

The creation of a general duty to bargain in view of the SANDF judgements

by

Louis Krüger

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Study Supervisor: Prof P H Myburgh

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Summary

Section 23(5) of the Constitution entrenches trade unions, employer's organisations and employers' right to engage in collective bargaining. For employees, collective bargaining is the key which opens the door to better wages, improved working conditions and an overall better standard of living to name but a few. The Labour Relations Act was promulgated to give effect to section 23 of the Constitution. However, in section 2 of the Labour Relations Act, members of the South African National Defence Force were excluded from the ambit of the Labour Relations Act (LRA). After the Constitutional Court regarded members of the South African National Defence Force (SANDF) to be "workers", they also had the right to engage in collective bargaining. However, because of the special duty that the members of the SANDF have to fulfil namely to ensure the safety of the republic and its citizens, they are not awarded the right to strike. The question therefor is: How do the members of the SANDF compel the SANDF to bargain with them?

The aim of this study is to establish if a duty to bargain was implemented by Chapter XX of the General Regulations of the South African National Defence Force and the Reserve. Firstly, the new dispensation of voluntarism under the new LRA is examined to understand how collective bargaining would work in a normal situation and not that of the members of the SANDF. Freedom of association is also discussed. The reason for this was because members of the SANDF also have to right to associate with a trade union of their choice by sections 18 and 23(2) of the Constitution. Under the new LRA, organisational rights also play a major role in the bargaining process and afford trade unions more bargaining power.

The voluntarist approach followed by the new LRA effectively removed the duty to bargain from collective bargaining. As explained above, the special situation applicable to the SANDF and its members are not governed by the LRA and therefor a duty to bargain might still exist in this specific system of collective bargaining managed by the regulations. The duty to bargain is based on representativeness and good faith which are also examined in this study.

To establish if a duty to bargain was created by the courts, an examination of the judgements of the High Court, the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court reiterated that there is no legally enforceable duty to

bargain between the SANDF and the South African National Defence Union (SANDU).

If Chapter XX of the regulations is scrutinised, it can however be seen that there is an initial duty on the SANDF to bargain with a registered military trade union over matter set out in regulation 36 which include most if not all matters of mutual interest. Therefor it would seem that a duty to bargain is created by Chapter XX.

Keywords

Section 23(5); collective bargaining; South African National Defence Force; duty to bargain; voluntarism; freedom of association; matters of mutual interest; military trade union; South African National Defence Union.

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LIST OF ABBREVIATIONS

LRA	Labour Relations Act 66 of 1995
SANDF	South African National Defence Force
SANDU	South African National Defence Union
MBC	Military Bargaining Council
MAB	Military Arbitration Board
CCMA	Council for Conciliation, Mediation and Arbitration
SACCAWU	South African Commercial Catering & Allied Workers Union
MAWU	Metal & Allied Workers Union
UAMAWU	United Africa Motor & Allied Workers Union
SASJ	South African Society of Journalists
SAAN	South African Associated Newspaper Group of Companies
NLRB	National Labor Relations Board
NEIA	Natal Engineering Industrial Association
SEIFSA	Steel & Engineering Industries Federation of South Africa
FAWU	Food & Allied Workers Union
COSATU	Congress of South African Trade Unions
NACTU	National Council of Trade Unions
SACCOLA	South African Employers' Consultative Committee on Labour Affairs
ECCAWUSA	Entertainment Commercial Catering & Allied Workers Union
SAPS	South African Police Service
POPCRU	Police and Prisons Civil Rights Union

PSA	Public Service Act
MTU	Military Trade Union
NUM	National Union of Mineworkers
AMCU	The Association of Mineworkers and Construction Union

1 Introduction

The relationship between employer and employee has always been a bit of a strained one to say the least. Given the inequality of the relationship between an employee and employer, it is not difficult to understand why. Employers enjoy overwhelming financial backing and resources. For a single employee to go up against his/her employer and make demands such as wage increases or improved working conditions is unheard of. Employees acting solely will therefore have no impact on the employer; they cannot exercise any pressure on the employer to make their voices heard. On the other hand, employees working together will have a more substantial impact on the employer, making their plight heard. These are the basics of collective bargaining, putting the employer and employee on equal footing at the bargaining table.

With the promulgation of the *Constitution of the Republic of South Africa*¹ (hereafter the Constitution), a new era of labour relations was ushered in. The rights of employees were entrenched in Chapter 2 of the Constitution also called the Bill of Rights. Section 18 of the Constitution states that everyone has the right to freedom of association. In short, this means that every person may associate with an organisation of his/her choosing. In section 23 of the Constitution the rights pertaining to labour relations are entrenched. Here, workers' rights to form and join a trade union and participate in the activities of the trade union, such as to go on strike, are protected. Section 23(5) states that every trade union, employer's organisation and employer have the right to engage in collective bargaining. The *Labour Relations Act*² (hereafter the LRA) was promulgated to give effect to these rights mentioned above.

The LRA is the piece of legislation which controls and shapes the way collective bargaining is done in South Africa. The LRA is written in such a way that it creates a framework for collective bargaining to be done on a voluntary basis. Employers and employees are therefore not forced to bargain. Collective bargaining is also done privately which means that the judiciary cannot be involved with the outcome of the

1 *Constitution of the Republic of South Africa*, 1996.

