1125] This programme was developed under the auspices of the Employment Intensive Investment Programme (EIIP), an ILO programme that supports governments, employers, unions and community-based organizations to enhance investment in infrastructure development and improve community access to basic goods and services.[1126]

[1121] National Skills Accord '*New Growth Path: Accord 1',* available at *https://www.gov.za/sites/default/files/ngp_dboe_red_accord_schools.pdf*, accessed on 30 May 2021.
[1122] Zwelinzima Vavi in the *National Skills Accord. New Growth Path: Accord 1* at 3, available at *https://www.gov.za/sites/default/files/ngp_dboe_red_accord_schools.pdf*, accessed on 30 May 2021.
[1123] *EPWP Phase IV Business Plan 2019 – 2024*, available at *http://www.epwp.gov.za/5yreports.html*, accessed 13 July 2021.
[1124] See Expanded Public Works Programme, available at *http://www.epwp.gov.za/*, accessed 30 June 2021.
[1125] International Labour Organization South African New Growth Path Sets Ambitious Target to Create 5 Million Jobs by 2020, available at *https://www.ilo.org/jobspact/news/WCMS_151955/lang--en/index.htm*, accessed 30 June 2021.
[1126] Ibid.

So far, the programme has already completed three phases which are on five-year rotations since 2004. In Phase I, the goal of the programme was to alleviate unemployment for at least a minimum of 1 million people in South Africa in the following way: 55 per cent women, 40 per cent youth and 2 per cent amongst the disabled. Fortunately, the programme achieved 1 million work opportunities and was able to provide income to the neediest. The objective of Phase II was to create at least 2 million Full-Time Equivalent (FTE) work opportunities for the poor and the unemployed. In this way, the Programme created over 4 million work opportunities, which was above the 4.5 million targeted. In addition, the EPWP aimed at creating over 400'000 job opportunities in Limpopo province by 2014.[1127] However, relevant data in support of this contention could not be found.

In Phase III, the programme was based on the lessons from the first two phases above. The objective was to contribute to poverty alleviation through income transfer and providing work opportunities to the poor and unemployed people and prepare them for the labour market through skills and enterprise development. Although the target for work opportunities was 6 million, the programme could only create over 4.5 million work opportunities. Currently, the programme is on Phase IV, which will end in 2023. This implies that the programme is still running, and prospective workers are taken on rotational calls for employment.

5.5.2. The role of learning institutions in the acquisition of knowledge

Institutions of learning play a vital role in the development of future generations. To grow future timber, there is a need to encourage the development of the future generation.[1128] Development can also be seen through the education and training of the current workforce. The indicators for learning goals relate to the contribution to the development of human resources, improvement of the match between education and the labour market, and efficiency of education systems.[1129] Many employees in the past did not have access to education and training opportunities. However, it has been seen above that the government provides ways in

[1127] Ibid.
[1128] Evance Kalula 'ILERA and the future of work: Challenges and opportunities in the quest for universal decent work and social solidarity' in Dong-One Kim and Mia Ronnmar (eds) *Global Labour and Employment Relations: Experiences and Challenges* (2020) at 230.
[1129] Rénette du Toit *School-To-Work Transition and Labour Market Intermediation in a Developing Context: Career Guidance and Employment Services* (2005).

which individuals may access education through institutions learning and skills development programs.

The White Paper on Education and Training (1995:15) also identifies education and training requirements of a successful economy and society in this way:

> Successful modern economies and societies require the elimination of artificial hierarchies, in social organisation, in the organisation and management of work, and in the way in which learning is organised... They require citizens with a strong foundation of general education, the desire and ability to continue to learn, to adapt to and develop new knowledge, skills and technologies, to move flexibly between occupations, to take responsibility for personal performance, to set and achieve high standards, and to work co-operatively.

While the *White Paper* was tabled more than 25 years ago, measures to achieve a successful modern economy is yet to be achieved. However, opportunities for access to education and skills development are growing to reach the marginalised. Education is vital in developing knowledge, skills, attitudes and values that will enable people to participate and benefit from an inclusive and sustainable future amongst the environment, economic, and social challenges they face.[1130] In this way, new technological developments must be placed at the heart of teaching institutions and learning strategies and should become an integral component of everyday institutional business.[1131]

Despite this, limited resources may challenge the development of countries. Though it does not involve financial resources, this restrictive issue might include knowledge, information, technology, and human resources.[1132] In South Africa, the lack of skills in firms is associated with the country's lack of allocation and control of resources, which exacerbates low productivity and slows down wealth creation.[1133]

Although these challenges impact the workforce, the reality is that they are confined basically to skills development. Furthermore, the absence of such opportunities to learn, acquire knowledge and use technology impacts the development of future employees. Developing

[1130] A Schleicher *The Future of Education and Skills: Education 2030, The Future We* Want, available at *https://www.oecd.org/education/2030/E2030%20Position%20Paper%20(05.04.2018).pdf.%20%5b accessed* on 22 January 2021.
[1131] Ibid.
[1132] R Du Toit op cit note 1129.
[1133] Goldman, Maritz, Nienaber et al op cit note 163.

countries may still experience challenges concerning technology. This is so because, even at their behest, most of the population might not have access to these technological opportunities.

There is a need to embrace the opportunities technology provides for humans and employ the benefits effectively to allow development. The ILO refers to various opportunities that will benefit people in the changing world of work. Amongst these opportunities are effective lifelong learning and quality education for all.[1134] In addition, the latter refers to effective measures that must be taken to support people through the transitions they will face throughout their working lives.[1135] The question that may arise is, why lifelong learning? To develop the next generations, the need for lifelong learning must not be overlooked. Hence, this must begin from early childhood development through basic education and into higher education institutions. This includes both formal and informal education.

Lifelong learning requires more than skills needed to provide services but also developed capabilities needed to participate in a democratic society.[1136] Lifelong learning has transformative potential in which investment in learning at an early age facilitates learning at later stages. This is extended and linked to intergenerational social mobility, which can expand the choices of future generations.

Although this is not an exhaustive list, the National Development Plan 2030 also presents a long-term strategy to increase employment and broaden opportunities through education, vocational training and work experience, public employment programmes, and access to information.[1137] This implies that institutions of learning play an essential role in developing skilled future workers. In addition, learning institutions must reflect twenty-first-century learning, which conceptualises a 'smart' worker who is flexible and agile, who can contribute critically and creatively to the twenty-first-century workplace.[1138]

[1134] ILO *Centenary Declaration for the Future of Work* adopted by the Conference at its One Hundred and Eighth Session, Geneva, 21 June 2019, available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf, accessed on 22 September 2022.

[1135] Available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf, accessed on 22 September 2022.

[1136] Günther Schmid 'Transitional labour markets: A new European employment strategy*'* 2017.

[1137] Ibid at 28.