2 *Labour Relations Act* 66 of 1995 (hereinafter the LRA).

bargaining. This also means that a party cannot be forced to engage in collective bargaining by a court. This effectively means that a duty to bargain does not exist in South African labour relations, because of the nature of labour relations provided and shaped by the LRA. As stated above, the LRA provides for voluntary and private collective bargaining. There is however, a unique problem which the LRA itself creates in section 2 of this act. Section 2 of the LRA states the following:

This Act does not apply to members of-

- (a) the National Defence Force;
- (b) the National Intelligence Agency;
- (c) the South African Secret Service;
- (d) the South African National Academy of Intelligence;
- (e) Comsec.

This section of the LRA, together with *South African National Defence Union v Minister of Defence and Another*,³ created a difficult problem. This can clearly be seen if section 2(a) of the LRA is read. This subsection excludes the National Defence Force from its ambit. This means that labour relations, if any do exist, between the members of the South African National Defence Force (hereafter SANDF) and any trade union/s, cannot be governed by the framework set out in the LRA.

In SANDU 1999, the Constitutional Court afforded members of the SANDF the ability to form and join a trade union. Justice O'Regan decided in SANDU 1999 that members of the SANDF could be seen as "workers" as used in section 23 of the Constitution, the section pertaining to labour relations. This gave these members the constitutional right to form and join trade unions. This landmark decision effectively meant that there were to be collective bargaining between the SANDF and trade unions such as SANDU.

After this, the Minister of Defence instituted regulations to arrange and govern labour relations that were to take place between the SANDF and SANDU (as well as any other trade union). These regulations instituted the Military Bargaining Council (hereafter the MBC) which was the forum in which collective bargaining between the

3 *South African National Defence Union v Minister of Defence and Another* 1999 4 SA 469 (CC) (hereinafter SANDU 1999).

SANDF and the trade unions to which its members belonged were to be resolved. The Military Arbitration Board (hereafter the MAB) was also established by these regulations to resolve disputes not resolved in the MBC. Certain disputes concerning the unilateral implementation of policy by the SANDF, preconditions for collective bargaining set out by the SANDF and the constitutionality of certain regulations issued by the Minister of Defence were not resolved by the MBC or the MAB and were heard by the Supreme Court of Appeal and ultimately by the Constitutional Court. The main issue throughout, was whether a duty to bargain existed between the SANDF and SANDU over matters of mutual interest. Section 23(5) provides the following:

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

SANDU argued that the right to engage in collective bargaining imposed a duty on the SANDF to bargain with SANDU over matters of mutual interest. Specifically, the matter of mutual interest referred to was a proposed personnel restructuring and transformation policy which could have an adverse effect on the members of SANDU. The SANDF stated in turn that neither the regulations, nor section 23(5) of the Constitution imposed a duty on the SANDF to bargain with SANDU over matters of mutual interest. This conundrum means that SANDU was now recognised as a trade union, but because it couldn't incite its members to join in protest or strike action, it had no bargaining power against the employer (SANDF) and therefore the SANDF could simply unilaterally introduce changes and refuse to bargain over the proposed changes, which could affect the members of the Defence Force adversely.

In *South African National Defence Union v Minister of Defence and Others*⁴ the Constitutional Court had to decide whether section 23(5) of the Constitution, which states that there is a right to engage in collective bargaining translates into a duty to bargain in the unique relationship between the SANDF and SANDU or any other trade union which would be registered at the MBC. This study will examine the decision of the Constitutional Court and establish if there exists a duty to bargain

⁴ *South African National Defence Union v Minister of Defence and Others* 2007 28 ILJ 1909 (CC). (Hereinafter the *Constitutional Court case*).

which forces the SANDF to engage in collective bargaining with SANDU over matters of mutual interest between the parties.

2 Collective bargaining and the LRA

2.1 A brief history of the right to bargain collectively

The history of collective bargaining in South Africa is firmly rooted in political or socio-economic factors. Industrial action has been at the forefront of the struggle for fundamental and humanitarian rights being entrenched in the Constitution. From the Rand Rebellion at the beginning of the previous century all the way through to the struggles fought by black unionists to have black unions recognised and to make it possible for them to participate in collective bargaining. This recognition of black unions and the economic pressure they put on government went a long way in securing the fall of the Apartheid government.⁵

2.1.1 Period from 1902 to 1979

Between 1902 and 1910 two controversial pieces of legislation were enacted to limit the South African labourers' right to use industrial action.⁶ These were the *Railway Regulation Act*⁷ and the *Transvaal Industrial Disputes Prevention Act*.⁸ The other piece of legislation of importance was the *Railways and Harbours Service Act*.⁹ These specific acts curbed the employees' right to strike significantly by providing that disputes had to be referred for mandatory conciliation or arbitration.

After the First World War ended in 1918, the disputes between white labour and mining administration continued. The reason for this was the enactment of the *Union Native Labour Regulation Act*¹⁰ which regulated the influx of unskilled black contract migrant workers to the mines.¹¹ This meant that highly skilled white labour could be easily replaced by unskilled black workers whose wages were not nearly as expensive as those of the white labourers. The government later enacted the *Industrial Conciliation Act*¹² in 1924. This act instituted conciliation boards and

5 Molusi 2010 *Obiter* 156.

6 Myburgh 2004 *ILJ* 962.

7 *Railway Regulation Act* of 1908.

8 *Transvaal Industrial Disputes Prevention Act* 20 of 1909.

9 *Railways and Harbours Service Act* 28 of 1912.

10 *Union Native Labour Regulation Act* 15 of 1911.