[1138] L Benade 'Is the classroom obsolete in the twenty-first century? (2017*)* 49 (8) *Educational Philosophy and Theory* at 796–807.

Amongst the key problems associated with failed negotiations is the lack of an adequately resourced body to educate social partners about economics, train social partners in modern negotiation skills and provide reliable economic information.[1139] Educational institutions must bring the lifelong learning aspiration to reality for all, considering the uniqueness and diversity of workers' needs.[1140] This is so because the focus in the past was on three parties, including the employer, employees and trade unions and the government as primary actors.[1141]

Conversely, this stance has changed in that educational institutions are crucial actors in developing the knowledge of future employees and, in some cases, enabling them to attain relevant skills. In this digitalised world of work, employees will need more skills to perform their duties as required. They must adapt to the frequent transitions between jobs and the intermittent unemployment spells.[1142]

Lifelong learning is imperative in building and maintaining workforce skills.[1143] The absence of education and relevant skills in the changing world of work poses a threat to employment opportunities. However, it has been argued that poverty, unemployment, and illiteracy patterns are embedded, reflected and reproduced in schools.[1144] This is so because of the growing inequality in South Africa. This implies that education is one of the key drivers of inequality in South Africa.[1145] However, education has grown in importance, especially now that it contributes to skills development. In this regard, human capital (education attainment) correlates with higher wealth and incomes and earnings.[1146]

Although graduates are making their way up in the labour market, this does not take away the fact that there is a high rate of unemployment in South Africa. In the end, the high unemployment rate leads to relatively low levels of skill generation due to the absence of high-

[1139] Brand op cit note 920.
[1140] World Economic Forum op cit note 1037 at 14.
[1141] John Thomas Dunlop *Industrial Relations Systems* (1958).
[1142] Ronald Bachmann & Rahel Felder 'Job stability in Europe over the cycle' (2018) 157(3) *International Labour Review*.
[1143] Thomas A Kochan 'Challenges and opportunities facing ILER and our field' in Dong-One Kim and Mia Ronnmar *Global Labour and Employment Relations: Experiences and Challenges* (2020) at 77.
[1144] Linda Chisholm 'The state of South Africa's schools' in J Daniel, R Southall & J Lutchman (eds) *State of the Nation 2004–2005* (2004). HSRC Press, Cape Town.
[1145] Hurlbut op cit 1095.
[1146] Ibid.

paying jobs.[1147] In alleviating poverty, there is a need for employment security to allow those affected by the past regressions of apartheid to have better lives. Collective bargaining as a form of dialogue can assist in providing ways in which employees in the workplace can be upskilled to meet new technological developments.

Indeed, the world of work is constantly changing. However, the question remains as to what it is that learning institutions can contribute to sustain businesses and safeguard employment for the benefit of all. Presumably, poverty amongst black people in South Africa remains the driving force for employment, and such a marginalised group of people need to be protected by the law. Hereunder, the study highlights the company's role in a technologically inclined world of work.

5.5.3. The role of a company in the changing world of work

The future of work is tied to various changes that contribute to work arrangements and how business is conducted. Technology is one of the most significant developments as it contributes to companies' economic growth. In this way, existing and emerging technologies play an important role in businesses. Companies must prepare for an instantaneous transition alongside technological changes engulfing the world of work. Also, we cannot only rely on the government to reskill people in the face of rapid technological change and automation; businesses will have to drive this movement.[1148]

According to Kochan, firms must introduce a new technological process to compete successfully in international markets.[1149] Therefore, emerging and new process technologies will be required to enable improved contacts, scaled and future devices and interconnects monolithic 3D integration, and new computing architectures.[1150] Emerging technologies refer to various current developing technologies and can include a build-up on existing technologies.

[1147] Ibid.
[1148] Harry Hummels 'Responsible leadership is inclusive leadership' (2017), *Stanford Social Innovation Review* available at *https://ssir.org/articles/entry/responsible_leadership_is_inclusive_leadership, accessed on* 09 September 2021.
[1149] Verma, Anil, Thomas A Kochan & Russell Lansbury *et al Employment Relations in the Growing Asian Economies* (1995).
[1150] Clark *et al* 'Perspective: New process technologies required for future devices and scaling' (2018) *6 APL Mater.*

It is usually reserved for technologies that create or are expected to create significant social or economic effects.[1151]

To gain from the opportunities presented by these changes, companies need to collectively engage with various stakeholders to negotiate effective ways to use such opportunities to sustain the business. This may also be helpful in that such engagements may open platforms to address the challenges that negatively affect the future of work. These engagements are critical in that they can positively contribute to the development and success of the business. This is so because a company does not operate independently: it is tied to various stakeholders. As much as the benefits accrued in a company can be shared with various stakeholders, its company growth and development depend on those stakeholders.

The need for collective bargaining has emerged, most specifically perpetrated by Covid-19 and technology usage in business. Many workers have lost their jobs, and the need for safety rules to be implemented in the workplace are some of the things that remain necessary. This denotes that, from time to time, companies must respond to challenges that may either build or break the business. In so doing, companies need to use various worker support initiatives to ensure that, while the company benefits from technological advancements, workers are also given the opportunities to develop their skills to remain relevant in the changing world of work.

Employment security is crucial in the development of a company in that it generally benefits both employers and employees. An employer that offers development opportunities to its employees tends to benefit from these initiatives. For example, employees will need various skills to progress and be flexible in the changing world of work. As noted above, the South African government provides various skills development for both workers and prospective workers through internships, learnerships, and traineeships.

Companies may also facilitate these initiatives by training the current workforce to absorb the necessary skills. The future of work that benefits all depend on such initiatives. These initiatives are relevant for employment security, businesses' sustainability, poverty alleviation,

[1151] Winston & Strawn LLP *What Is the Definition Emergency Technology?* available at *https://www.winston.com/en/legal-glossary/emerging-technology.html*, accessed on 15 July 2021.

reduction, and economic growth. According to Collins, employers and employees will benefit from such initiatives in this way:

> For the employer, this commitment is a crucial long-term strategy for improving competitiveness by means of investment in human capital… for employees, this commitment to training is an essential component to the promise of employment security and employability that replaces the earlier commitment to job security. Default rules that reflected such an economic model would require the employer to provide worthwhile training opportunities, including training in general skills, and require the employee to take up those opportunities.[1152]

The discussion above implies that, where such opportunities are made available to workers, the development and success of a business will be achieved. In turn, a business will continue being sustainable. To achieve this, reference can also be made from the *White Paper,* which points explicitly that businesses must be transparent about expected shifts in future demand for work and required skills, providing workers with enough lead time to develop the necessary new skills.[1153] This will aid in setting the gap of transition by workers.