11 Visser 2000 *ITH-Tagungsberichte* 34 220.

12 *Industrial Conciliation Act* 11 of 1924.

industrial councils where collective bargaining could take place. If disputes weren't properly referred to these institutions for mediation and arbitration then it was a criminal offence to engage in industrial action (for example strikes).¹³ After the National Party came into power in 1948 the *Native Labour (Settlement of Disputes) Act*¹⁴ paved the way for the establishment of workers' committees for black labourers to handle all their grievances and complaints. In 1956, the National Party government enacted the then *Industrial Conciliation Act*¹⁵ (later the LRA of 1956). In the 1970's, there was a resurgence of black unionists and the government tried to respond by enacting the *Black Labour Relations Regulations Amendment Act*¹⁶ which replaced the workers' committees introduced in 1930 by liaison committees representing black workers at plant level.¹⁷

2.1.2 Period from 1979 to 1994

After it was clear to the government that the black unionist movement was not going to be appeased by not letting black workers take part in collective bargaining at industry level, they decided to launch a Commission of Inquiry into Labour Legislation. This Commission came to be known as the Wiehahn Commission, named after its chairperson, Professor Wiehahn. One of the recommendations of the Wiehahn Commission was the establishment of the then Industrial Court. The court should be headed by a Supreme Court judge with experience in the area of labour relations.¹⁸ The introduction of the concept of unfair labour practice into the Industrial Court was also recommended. This concept effectively restricted the employers' use of dismissal as a tool in bargaining. In 1979 the Parliament promulgated the *Industrial Conciliation Amendment Act*¹⁹ which adopted most of these recommendations. The effect of these amendments to the 1956 LRA was that black trade unions were now legally capable of joining centralised bargaining structures to take part in collective bargaining at industry level.

13 Steenkamp, Stelzner and Badenhorst 2004 *ILJ* 947.

14 *Native Labour (Settlement of Disputes) Act* 48 of 1953.

15 *Industrial Conciliation Act* 28 of 1956.

16 *Black Labour Relations Regulations Amendment Act* 70 of 1973.

17 Steenkamp, Stelzner and Badenhorst 2004 *ILJ* 948.

18 Myburgh 2004 *ILJ* 964.

19 *Industrial Conciliation Amendment Act* 94 of 1979.

2.2 Overview

Collective bargaining has come a long way and evolved to a great extent over the years to be where it is today. Collective bargaining is an invaluable tool in the hands of the different parties to the employment relationship.²⁰ Not only can employers use collective bargaining to maintain peaceful relationships between itself and its employees, but employees can use it as a means of bettering and enforcing certain employment standards in the workplace. For example, the workers could negotiate with the employer over a safety issue, overtime payment, leave and so forth. To keep its employees from becoming disgruntled, the employer can listen to the employees' quarrels or demands and improve the working conditions. So it is clear that collective bargaining can be mutually beneficial to both parties. Sir Otto Kahn-Freund expressed the inequality between employer and employee in his famous phrase:²¹

The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent in, and must be inherent in the employment relationship.

As a result of this inherent inequality the relationship between employee and employer has to be regulated. Employers can exercise bargaining power on the employees because they have the resources, assets and perhaps, most of all, they have a powerful motivation behind it, which is to make a profit. The employees on the other hand are open to abuse and exploitation by employers.²² When weighed against the bargaining power of the employer employees on their own have little or no bargaining power. The result of this is that the employee does not have a choice in accepting or rejecting new working conditions forced upon him/her. Employees may organise and join trade unions to exert their power collectively against the employer or employers' organisation. According to Kahn-Freund this exercise of bargaining power between management and organised labour has to be controlled and regulated.²³

20 Du Toit 2007 *ILJ* 1405.

21 Kahn-Freund *Labour and the Law* 6.

22 Hogbin *The New Zealand Business Roundtable* 1.

23 Vettori *Regulate the employment relationship* 43.

The previous *Labour Relations Act*²⁴ had an abstentionist approach towards collective bargaining:²⁵

It proceeded from the assumption that there exists an equilibrium of power between the two sides which makes it unnecessary and undesirable for the State or its organs to intervene in the substantive results of collective bargaining.

The abstentionist approach simply means that the state will intervene in collective bargaining as little as possible as to leave the bargaining to the parties themselves. The new LRA also follows a philosophy of abstentionism, but with a fundamentally different approach as the new act was drafted with due observance of the inherent inequalities between management and organised labour. This time around the parties are put on equal footing and they can decide together to bargain for individual and collective worker rights, without any influence from the courts or the state.

These disparities are addressed by a system of collective bargaining. The manner in which collective bargaining is regulated in South Africa is contained in the LRA. But, the LRA cannot by itself fix the inherent inequalities of the employment relationship. Organisational rights and protection and regulation of rights are all covered by the LRA, but it needs backing from organised labour and trade unions to work efficiently. These at least give the trade unions an opportunity to be recognised by the employer as the collective bargaining agent for the employees, provided the trade union is sufficiently representative as envisaged in section 11 of the LRA. Labour legislation cannot, however well intentioned, bridge the gap. Kahn-Freund insists that the workers need to establish social power on their side to counteract the exercise of power by the employer.²⁶ Employees exercise social power by establishing trade unions and then they can engage in collective bargaining with the employer or employers' organisation. The conclusion therefore made by Kahn-Freund is that labour legislation cannot be effective when the influence of the trade unions and organised labour is not backed by the legislation or legal norms.²⁷

24 *Labour Relations Act* 28 of 1956 (hereinafter previous LRA).

25 Jordaan *Law, Democracy & Development Law Journal* 2.

26 Vettori *Regulate the employment relationship* 44.

27 Du Toit *ILJ* 1407.

The International Labour Organization (hereafter the ILO) has also recognised the vital importance that collective bargaining has in sustaining labour standards across the world. This can be seen in its protection of the right to collectively bargain contained in Convention 87 of 1948 on *Freedom of Association and the Right to Organize* as well as Convention 98 of 1949 on the *Right to Organize and Collective Bargaining*.²⁸

There are different models that can be used to approach collective bargaining which will be discussed in what follows.

2.3 Voluntarism

The LRA has comprehensively changed the way collective bargaining is done in South Africa. It has done this by introducing a model of collective bargaining that is voluntary, instead of there being a duty to bargain on the different parties to the bargaining process.²⁹

2.3.1 Different models of collective bargaining

Before the voluntary model of collective bargaining is explained further, it would be useful to explore other models of collective bargaining.

At the one end of the scale the compulsory model advocates the intervention of state organs to promote the bargaining process. Usually when this model is used, legislation imposes a duty to bargain on the bargaining parties which can then be enforced judicially.³⁰ Here, collective bargaining topics and levels are set out by legislation. Normally a duty to bargain accompanies the compulsory model and this duty can be judicially enforced. The compulsory model takes the opposite approach to bargaining than that of the voluntarist approach as discussed below. In a system that utilises the compulsory model of bargaining, parties to the bargaining table are compelled to engage in effective and good faith bargaining by instituting a duty to bargain through the working of legislation. The judiciary can then enforce this duty by

28 Erasmus and Jordaan *SAYIL* 90.

29 Du Toit *et al Labour Relations Law* 241.

30 Belcher *Promotion of Collective Bargaining* 16.

forcing parties who refuse to bargain to then engage in good faith bargaining. In the compulsory model of collective bargaining legislative procedures and regulations dictate the way in which bargaining is done and enforced.

The duty to bargain can be summarised in the following way:³¹

The 'duty to bargain' entails the imposition of a legal duty on an employer to bargain in good faith, with a trade union recognised as the bargaining agent, over bargaining subjects, for the appropriate bargaining unit.

Just because a duty to bargain in good faith exists, it does not mean that parties will reach agreement on issues of mutual interest. It is obvious that bargaining impasses will still be a regular occurrence and therefore a remedy must still be available to parties to force one another to accept demands. This means that industrial action can still be utilised in the compulsory bargaining model.

In the compulsory model of collective bargaining the subject matter of bargaining is regulated by the state through the enactment of legislation. Bargaining subject matter is set out specifically and parties cannot decide or negotiate amongst themselves over which matters and issues can be bargained for as is the situation in the voluntary model of collective bargaining.³²

Another model of collective bargaining which takes a step towards voluntarism is the voluntary model of collective bargaining that includes compulsory conciliation. The defining quality of this model is that compulsory conciliation is required before a protected strike can be embarked on. This model also protects the parties' freedom of association as well as the right to strike.³³

The third model which takes another step towards the purely voluntary model of collective bargaining is the voluntary model requiring machinery (specialised bodies) to promote and help the regulation of collective bargaining. This model requires the establishment of specialised bodies (not unlike the the Commission for Conciliation,

31 Belcher *Promotion of Collective Bargaining* 23.

32 Belcher *Promotion of Collective Bargaining* 26.

33 Belcher *Promotion of Collective Bargaining* 15.

Mediation and Arbitration (hereafter the CCMA) or bargaining councils) which regulate and aid the negotiating process and the resolution of disputes.³⁴

The voluntary model of collective bargaining leaves the organisation, regulation and participation to the bargaining parties themselves and there is usually no state interference to enforce collective bargaining. The state only promotes and provides support for the bargaining parties wherein they can actively partake in the bargaining process.³⁵

2.3.2 The discarding of unfair labour practice idea and the voluntarist approach of the LRA

During the previous labour regime in South Africa the then Industrial Court could force parties engaged in collective disputes to partake in collective bargaining. This changed with the alteration of the idea of an unfair labour practice as it was defined in the previous LRA. In 1979, after thorough consideration by the Wiehahn Commission, the concept of unfair labour practice was again altered by section 1(1) of the *Industrial Conciliation Amendment Act*: "Any labour practice which in the opinion of the industrial court is an unfair labour practice." The legislature therefore left the task to the Industrial Court to give substance and meaning to the term unfair labour practice. The Industrial Court itself was also founded by section 17(1)(a) of the aforementioned Act.³⁶ The concept of unfair labour practice was totally discarded by the current LRA and the term was given a totally new meaning. An objective of the new LRA was to institute a system of voluntarism for collective bargaining, and by discarding the previous idea and instituting a whole new system of collective bargaining, this objective was achieved. This whole new system meant that the bargaining parties were no longer dependent on the definition of unfair labour practice. The new definition is contained in section 186 of the LRA. By excluding collective disputes from the definition of unfair labour practice, the CCMA and the Labour Court have no power to compel or force a party to a collective dispute to bargain with the other party to the dispute.³⁷ Importantly, this meant that the duty to

34 Belcher *Promotion of Collective Bargaining* 14.

35 Belcher *Promotion of Collective Bargaining* 13.

36 Abrahams *The unfair labour practice relating to promotion* 4.

37 Du Toit *et al Labour Relations Law* 241.

bargain between the parties to an employment relationship was effectively removed. The concept unfair labour practice now only included certain conduct specifically between an employer and employee. The reason for this was given in the Explanatory Memorandum to *Draft Labour Relations Bill*. It is stated that the old system developed by the Industrial Court had the following result:³⁸

...a confused jurisprudence in which neither party is certain of its rights and in which economic outcomes are imposed on parties which often bear little, if any, relation to the needs of the parties or the power they are capable of exercising.