In any case, what corporations do matters to all other stakeholders and the world at large.[1154] This is so because many benefits are generated when an existing company facilitates growth and contributes to the development of other things. Although this is not an exhaustive list, a sustainable company can contribute to tax payments, corporate social responsibility (CSR), the provision of customer services, payment of wages to employees, and payment of dividends to shareholders. To make sure that such vital contributions are still made at company levels, engagements are needed to address the challenges faced in the changing world of work and respond in ways that will benefit the country at large.

Brand also emphasises that social partners may do much without legislative intervention to improve collective bargaining in South Africa.[1155] New measures to deal with collective bargaining must be implemented. Therefore, when collective bargaining is based on mutual trust between social partners and designed to balance inclusiveness and flexibility, companies

[1152] Collins op cit note 1060 at 40.
[1153] World Economic Forum op cit note 1037 at 13.
[1154] Bryan T Horrigan '21st century corporate social Responsibility Trends: An emerging comparative body of law and regulation on corporate responsibility, governance, and sustainability' (2007) *Macquarie Journal of Business Law.*
[1155] Brand op cit note 920.

and workers will respond to demographic and technological change and adapt to the new world of work.[1156]

The study provides that, as a way to respond to these challenges, there is a need for solidarity and economic democracy.[1157] Economic democracy offers a more inclusive and fairer system for organizing society and the economy while contributing to resolving pressing current problems, from rising income and wealth inequality to how society deals with the environment and climate change. [1158] Furthermore, it should be noted that there is no single approach to what entails economic democracy. In this way, the decision-making process must be for the common good of all.

A business will achieve economic growth where every stakeholder's voice is considered in the decision-making process to develop a business. Considering the changing work arrangements, opportunities to upskill the current workforce can be granted through training programmes. Accordingly, employers need to make this happen by allowing their employees to develop themselves through learning and attaining relevant skills. Despite this, there is always one emerging challenge concerning the education and transition of prospective workers in the world of work.

There is a gap between content taught in higher education institutions and what employers expect in the world of work. Employers believe that graduates are readily active to take on any opportunity that will allow them to gain work experience. However, problems relating to the transition from education to work are observed in many jurisdictions, including South Africa.[1159] For example, graduates in Australia and the United States of America (USA) face the gap between theory and its practical application to work, known as the 'reality shock'.[1160]

[1156] Stefano Scarpetta 'OECD Director of Employment, Labour and Social Affairs, at the launch of the report in Berlin', available at https://www.oecd.org/employment/revamp-collective-bargaining-to-prevent-rising-labour-market-inequalities-in-rapidly-changing-world-of-work.htm, accessed on 19 February 2020.
[1157] Supiot op cit note 1079 at 124. For a detailed version on this principles, read pages 124-134. The implementation of these principles falls within the constitutional missions of the ILO.
[1158] Marko Sarajevo 'An Introduction to Economic Democracy: Co-operatives as Drivers of Economic Growth' available at *http://library.fes.de/pdf-files/bueros/sarajevo/14879.pdf,* accessed on 22 January 2021.
[1159] Maake-Malatji M I 'The law and regulation of internships in South Africa' in Andrew Stewart, Rosemary Owens, Niall O'Higgins (eds) et al *Internships, Employability and the Search for Decent Work Experience* (2020).
[1160] Marlene Kramer *Reality Shock: Why Nurses Leave Nursing* (1974); Matthew D Ankers, Christopher A Barton & Yvonne K Parry 'A phenomenological exploration of graduate nurse transition to professional practice within a transition to practice program' (2018) 25 *Collegian* at 319, available at *https://www.collegianjournal.com/article/S1322-7696(17)30027-6/pdf,* accessed on 14 May 2019.

The ILO Global Commission has also reiterated this on the Future of Work by stating that transitioning from school to work is increasingly difficult.[1161] However, as noted above, in collaboration with businesses, the South African government addresses this gap by providing prospective workers and the current labour with internships, learnerships, and traineeships opportunities.

Among the factors that impede developing cooperative labour-management relationships in governments are existing legal frameworks limiting bargainable issues and union leaders' resistance to change.[1162] It is submitted that there is no future of work without technology. Hence, the world of work is shifting, and collective bargaining in industrial relations needs to be re-evaluated to continue being appropriate. Collective bargaining for employees has both a protective and distributive function. Broadly, as a protective function, it ensures adequate pay, establishes limits on daily and weekly working time; regulates other working conditions for those with weak individual negotiating power; provides for a voice, and as a distributive function, ensures that employees secure a fair share of the benefits of training, technology, and productivity growth.[1163]

For workers to enjoy these benefits, there is a need for effective and skilled negotiators familiar with the developing trends in the labour markets. This is required for effective negotiations and representation of workers' interests. The duty to find ways to respond to technological changes is not only vested in businesses. Trade unions also play a vital role in representing the interests of the workers through collective bargaining. Trade unions foster employees' collective voice through representation.

There is an emerging need to look at the future of work within the landscape of the marginalised. It all has to start here by recognising the stakeholder that tends to lose the most if we allow changes to happen but do not change our current situation to offer support for those suffering the most. Labour unions must prioritize the longer-term protection of employment

[1161] ILO, Global Commission on the Future of Work (Issue Brief No 2, 17 February 2018).
[1162] M Thompson & J Fryer 'Changing roles for employers and unions in the public service' in Evert A Linquist & Kenneth A Rasmussen(eds) *Government Restructuring and the Career Public Service in Canada* (2000), at 41–67.
[1163] Visser op cit note 709 at 2. This is reiterated in OECD countries in that collective bargaining and workers' voice aims at ensuring adequate conditions of employment (protective function), a fair share of the benefits of training, technology and productive growth (inclusive function) and social peace (conflict management function) (OECD 'Collective bargaining in a changing world of work' in OECD Employment Outlook (2017) OECD Publishing. Available at https://doi.org/10.1787/empl_outlook-2017-8-en, accessed on 19 February 2020).

over the short-term protection of jobs, with mechanisms that support the right balance between flexibility and security.[1164]

The preceding chapter has established that trade unions are essential institutions that focus on protecting and advancing their members' interests in the workplace. To shape the future of work, trade unions also need to engage with other social institutions to foster the interests of their member, which will at a later stage also benefit future workers. To succeed in adopting workplace innovations and sustain workers in unionised workplaces, the union needs to include meaningful participation.[1165] Hence, trade unions play an essential role in society, and it is in the workplace that their role can be observed.

This implies that trade unions can be instruments of change.[1166] They can still facilitate the necessary change in this changing world of work for the viability and sustainability of corporations. Thus, while negotiating for better working conditions and other terms of employment, they can assist in finding innovative ways in which employers and employees may benefit from the collective relationship, which may benefit the broader society.

Furthermore, the voice of employees becomes more audible when addressing political injustices rooted behind that voice. Therefore, allowing employees to have a collective voice on the changes that may affect their social, cultural, and economic life may result in the reinvention of good working relations. Employees may transition easily and adapt to these changes. In this way, employees may easily change their frame of reference about technology and work on ways to upskill themselves to remain relevant. Thus, employees need support to be optimistic about these technological advances.

It has been found in the US that, where employees voice is given preference in important labor issues, the general stability of the business is increased.[1167] Employees cannot improve their

[1164] World Economic Forum op cit note 1037 at13.
[1165] Thomas A Kochan & Paul Osterman '*The Mutual* Gains Enterprise: Forging A Winning Partnership *Among Labor, Management, And Government* (1994) at 105.
[1166] Anil Verma 'What do unions do to the workplace? Union effects on management and HRM policies' (2005) 26 *Journal of Labor Research* at 415–449
[1167] Available at *https://employment.findlaw.com/wages-and-benefits/collective-bargaining-process-overview.html*, accessed on 19 February 2020.

lives without gaining an effectual collective voice that will shape their world.[1168] It has also been noted in Europe that giving employees a voice is the only way to address inequality.[1169] The responsibility for tackling inequalities in the workplace lies in the hands of all.

In contrast, economists in the US contend that markets can work better without trade unions or even state monopolies. This is because it is believed that trade unions weaken workers' negotiating power and capacity to organise, partly explaining why salaries are falling.[1170] In this way, they are destroying the structures that help workers make pay rises a priority.[1171] Moreover, Verma and Kochan posit that union membership and collective bargaining in some countries have dramatically declined.[1172] However, it is argued that, although employers can do without collective bargaining, engaging in this process is essential for employees.[1173]
The state of collective bargaining in OECD countries has also been under scrutiny. There has been a significant decline in the collective agreements and the share of workers who are trade union members.[1174] Consequently, increases in different forms of non-standard employment in several countries pose a challenge to collective bargaining, as non-standard workers are under-represented by trade unions.[1175] However, collective bargaining and workers' voices play a crucial role in many OECD countries' labour markets.[1176]

Furthermore, collective bargaining and workers' voice remain important and flexible instruments that should be mobilised to help workers and companies face the transition and ensure an inclusive and prosperous future of work.[1177] Therefore, the role of collective bargaining in articulating, pressing demands for higher wages, representing the collective

[1168] Sarita Gupta, Stephen Lerner, & Joseph A. McCartin '*It's Not the "Future of Work" It's the Future of Workers That's in Doubt*', available at *https://prospect.org/labor/future-work-future-workers-doubt/*, accessed on 19 February 2020.
[1169] Gaby Bischoff MEP, former president of the Economic and Social Committee at the *industriAll Europe* Campaign launch event 26/09/2019, available at *https://news.industriall-europe.eu/Article/367* , accessed on 19 February 2020.
[1170] Cathy Feingold 'US public employees mobilise as Supreme Court weighs union rights' *Equal Times* 26 February 2018, available at *https://www.equaltimes.org/us-public-employees-mobilise-as#.XpaKqPgzZPa,* accessed on 15 April 2020.
[1171] Available at https://employment.findlaw.com/wages-and-benefits/collective-bargaining-process-overview.html, accessed 19 February 2020
[1172] It is evident that there has been a decline in union membership around the world in the latter half of the 20th century. See A Verma & T A Kochan 'Unions in the 21st century: Prospects for renewal' in A Verma & T A Kochan (eds) *Unions in the 21st Century* (2004).
[1173] D' D'Arcy du Toit, 2007 *ILJ* at 1411.
[1174] Cazes, Garnero, Martin et al op cit note 2.
[1175] Ibid.
[1176] Ibid.
[1177] Ibid.

interests of workers, facilitating an exchange between workers and their employers on various aspects of the working life is important.[1178] Similarly, collective agreements can be flexible tools to address the challenges faced today and in the future.[1179]

Although the study does not provide any dissertation on workplace forums, it is essential to note that one of the aims of workplace forums is to grant employees a voice in the workplace regarding production issues.[1180] These forums operate as a complement to collective bargaining. In this changing world of work, they are crucial as they are also designed to deal with non-wage issues such as changes in the organisation of work, restructuring, the introduction of new technologies and work methods, health, and safety at work.[1181] These realities are meant to be creative and grow sustainable companies.

Visser, Hayter & Gammarano hold that the stability and increase in collective bargaining coverage depend on the strategies of the social partners and government policies that support collective bargaining.[1182] The South African labour movement has retained a significant following political clout and is a source of inspiration to labour activists worldwide.[1183]

The institution of collective bargaining in the South African labour market continues to be affected and threatened by a lack of organisational negotiation skills. An example can be drawn from the Marikana tragedy. The Marikana tragedy is one reminder that trade unions and employers failed to show their negotiation skills and tackle the plague of strike violence. This has led employers to suggest the need to curtail the right to strike, while sections of the labour movement have responded defensively, arguing that the right to strike is under threat.[1184]

[1178] Freeman & Medoff op cit note 70.
[1179] Cazes, Garnero, Martin et al op cit note 2.
[1180] Slabbert et al op cit NOTE 1013 at 5-25. See also F Steadman 'Workplace forums in South Africa: A critical analysis' 2004 *ILJ* at 1171.
[1181] Botha op cit note 5 at 1–34.
[1182] Visser, Hayter & Gammarano op cit note 35 at 1.
[1183] Geoffrey Wood 'Negating or affirming the organising model? The Case of the Congress of South African Trade Unions' in Anil Verma & T.A Kochan (eds) *Unions in the 21st Century* (2004).
[1184] The Congress of South African Trade Unions' (COSATU) research arm, the National Labour and Economic Development Institute (NALEDI) held a workshop on 10 September 2014 on the right to strike. One of the presenters argued that the right to strike was under threat because of the demand by some employers to reintroduce into the LRA the requirement that unions undertake a secret ballot before embarking on a strike. Currently, unions are required to include balloting in their constitutions, and the Department of Labour recently sent letters to unions asking how they were dealing with this requirement. Irvin Jim, general secretary of the National Union of Metalworkers of South Africa (NUMSA), saw this as an 'attack on workers' right to strike' (quoted in Marrian (2014) at 3. Another potential erosion of the right to strike is declaring large numbers of economic activities as 'essential services' through the National Key Points Act and restricting protests through the Regulation of Gatherings Act of 1993.

The aftermath of the Marikana massacre and other violent strikes in South Africa have proven the need for negotiation skills.[1185] Where collective bargaining fails, various issues may stem from the incompetence of negotiators. Amongst other vital aspects pertaining to the changing world of work is innovation. There is a need to change the scene regarding education and training for negotiators. Thus, labour movements need to heed this to survive the challenges discussed in the previous chapter. Kochan also posits that:

> Union leaders need to articulate a positive vision and strategy for their role in society and for how a rebuilt and innovative labor movement can help build and supply the labor force as well as the employment conditions needed to close the jobs deficit and to get wages and other conditions of work moving in a positive direction.[1186]

Like any form of negotiation, collective bargaining requires skilled negotiators with expertise in conflict resolution. It can be speculated that the absence of negotiating skills is one of the reasons why negotiations fail. Even the industry has realised that labour negotiations may make or break the company.[1187] It is also evident that the time taken to prepare for collective bargaining may also impact the production of the business.