The system introduced by the new LRA reverted back to a system of voluntarism, similar to what existed before the development of the wide definition of the term unfair labour practice by the Industrial Court during the 1980's. The previous LRA instituted conciliation boards and industrial councils. These forums were used to resolve issues of mutual interest between the employers and employees.³⁹ The new LRA simply tapered the concept of unfair labour practice to not include collective disputes. As stated above, this meant that the CCMA or the Labour Court could no longer interfere with collective labour disputes.⁴⁰ Parties to the employment relationship can therefore determine matters of mutual interest between themselves.

This new system of voluntary collective bargaining attracted a lot of criticism. One of the practical problems that would be encountered would be for smaller unions. Smaller unions would have a problem bargaining with established unions as they could not force these bigger unions to bargain with them, which would effectively undermine the impact they can exert during the bargaining process. There were also fears that the negotiations over substantive issues would be plagued by recognition disputes. The drafters of the LRA however stated that the old system of collective bargaining where the settling of collective disputes was made compulsory by the judicial system was inflexible in an ever-changing labour market that needs to change along with global trends and economic situations. It was further explained that:⁴¹

38 GN 97 of 10 February 1995.

39 Khoza *Examination of Employee Participation* 112.

40 Du Toit *et al Labour Relations Law* 241.

41 GN 97 of 10 February 1995.

the bargaining parties [should be] able to determine the nature and structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements.

The essence of the new system of voluntarism was that instead of a general duty to bargain, other methods and procedures were being implemented to encourage bargaining rather than force it, under which organisational rights, the right to strike and the freedom of association are included. This new framework of collective bargaining made the need for a duty to bargain superfluous.⁴² When disputes do inevitably occur and consensus cannot be reached by the parties over a certain matter, industrial action (strikes and lockouts) can be implemented by the parties to influence the others in their decisions. Compulsory conciliation is a process which parties to the dispute must exhaust before they embark on industrial action such as a strike or a lockout. Essentially a neutral third-party assists the parties in reaching a mutually beneficial agreement to resolve the dispute at hand.

The LRA places the employee in a better position than was previously the case. Drafters of the LRA acknowledged the fact that employees were in a more vulnerable position than employers because of the resources available to the latter. Therefore, abovementioned methods and procedures were put in place to ensure that the inherent inequality in the employment relationship was addressed.

Trade unions that are sufficiently represented are afforded organisational rights. These organisational rights could be used to compel the employer to bargain with the trade union instead of a duty to bargain compelling the parties to bargain. The granting of organisational rights make it possible for a trade union to realize its goals of building a membership, sustaining and improving that membership and using this power of solidarity to exercise its strength against an employer. Once the trade union has obtained the required number of members and it becomes sufficiently representative, it qualifies for certain organisational rights and can use these to compel an employer to bargain with it.⁴³

42 Belcher *Promotion of Collective Bargaining* 74.

43 Mischke *Contemporary Labour Law* 52.

A subtle element of compulsory collective bargaining is contained in this system where organisational rights are granted to trade unions. A trade union must notify the employer in writing if such a trade union would like to exercise any of the organisational rights it was granted within the workplace. After the trade union has issued the employer with the abovementioned written notice, section 31(3) of the LRA will come into play:

Within 30 days of receiving the notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of that workplace.

This in effect means that there is a duty placed on the employer to bargain with the trade union about the conditions and the way in which the organisational rights are exercised.⁴⁴ Clearly this can be seen as an element of compulsory collective bargaining as a duty to bargain is placed on the employer to meet with the trade union and "endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of the workplace".⁴⁵

Trade unions could also use strike action to compel an employer to bargain with it although special mention has to be made in the case where the issue in dispute is a refusal to bargain. When there is a dispute concerning a refusal to bargain, section 64(2) of the LRA is called upon:

If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of (1) (b) or (c).

A recent judgement concerning this issue was passed in the Johannesburg Labour Court. In the case of *Brinant Security Services (Pty) Ltd v United Private Sector Workers Union UPSWU & Others*⁴⁶ AC Basson J stated that it was trite law that a dispute over a refusal to bargain must be referred to advisory arbitration before the trade union gives the notice to strike in terms of section 64(1)(b) of the LRA. The learned judge also submitted that the real issue in dispute in this particular case was

44 Du Toit *et al Labour Relations Law* 231.

45 Section 21(3) of the LRA.

46 *Brinant Security Services (Pty) Ltd v United Private Sector Workers Union UPSWU & Others* (J3339/12) 2013 ZALCJHB 31 (18 March 2013).

one of a refusal to bargain and therefore the respondents should have awaited an advisory award before embarking on a strike.⁴⁷

Strike action as an economic weapon can also be used in instances where the employer unilaterally institutes a change of terms and conditions of employment. Section 64(4) of the LRA states that employees can embark on strike action to a) force the employer to restore the *status quo* and b) to compel the employer to return to the bargaining table and bargain in a proper way. This means that even though there is no duty to bargain on the employer, it can be compelled by employees to revert to the status quo until such time as the issue has been bargained on. This right can be enforced through the use of industrial action to bargain with them and listen to their demands. According to Mischke, strike action is a union's most appropriate response to an employer's refusal to bargain with it.⁴⁸

Essentially, the system of voluntarism under the new LRA means that parties to the employment relationship are supported and encouraged to participate in collective bargaining. Inequality in the employment relationship has been addressed and a duty to bargain is no longer necessary. Van Niekerk AJ explained it as follows in *NPSU & others v National Negotiating Forum & others*⁴⁹ when he stated the following:⁵⁰

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

47 7(18-19).