The importance of the South African labour organisations and their influence during the apartheid era in the newly democratic country is undoubtedly appraised. However, there is a need to adhere to the changes and features of labour in the current state. The trade union must meet the needs of a knowledge-based workforce and economy and serve as a driving force and champion for innovation.[1188] Item 8(1) of the Code of Good Practice also provides for the development and preparation of negotiators.[1189] This is a commitment to developing competent negotiators to engage in collective bargaining. In addition, training courses should be developed to advance the negotiators' skills. This implies that employees will need appropriate skills to remain relevant in the changing world of work, and labour organisations also need to acquire negotiating skills. This is so because employees' representation depends on well-organised trade unions with effective leadership and negotiation skills.

[1185] For effective negotiations skills, see Luanne Kelchner 'Top ten effective negotiation skills' (2019), available at *https://smallbusiness.chron.com/top-ten-effective-negotiation-skills-31534.html*, accessed on 17 June 2020. Although this is not an exhaustive list, the later talks on preparation for negotiations, problem analysis to identify interests and goals, the need for active listening skills, clear and effective communication and keeping emotions in check.

[1186] Thomas A Kochan 'The American jobs crisis and its implication for the future of employment policy: A call for a new jobs compact' (2013) 66(2) *ILR Review*.

[1187] Wilson Randle *Collective Bargaining Principles and Practices* (1951).

[1188] Kochan op cit note 1186.

[1189] Code op cit note 138.

Until this gap is addressed, negotiations will likely fail, the high rate of strikes will grow, and violence will still be exercised to achieve desired goals. Accordingly, union power needs resources and capabilities to foster the renewal of its capacity to increase, activate, and represent its membership successfully.[1190]

Botha also contends that the current state of collective bargaining and employment relations in South Africa boils down to poor leadership and management.[1191] Collective bargaining in South Africa has been underlined by the legacy of deep 'adversarialism' between employers and organised labour.[1192] This is so because of the quality of bargaining across both the private and public sectors and the lack of trust between the parties, with no real dialogue on the shop floor between line management and employees on how to influence business outcomes.[1193]

This traditional adversarial relationship between unions and management is no longer viable in today's competitive environment.[1194] There is a need for regular communication and interaction between employers, employees, and representative organisations on the challenges that may affect the future of work. Productive cooperation encompasses features of commitment by management to bilateral communication, workers' willingness to share information, management's willingness to delegate decision-making authority to workers, and workers' willingness and motivation to improve the firm's performance.[1195]

This is so because nothing can serve as an alternative to social dialogue, collective agreements and employees' voices.[1196] In the world of work that is akin to change, there is a need for social partners to work closely with each other to find ways to sustain their businesses through

[1190] Webster op cit note 883 at 139.
[1191] Botha op cit note 5 at 1-34.
[1192] Darcy du Toit Darcy Du Toit op cit note 20 *ILJ* 1544.
[1193] Botha op cit note 5 at 1-34.
[1194] Kennedy Brenda L. (Brenda Louise) 'Interest-based collective bargaining: a success story' *IRC Press Industrial Relations Centre Queen's University Kingston*, ON K7L 3N6.
[1195] Tayo Fashoyin, Emily Sims & Arturo Tolentino Labour-*management cooperation in SMEs: Forms and factors* (2006).
[1196] Anna Byhovskaya 'Collective bargaining and social dialogue: part of the solution', available at https://www.socialeurope.eu/collective-bargaining-and-social-dialogue-part-of-the-solution, accessed on 19 February 2020. See also International Labour Office 'The impact of social dialogue and collective bargaining on working conditions in SMEs' (2018). Anna Byhovskaya 'Collective bargaining and social dialogue: part of the solution', available at https://www.socialeurope.eu/collective-bargaining-and-social-dialogue-part-of-the-solution, accessed on 19 February 2020.

negotiations. In the end, this aims to decrease the high unemployment rate and inform social partners of the required growing skills.

It is against this background that, to respond to these changes, there is a need for committed actions between employers, employees (together with their representative organisations) and governments. This will strengthen the social contract between these parties. A social contract is an implicit arrangement that defines the relationship between the government and citizens, between labour and capital, or between different groups of the population.[1197] It is a way of achieving social justice. The effectiveness and relevance of the social contract depend on how it can adapt to new economic, social, and political realities.[1198]

5.6. Conclusion

It is against this background that the author stresses making new technologies a subject of collective bargaining. This is the case because new technologies have a huge impact on sectors instead of just workplaces. Also, less literature and judicial precedents supporting the role of new technologies in the changing world of work. The same can be said about education and training in the workplace, as provided in section 84(1)*(i)* of the LRA. In this way, collective bargaining can operate to address new technological changes and provide ways to respond to such changes.

Furthermore, it can be seen from the above discussion that the future of work can only be shaped where businesses, workers, governments, and educational leaders work together.[1199] While some changes pose a threat to the future of work, it is evident that there are emerging opportunities beneficial to all. In this way, we can see the importance of skills development, education and training. To win the battle against the challenges posed by technology, employers need to upskill the labour force as a way of developing them through training. This will enable employees to remain relevant in the changing world of work.

[1197] See a note on contributions from Christina Behrendt, Isabel Ortiz, Emmanuel Julien et al Social Contract and the future of work: Inequality, income security, labour relations and social dialogue' in International Labour Organization *The Future of Work Centenary Initiative* [2015].
[1198] Ibid.
[1199] Thomas A Kochan *Shaping the Future of Work: What Future Worker, Business, Government, and Education Leaders Need to Do for All to Prosper* 1 ed (2016).

Chapter 6: Conclusion and recommendations

6.1 Introduction

The thesis consists of six chapters dealing with collective bargaining as a feature for business sustainability. These chapters provide for ways in which collective bargaining contributes to business sustainability. They provide the general introduction of the study, outline various theoretical contentions in support and against the implementation of good faith bargaining, make a comparative analysis of the laws regulating good faith bargaining, discuss various interests of parties to a business and outline the role of technology in the future of work.

The thesis has established that conflict is inevitable in employment relations. It is, nevertheless, submitted that collective bargaining recognises joint decision-making and acts as a tool for dispute resolution. This thesis has examined how collective bargaining contributes to business sustainability to lead the future of work that benefits all. In achieving this, the study has highlighted numerous ways business sustainability can be achieved through collective bargaining. This contribution can be seen in applying good faith bargaining principles while recognising and reconciling parties' conflicting interests and responding swiftly to the technological changes in the world of work.

It is against this background that it is evident that there is a shortage of scholarship on the topic of collective bargaining as a mechanism of business sustainability. This study filled this gap by providing insights on the importance of collective bargaining through its contribution to economic growth, development of business productivity, alleviation of the high unemployment rate, poverty reduction, and employment security. All of these features are tied to the overall existence of a company. At a foundational level, a business must be viable to contribute to the realisation of these opportunities. This study aimed to investigate several ways collective bargaining can be refined to support and contribute to sustainable corporations in the changing world of work. The thesis was based on the following objectives:

a). To describe several factors that influenced the emergence of good faith bargaining principles;

b). Concerning the above, to draw a comparative analysis on good faith bargaining laws to provide lessons for South Africa;

c). To examine the impact of recognising the parties conflicting interests in negotiations; and

d). To contribute to the theoretical discourse on the role of collective bargaining and technology in the changing world of work.

The findings from this study provide a better understanding of the institution of collective bargaining in the changing world of work. In this way, the findings below denote how collective bargaining contributes to business sustainability.

6.2. Key findings

Collective bargaining plays a vital role in the sustainability of a business. To illustrate this point, Chapter 1 of the study has shown that opportunities for constructive dialogue can be seen through freedom of association and the exercise of collective bargaining. In this way, they enable and harness energy to focus on solutions that benefit the enterprise, its stakeholders, and society.[1200] Reliance had been made on the essential findings and the thesis analysis.

Relying on the context above, Chapter 1 framed the question: How can collective bargaining support corporations' viability and employment security in the changing world of work? To determine the role of collective bargaining and its contribution to business sustainability, the thesis has interrogated the need to apply good faith bargaining principles, recognise and reconcile parties' conflicting interests, and respond swiftly to the technological changes in the world of work. The thesis is grounded on these key findings.

Chapter 1 of the study has confirmed that collective bargaining in South Africa is a borrowed concept. It has been used in other countries and copied into the national legislation to determine employment terms and conditions. As seen in Chapter 3 of this thesis, South Africa continues to draw lessons from other countries in developing laws concerning collective bargaining.

In addition, good faith bargaining principles contribute to the viability of the business. In this way, Chapter 2 highlighted various conflicting theoretical contentions that supported and were against the imposition of the duty to bargain in good faith. Without a doubt, collective bargaining in South Africa was mandatory during the era of the Industrial Court. The duty to bargain derived from the broad unfair labour practice jurisdiction under the Labour Relations

[1200] International Labour Organization *Q&As on Business and Collective Bargaining* (1960), available at *https://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_CB_FAQ_EN/lang--en/index.htm#Q1*, accessed on 24 February 2020.

Act, 1956. This also perpetrated the emergence of the duty to bargain in good faith. However, the duty to bargain was effectively removed when the 1996 LRA came into operation.

Furthermore, the study proved that various researchers and authors had seen the need to impose a duty to bargain in good faith even though collective bargaining in South Africa is voluntary. Due to this, two schools of thought emerged in support and against a judicial duty to bargain in good faith. In the end, discussions surrounding these contentions proved that the greatest net benefit from collective bargaining could be obtained when a system is in place that promotes good faith bargaining and the efficient enforcement of collective agreements.[1201]

Drawing from the contentions in Chapter 2, the thesis provided a comparative analysis of the good faith bargaining requirements from New Zealand and the USA to provide lessons for South Africa in Chapter 3. The study provided a clear view of the comparative countries' law regarding good faith bargaining. Unlike New Zealand and the USA, collective bargaining in South Africa is not judicially imposed on the parties, and neither is good faith bargaining. However, South Africa has guiding principles for good faith bargaining.

The comparative analysis proved that good faith bargaining assists in dealing with intransigent parties. This is so because the likelihood of parties acting in good faith in the absence of the duty is far-fetched. Evidence in support of this contention has been provided in the study. Thus, even when eloquent facts are made, this may be disregarded simply because every party pushes their motives. The result of this may have detrimental effects on all parties, including the business.

In addition, good faith bargaining has benefits for all stakeholders. Where good faith is applicable, industrial disputes will be resolved amicably and in a way that promotes the conclusion of mutually collective agreements. Similarly, this will result in a more significant public benefit, secure the economy, sustain corporations, and ensure trustworthy and reliable production outcomes with the potential to unlock economic development. As a way of business sustainability, good faith bargaining benefits companies in alleviating challenges that follow failed negotiations. In this way, it acts as a foundation for employment security and recognises and considers parties' interests.

[1201] Dau-Schmidt KG, Harris SD & Lobel O *Labor and Employment Law and Economies* 2 ed (2009).

Therefore, it must be acknowledged that good faith will require contracting parties to show respect for the other party's legitimate interests.[1202] Although bargaining in South African industrial relations remains voluntary, the need to consider good faith in negotiations remains unavoidable and should always be stressed. In the latter's absence, productivity may be affected, employment threatened, and the business may cease to operate.

By looking into these countries' regulatory frameworks on good faith bargaining, it can be seen that good faith in negotiations has yielded positive results. However, it is not without criticism. Furthermore, the study has demonstrated that parties to negotiations may use good faith as a concept of making unreasonable demands. In some cases, trade union members have filed charges for unfair labor practices before negotiations even start when parties cannot agree on location, time, and dates.[1203] Consequently, when disagreements emerge, the union will file charges of bad faith against the employer. South Africa is yet to learn from these experiences as it only provides guiding principles for good faith bargaining because collective bargaining remains voluntary.

Furthermore, South Africa moved from the setting where collective bargaining operated under militancy to a position where bargaining must be conducted in good faith. From the chapters discussed above, it is clear that this past aggressive or violent behaviour is still in force; hence, good faith bargaining was needed. The level of trust of the parties in collective bargaining is one reason for the need to conduct negotiations in good faith. In the end, this combat chances of strike and other ramifications tied to strike, which can negatively impact a business.

One other issue is that when collective agreements lapse, their subject matter becomes open for negotiations once again. This denotes that the bargaining cycle will have to commence again. The chapter also provided various lessons that can be captured from the two comparative countries. In this way, we learn that although good faith bargaining has been an important subject, its application is still problematic. However, whether imposed or not, the study noted that it should be taken as a norm. In so doing, it will be used as a tool to alleviate consequences

[1202] G Lubbe 'Bona fides, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg' (1990) at 11. See also R Zimmerman 'Good faith and equity in modern Roman-Dutch law' in Reinhardt Zimmerman and Daniel Visser (eds) *Southern Cross: Civil and Common Law in South Africa* (1996) at 259–260.
[1203] UpCounsel op cit note 217.

following failed negotiations. In addition, the concept of good faith bargaining makes us realise that though tensions and/or conflicts are part of industrial relations, negotiating in good faith redress and/or will help in the resolution. More so, it will also assist the judiciary with the burden of proving cases of bad faith. Thus, if parties are obliged to bargain in good faith, the burden of proving bad faith in negotiation will be lesser.