48 Mischke *Contemporary Labour Law* 52.

49 *NPSU & others v National Negotiating Forum & others* 1999 20 ILJ 1081 (LC).

50 1083H-I.

2.4 Freedom of association

2.4.1 Overview

Freedom of association has also enjoyed constitutional protection as it is contained in section 18 of the Constitution in the Bill of Rights. Particular mention of freedom of association in an employment framework is given in section 23 of the Constitution.

Section 5 of the LRA protects the employee's right to freedom of association.⁵¹ This is done by protecting the employee from any action by the employer which victimises the employee if he/she takes part in any trade union activities or if the employee exercises any right established by the LRA.

Freedom of association is a fundamental cornerstone of collective bargaining.⁵² It has both an individual and collective character which is incorporated in many international standards. It is therefore a globally recognised freedom or right.⁵³ The collective element of freedom of association can be seen in the relationship between a trade union and its members. The right to freedom of association is not vested in the trade union but in the individual members of the trade union. According to Olivier, freedom of association from the viewpoint of the employee could be defined as the following:⁵⁴

Those legal and moral rights of workers to form unions, to join the union of their choice and to demand that their union function independently.

The ILO has also given meaning to freedom of association through some of its conventions, namely Convention 87 of 1948 on *Freedom of Association and the Right to Organise* and Convention 98 of 1949 on the *Right to Organise and Collective Bargaining*. In Convention 87 of 1948 article 2 (the right of employees to join organisations of their choosing), article 3(1) and (2) (the right of these organisations to function independently without interference) and article 5 and 6 (the right to form and join federations and confederations and affiliate with other

51 Du Toit *et al Labour Relations Law* 186.

52 Olivier "Freedom of Association and union security arrangements" 4.

53 Olivier "Freedom of Association and union security arrangements" 1.

54 Olivier "Freedom of Association and union security arrangements" 3.

international federations) are the most significant. The most essential parts of Convention 98 of 1949 to the realisation of freedom of association is article 1, which afford employees protection against discriminatory acts against them by employers because of their union membership status. Article 2 gives these organisations protection against the acts of government, other organisations and of course the employers.⁵⁵

The trade union members themselves have a say in the decisions that the trade union makes and this aspect is examined next.

2.4.2 Constituencies mandate

Every trade union must have a constitution as set out in section 95(1)(b) of the LRA. Section 95(5)(h) states that:

(5) The constitution of any trade union or employers' organisation that intends to register must-

(h) establish the manner in which decisions are to be made;

The reason for this subsection is to ensure that trade union representatives do not negotiate beyond the mandate that was given by the union's members. Du Toit states the following:⁵⁶

Beyond this, every union constitution contains aims, objectives and rules which define an outer parameter to what may lawfully be done on the union's behalf. Since a registered trade union is a body corporate with functions determined solely by its constitution, ultra vires acts by union representatives will prima facie be null and void.

It is further stated that the acts of union representatives will always be subject to limitation by the union's constitution itself. This means that it would be stipulated by which procedures a union representative is elected and who are authorised to act on behalf of the union and the membership and the degree to which these elected representatives' abilities reach. The question is whether the members of the trade union could contest any collective agreement entered into by their elected

55 Olivier "Freedom of Association and union security arrangements" 3.

56 Du Toit D 1993 *ILJ* 1168.

representatives that went against the wishes of the members. Another question needs to be asked: Are these elected representatives under a duty to serve the interests of the members? This is referred to as the duty of fair representation and was developed by the US courts. Jordaan states the following in relation to the LRA and the duty of fair representation:⁵⁷

It is regrettable, however, that the Act does not provide for a duty of representation. While such a duty may be implicit in the constitution of an organisation, it would not, for example, extend to workers who are not trade union members but who are, in terms of a collective agreement, nevertheless represented by the union in collective bargaining. Provision for such a duty may, of course, be made in a collective agreement and would then become enforceable through arbitration proceedings.

In *SACCAWU v Garden Route Chalets (Pty) Ltd*⁵⁸ the parties had signed a collective agreement in terms of which the employer had to transport certain employees from Rondevlei, Smutsville and Barrington to and from work. The union, who represented seven workers from George, referred a dispute to the CCMA. It argued that it was an unfair labour practice for the employer not to extend this agreement to the George workers. They were excluded from this benefit. The commissioner held that instead of the employer denying the workers from George the benefit; it should have compensated the employee for the disadvantage in some or other way.⁵⁹ This case illustrates those collective agreements that were entered into with the employer by union representatives that could be challenged by the membership if the provisions of these agreements amounted to an unfair labour practice. This shows that the constituency of a trade union have a way in which to remedy certain clauses in a collective agreement with which they are not happy, as long as these clauses constitute an unfair labour practice.

57 Jordaan *Law, Democracy & Development Law Journal* 3.

58 *SACCAWU v Garden Route Chalets (Pty) Ltd* 1997 3 BLLR 325 (CCMA).

59 Norton 2006 www.contentafrica.net.

2.5 Organisational rights

2.5.1 Overview

Organisational rights are a direct result of the more voluntarist approach taken by the LRA. As stated above, employers' socio-economic strength will always be superior to that of the average employee. Organisational rights awarded to trade unions remedy this unequal relationship between employer and employee. The current LRA has removed the duty to bargain as explained above. This meant that employees/trade unions needed something to compel the employer to bargain. Organisational rights and the entrenchment of the right to strike was the answer to this problem in a voluntarist system.⁶⁰

Organisational rights are contained in sections 12 through 16 of the LRA. The following rights are set out: access to the employer's premises for purposes of recruitment and servicing their members (section 12); stop-order facilities (section 13); leave from work for employees who are office-bearers of the union (section 15); the election of trade union representatives and their right to monitor that the employer adheres to various labour laws and conditions of employment (section 14(2) and 14(4)); part-time off for these elected trade union representatives to undergo training and to perform their various functions and the right to the disclosure of information by the employer which would allow the trade union to engage in effective consultation and bargaining.⁶¹

For trade unions to qualify for organisational rights they must be registered in terms of the LRA and be at least sufficiently representative (this will be discussed below).

There are also three different ways in which a trade union can obtain organisational rights. The first is through the inclusion of organisational rights in a collective agreement. Section 20 of the LRA states that nothing in Chapter 3, Part A of the LRA precludes the conclusion of a collective agreement that regulates organisational rights. This collective agreement could contain the specific rights which the union are

60 *Explanatory Memorandum to the Draft Bill 1994.*

61 *Du Toit et al Labour Relations Law 218.*

entitled to and the method in which the organisational rights are exercised. The parties to the collective agreement may also agree on limitations imposed on the exercise of these organisational rights. If organisational rights are obtained by a union in this manner, its level of representativeness is irrelevant. This was illustrated in *NUMSA v Bader Bop and Another (Pty) Ltd*⁶² where the Constitutional Court decided that a minority union may strike in support of a demand for organisational rights even though it does not meet the statutory threshold for representativeness.

The second manner in which a trade union can acquire organisational rights is through the membership of a bargaining council or a statutory council. This is stated in section 19 of the LRA:

Registered trade unions that are parties to a council automatically have the rights contemplated in section 12 and 13 in respect of all workplaces within the registered scope of the council regardless of their representativeness in any particular workplace.

If a trade union acquires organisational rights in this manner, the representativeness is again irrelevant. A trade union that is a party to a bargaining or statutory council automatically receives the right to access of a workplace and the right to deduction of trade union subscriptions in all the workplaces that fall inside the scope of that registered council. Even if there is a collective agreement in place as discussed above, trade unions who are parties to these councils still receive these organisational rights regardless of the content of the collective agreement.

The third manner in which a trade union can acquire these rights is through a procedure set out in section 21 of the LRA. The trade union must firstly notify the employer that it pursues the granting of organisational rights. The employer and trade union must then meet to try and reach consensus on the organisational rights to be granted to the union. If no agreement can be reached by the parties, the dispute can be referred to the CCMA for conciliation. If the conciliation fails, the matter can be referred to arbitration or the union can embark on a strike in terms of section 65(2)(a) of the LRA.

62 *NUMSA v Bader Bop and Another (Pty) Ltd* 2003 2 BLLR 103 (CC).

Organisational rights can also be granted to a trade union by way of collective agreement, even if the trade union does not meet the required threshold for representativeness.

2.5.2 *Sufficient representative*

The term sufficient representative is not expressly defined in the LRA. The reference to "representative trade union" in section 39 relating to Statutory Bargaining Councils has guided the CCMA to use this provision as a guideline to establish what a representative trade union would be. The specific provision reads:

'representative trade union' means a registered trade union, or two or more registered trade unions acting jointly, whose members constitute at least 30 per cent of the employees in a sector and area.

In *SACTWU v Sheraton Textiles (Pty) Ltd*⁶³ the commissioner stated the following in regards to "sufficient representative":⁶⁴

Generally, a union should be considered sufficiently representative 'if it can influence negotiations, the financial interest of those engaged in the industry or peace and stability within the industry or section of the industry'. The arbitrator is required to have regard to the interests represented by a union and not exclusively the numerical representativeness of employees. Some indication of a numerical threshold, insofar as it is relevant, is provided in section 39(1) of the Act which sets a 30% membership base as the figure required by unions wanting to establish statutory council at sectoral level.

This can be illustrated in *UPUSA v Komming Knitting*⁶⁵ where it was held that the trade union, who had 7 members out of the 31 staff members (therefore 22% of the workforce), was held to be sufficiently representative. In *BIFAWU v Land Securities Management (Pty) Ltd*⁶⁶ the commissioner again considered whether section 39 of the LRA can reasonably be used as a guideline. Here it was decided that a figure between 19% and 20% representation in the workplace could be regarded as sufficiently representative. In *P.T.W.U. obo Members v Broubart Security*⁶⁷ the commissioner again referred to section 39 of the LRA and stated that the 30%

63 *SACTWU v Sheraton Textiles (Pty) Ltd* 1997 5 BLLR 662 (CCMA).

64 1419C-E.

65 *UPUSA v Komming Knitting* 1997 4 BLLR 508 (CCMA).

66 *BIFAWU v Land Securities Management (Pty) Ltd* 27 October 2003 GA 40128-02.

67 *P.T.W.U. obo Members v Broubart Security* 18 February 2003 ECP 2410-03.

threshold should also be applied to the private sector. The abovementioned case law therefore proves that no definite percentile can be set to test if a trade union is sufficiently representative. In each case the threshold can be established according to the particular facts of the case. Consistency should be applied, however, which means that when an employer grants organisational rights to a trade union, other trade unions with similar or greater membership should also be granted the same rights.

2.5.3 *Majoritarianism*

A union who represents a majority of employees in the workplace enjoy more organisational rights than minority unions or unions who are only sufficiently representative. These majority unions enjoy the right to elect shop stewards (section 14); the right to disclosure of information from the employer (section 16) as well as the right to conclude agency shop and closed shop agreements. The majority union is also in a superior position to bargain with employers because of their right to establish a workplace forum (section 80), the right to conclude collective agreements which can bind non-union members (section 23(1)(d)(iii)) and they could set thresholds for representativeness (section 18).