Collective bargaining cannot operate without emerging interests, as seen in the study in which Chapter 4 examined common and conflicting interests of the parties and their role in business sustainability. The thesis has shown that to alleviate consequences following failed negotiations, parties to collective bargaining must consider and reconcile such interests. Thus, collective bargaining entails the reconciliation of parties' conflictual interests to accommodate each other.

Furthermore, the thesis further showed that collective bargaining plays a pivotal role in industrial relations and cannot be replaced. Thus, the future of work relies on it to address the parties' disputes of interest. While assisting employees with regulation and provision of employment conditions, it also assists employers in balancing such to continue production. Thus, whereas employers are keen on operation, production, and profits, employees are keen on providing salaries for services offered for long life and satisfying their human needs. To acquire this, the need for collective bargaining will occasionally emerge.

As part of understanding the role of collective bargaining in industrial relations, the chapter showed its adequate links tied to the recognition and commitment to the thought that all stakeholders' interests play a pivotal role in sustaining organisations, representation, making profits and preserving employment. However, the study has shown that balancing these interests is no easy task. Trade unions and employers continue to face challenges in ensuring that their respective interests are protected. Moreover, the current legislative framework regarding strikes fails to find the proper balance between all the parties respective interests.[1204] Currently, there is a need for interest-based bargaining in workplace negotiations.

[1204] Selala KJ 'The Right to Strike and the Future of Collective Bargaining in South Africa: An Exploratory Analysis' (2014) *International Journal of Social Sciences* III (5), pp. 125.

Parties must employ a collaborative negotiation technique, which assumes that, although parties possess conflicting interests, the fundamental interests of labour and management are complementary.[1205] This method of bargaining focuses on the goal of all winning. Therefore, to meet their individual goals, these parties must consider the reality that they are dependent on each other. While these individual goals are essential, the ultimate achievement of such must not be through the disruption of the organisation.[1206] Similarly, employees must be familiar with how production functions and employers must be able to determine what constitutes employees' satisfiers or needs. This will assist in maintaining good relations between the parties.

Furthermore, the study proved that collective bargaining had been presented as one of the models of workplace governance and its adversarial nature. Therefore, it is without a doubt that employers and employees possess different bargaining powers; consequently, employees are at the mercy of their employers. Employers are the controlling force in an individual employment relationship; likewise, this manifests even when employees act collectively. If employees are not allowed to associate and act collectively, the unequal bargaining position between the employer and employees will remain.[1207]

Chapter 4 of the thesis has observed the need for preserving the peace and sustenance of an enterprise, considering factors that may be detrimental or hamper the existence of an employment relationship. However, it has been seen that the process is frequently conducted as a zero-sum and win-lose negotiation process. This has happened even in circumstances where the negotiation counterparts would benefit significantly from the kind of collaboration and cooperation that will enable win-win outcomes.[1208] This may arise simply because the process between labour and management in the labour relations system is characterised by an urgency to decide because of social, economic, and legal pressures.[1209] An outcome of this nature may have long-term effects.

[1205] Tustin C & D Geldenhuys *Labour relations: The psychology of conflict and negotiation* 2 ed (2002).
[1206] S Bendix *Industrial Relations in SA* (1996) at 255.
[1207] Olivier M 'A Charter for Fundamental Rights for South Africa: Implications for Labour Law and Industrial Relations' (1993), 658.
[1208] Heald op cit note 152.
[1209] Nel & Van Rooyen op cit note 152 at 165.

A need suffices for parties to bargain in good faith, considering their satisfiers. In the absence of this, parties are at liberty to profess their interests without considering the interest of other stakeholders. It may also happen that an agreement can be reached that does not satisfy the employer or the employees. The author emphasises that the parties must be able to treat each other as equals for successful negotiations. This entails that the sustenance of the business can be achieved where parties consider their counterparts' interests, which assists with the dilemmas surrounding the power imbalance between employers and employees.

Looking into the success of collective bargaining, the final analysis of this process is that the conflicting interests of labour and the employer must be reconciled with the good and survival of the enterprise.[1210] The study has proven that this also depends on the parties' willingness to compromise. This is a vital requirement of collective bargaining.

The future of work can only be shaped where businesses, workers, governments, and educational leaders work together.[1211] The author posits that the future of work depends on multiple stakeholders' constant engagements on matters that play a role in the workplace. In this way, chapter 5 of the thesis integrated digitisation and the role that collective bargaining can play in that regard. This is so because collective bargaining pays more attention to issues that arise within the sector. Hence, the author recommends that changes in the world of work concerning technology should be made a subject of collective bargaining. Technology does not only affect individual workplaces but most sectors. Examples of this have been given in chapter 5, which includes the transport sector and banking institutions.

In this way, we see the importance of collective bargaining in anticipating potential problems, advancing peaceful mechanisms for dealing with them, and finding solutions that consider the priorities and needs of both employers and workers.[1212]

Furthermore, chapter 5 proved that positive effects might result when unions are allowed to bargain over technological changes. By looking into the advantages and disadvantages,

[1210] Anstey et al op cit note 152.
[1211] Thomas A. Kochan *Shaping the Future of Work: What Future Worker, Business, Government, and Education Leaders Need to Do for All to Prosper* 1ed (2016).
[1212] *International Labour Organization* (ILO), Q&As on business and collective bargaining, available at https://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_CB_FAQ_EN/lang--en/index.htm#Q1, accessed on 24 February 2020.

employers and employees can constantly negotiate terms and conditions of employment that positively contribute to business sustainability. The study proved that more jobs would be created, although other jobs would be displaced. In this way, we also see the importance of skills development in the changing world of work. Thus, through education and training, employees may be able to upskill themselves.

The trick lies in assisting the current workforce in acquiring relevant skills that can be used in this technologically inclined world of work. On the one hand, companies must assist the current workforce by providing opportunities for training and learning. On the other hand, employees must be ready and willing to make use of such opportunities. In addition, educational institutions play a vital role in providing lifelong learning and creating a knowledgeable society. This will enable future employees to acquire relevant knowledge that can be used in the changing world of work and allow them to be flexible.

The role of the government in providing opportunities for skills development has been seen. In this way, both prospective employees and current employees may benefit from such opportunities even though they possess any educational background or not. Moreover, the study showed that the government has various programmes supporting the development of the labour force and creating employment.

6.3 Recommendations

6.3.1 Policy recommendations

The study has indicated that when collective bargaining fails, there are high chances of employees exercising their right to strike. In response to this, an employer may exercise its recourse to lock-out, which, in turn, can frustrate employees. In this way, employees would exacerbate things by engaging in violent behaviour during the strike, which has detrimental effects. The author recommends that strike violence should be outlawed. Thus, there must be a legislative framework regulating strike violence in South Africa.

The study has shown that exercising the right to strike in South Africa often results in violence. This also has a significant impact on the economy and the development and creation of wealth. This is due to the interdependence of all stakeholders in the sharing and existence of these organisations. Consequently, strikes characterised by violence and the unruly behaviour of

strikers are detrimental to the legal foundations upon which labour relations in this country are founded.[1213] However, it has been argued that the avoidable denial of access to resources constitutes violence.[1214] As discussed above, recognising parties' conflicting interests and good faith in negotiations are crucial.

Although strikes have reaped positive results for employees in the past, the violent nature challenges the exercise of this right. Political and social change in South Africa has been crucially shaped by large-scale strikes that have often taken a violent form.[1215] For example, as discussed above, one may look into the 1922 white mineworkers' strike, which took the country to the brink of civil war, claimed 153 people's lives, left 687 injured, and resulted in the execution of four men. Again, the 1946 African mineworkers strike and the mass strike of black workers cannot be forgotten. All these strikes ensued during the pre-democracy period, when employees did not have the right to engage in industrial action, as is now provided in s 23 of the Constitution. These strikes laid a foundation for the modern labour movement, and unions were established following these strikes in South Africa. However, the settings have changed, and no violence should be used as it negatively affects a business. Furthermore, when a business is affected, its effects will extensively be felt by all stakeholders.

The need to outlaw strikes accompanied by violence is supported by the ramifications following the strike, such as dismissal, no work- no pay, loss in production, and trade union liability for the members' illegal conduct. The Marikana tragedy is one reminder of the attempt by labour and employers to tackle this plague, yet they failed to do so. While employers have suggested the need to curtail the right to strike, sections of the labour movement have responded defensively, arguing that the right to strike is threatened.[1216]

Violence has proven to be a valuable means of achieving acceptable results.[1217] However, it is submitted that sustainable industrial relations should be the main focus. The right to strike must be seen in the context of a right that is protected from redressing the inequality in social and economic power in employer/employee relations. Employees resort to strike action to inflict

[1213] Mlungisi op cit note 881.
[1214] Tembeka Ngcukaitobi 'Strike law, structural violence and inequality in the platinum hills of Marikana' (2013) 34 *I LJ* at 836.
[1215] Webster op cit 883.
[1216] Op cit note 1184.
[1217] Freund, Le Roux & Thompson *Current Labour Law* (2012) cit note 814.

economic harm on their employers so that the latter will accede to their demands. However, lawlessness should not be allowed to infiltrate and pollute the right to strike. Accordingly, although the right to strike is an essential tool for employees during collective bargaining, they should not abuse and misuse it through acts of violence.

Trade unions also need to play a role in alleviating strike-related violence. Thus, labour unions must ensure that their members conduct themselves properly during strikes, whether protected or not.[1218]

6.3.2 Prerogative measures: Organisational plan for the increase in wages

The study showed that both employers and employees have conflicting interests in the business. Employers seek to increase profits, and employees seek substantial compensation for their rendered services. Due to these conflicting economic factors, the author recommends that companies must implement prerogative measures through organisational plans to increase salaries. This is also tied to employees' knowledge of how to improve production for business sustainability. Thus, employees may not require salary increases when it is not possible for the company to provide such.

The wage increase is a critical aspect of safeguarding the labour force. The author posits that salary increases boost employees' morale. In addition, employees that are compensated well and receive a timeous salary increase may stay with their employers for the longest time. This has a way of encouraging employees to work hard. Therefore, employers need to give their employees salary increases regularly to show that the employer appreciates and values them.

Furthermore, for a business to develop and increase production, it must also be making some profits because organisation will cease to exist without profits. Therefore, companies need to draw collective agreements that support the initiative of salary increases in relation to profit margins. A profit margin shows the profitability of a product, service, or business and is the percentage of revenue that is left after all associated expenses have been deducted.[1219] An organisational plan for an increase in wages builds good relations in workplaces by affording

[1218] Manamela & Budeli op cit note 966.
[1219] Sarah Johnson *What is Profit Margin? A Simple Introduction* 25 February 2020, available at *https://bench.co/blog/accounting/profit-margin/*, accessed on 29 July 2020.

or meeting the interests of both parties. Thus, where profits are made, employees may have a share in them.

6.3.3 Future research

The study confirmed complexities that may still be faced in the world of work and may affect the future of work. This denotes that more research is needed to provide knowledge on other aspects that may contribute to developing businesses and employment security which are exceptionally vital. As noted above, the findings have proved that collective bargaining influences business sustainability. More carefully designed studies are required to examine the role that collective bargaining can play in the changing world of work. For example, the emergence of Covid-19 has propelled the need for this research now that work arrangements are changing, and also because of the constant technological developments in the world of work.

This research may shed light on whether new technologies should be subject to collective bargaining. This is anticipated to assist in addressing the challenges employers and employees face in the changing world of work. In addition, opportunities presented may be employed in ways that assist in building productive businesses, contribute to the development of the economy, and provide employment security. In this instance, more empirical research is needed to explore questions such as:

(1) How can collective bargaining be used to address emerging technological developments that pose a threat to employment security?

(2) How can technology be used to advance businesses and employees?

(3) Which skills are regarded the most relevant in the changing world of work?

(4) How can businesses assist in developing the current labour force skills?

This further research is reserved for legal scholars and specialists and appropriate for interdisciplinary studies. Thus, various authors must be aware of what is happening concerning workplace technological advancements and how work arrangements are set to change in the future. This would be useful and will provide an understanding of the future of work and its effect on the current labour force. Moreover, this will assist in preparing future employees by attaining relevant skills needed in the world of work.

6.4 Concluding remarks

As noted in the thesis, the concept of collective bargaining is a broad area of study. However, the focus had been on collective bargaining as a feature of business sustainability and the future of work. There is evidence that the rationale behind collective bargaining is based on the fact that employers are in a greater position and possess more powers than employees. This confirms the need for power balance amongst parties to collective bargaining. Failure to confront this, the future of collective bargaining will be compromised.

In addition, unforeseen consequences may still be experienced, and the threat to production and employment becomes persistent. For example, when employees embark on a strike, the realisation that violence may ensue and dismissals may follow is not anticipated. Similarly, employers may not predict loss in production. Moreover, the impact of these consequences on the larger society and the economy must be considered. Therefore, parties to collective bargaining must adhere to the crucial role of collective bargaining in industrial relations as a mechanism for business sustainability.

The evidence also suggests that collective bargaining in industrial relations may promote equality in negotiations. Though not absolute, it will at least bestow the parties with equal status during negotiations. In this way, collective bargaining has served as the most feasible and mutually beneficial method of resolving basic and ongoing conflicts between the parties to the labour relationship.[1220] In conclusion, it appears reasonable to conclude that, based on the evidence given above, there is a need for innovative contributive mechanisms that can assist in redefining collective bargaining in South Africa, not to revolutionise it entirely but to cater to its purpose in the changing world of work.

[1220] Bendix op cit note 1206 at 255.

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