Majoritarianism has taken some criticism, one of which is that it would lead to union rivalry. A recent incident at the Lonmin-owned Marikana mine illustrates that union rivalry could lead to fatalities. National Union of Mineworkers (hereafter NUM) was a majority union at the mine and therefore enjoyed several organisational rights. NUM's membership suddenly declined from 66% to 49% at the Lonmin mines and therefore NUM lost some of its organisational rights. The Association of Mineworkers and Construction Union (hereafter AMCU) attracted members by promising wage increases. NUM lost members to AMCU and an intense union rivalry developed. When AMCU embarked on an illegal strike it turned violent and when AMCU members clashed with police a death count of 34 mineworkers was recorded.⁶⁸

68 Anon 2012 www.webcitation.org.

The driving force behind majoritarianism is that minority unions will be encouraged to recruit members in an effort to influence the bargaining.⁶⁹ It also keeps rival unions honest in their goals, which is to promote the interests of its members. Collective agreements between a majority union and an employer can also be extended to bind non-members. Another reason for the new industrial relation system to favour majoritarianism is purely because of practicality. It also keeps collective bargaining orderly and limits the number of unions that are registered (union proliferation).

2.6 Conclusion

In chapter 2 the new dispensation of voluntary collective bargaining was discussed as it has been implemented under the LRA. As can be seen above, this new voluntary system has empowered employees by giving them the freedom to associate which means that they have the right to join a trade union. Organisational rights awarded to sufficiently representative or majority trade unions strengthen employees' bargaining chips as does the right to strike. The LRA however does not apply to members of the SANDF which means that although the duty to bargain was removed by the LRA, there could still be a duty to bargain between the SANDF and its employees.

69 Khoza *Examination of Employee Participation* 96.

3 The duty to bargain examined

3.1 Introduction

In the previous chapter it was seen that the LRA established a voluntary system of collective bargaining. However, employees of the SANDF were expressly excluded from the LRA and therefore a different system had to be established for the parties to this specific relationship. Employees of the SANDF were not given the right to strike or afforded organisational rights. Without these rights and recourses, it would be difficult for employees to effectively bargain with the SANDF. If a duty to bargain existed between these parties, it could however change the situation of these employees and the SANDF could not unilaterally implement changes. In this chapter the duty to bargain will be discussed. The duty to disclose information is also an essential part of the duty to bargain in good faith as employers need to disclose relevant information to unions to achieve effective collective bargaining. Therefore it will form part of the discussion.

3.2 *Compulsory model of collective bargaining*

3.2.1 Representativeness

In the compulsory model of collective bargaining as discussed in the previous chapter, the parties to the bargaining unit must first be established. Here again representativeness plays a key role in establishing which trade unions will be bargaining agents. Once the said trade union has reached the required level of representativeness, it may be sufficient or a majority, it will be seen as a valid party to the bargaining process and will be recognised to have bargaining status.⁷⁰

3.2.2 Bargaining unit and the term workplace

The appropriate bargaining unit must also be established. The bargaining unit is that part of the workforce in which the union has claimed recognition. This means it is that part of the workforce from which the union's constituency is drawn. To see whether a trade union has reached a certain threshold of representivity, reference is

⁷⁰ Belcher *Promotion of Collective Bargaining* 25.

made to the bargaining unit or the constituency. The LRA provides for the thresholds of representivity and the definitions of the terms workplace and employee in this part of the Act is exclusively used to determine the representivity of a trade union. The parties are still allowed to divide the workplace into bargaining units.⁷¹ The LRA refers to a trade union's representivity in a certain workplace to establish if it is entitled to organisational rights.

Section 213 of the LRA contains the statutory definition of the term "workplace":

(c) in all other instances means the place or places that where the employees of an employer work. If an employer carries on or conducts two or more operations but is independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

The meaning of the term workplace can have a significant effect on the implementation of organisational rights. The term can be defined in the collective agreement in terms of section 21(3) of the LRA between the parties to the agreement. In *SACCAWU v Speciality Stores Ltd*⁷² the Labour Appeal Court decided that when the term workplace is defined differently in the collective agreement than the statutory definition contained in section 213 of the LRA, then the collective agreement cannot be contested on the grounds that the definitions differ. The main problem in relating to the term workplace comes in when there is a company with different divisions at different locations. In *OCGAWU & another v Volkswagen of South Africa (Pty) Ltd & Another*,⁷³ the Commissioner decided that a bargaining unit within an organisation could be seen as a separate workplace for the purposes of granting organisational rights. This meant that the statutory definition of workplace could be ignored and the CCMA or other forums like the Labour Court could then establish the definition thereof for purposes of granting organisational rights.

In *NUMSA v Feltex Foam*⁷⁴ the National Union of Metalworkers of South Africa (hereafter NUMSA) had a 17% membership of the employees in the company. It, however, had a 82% majority in the motor components division. A different union had

71 Section 20 of the LRA.

72 *SACCAWU v Speciality Stores Ltd* 1998 4 BLLR 352 (LAC).

73 *OCGAWU & Another v Volkswagen of South Africa (Pty) Ltd & Another* 2002 1 BALR 60 (CCMA).

74 *NUMSA v Feltex Foam* 1997 6 BLLR 798 (CCMA).

sole bargaining rights with the employer following a recognition agreement concluded by the employer and the union. The Commissioner then decided that the motor components division of the company can be seen as a separate workplace because of its physical uniqueness. This cannot however be true of all divisions in a company. In *OCGAWU v Total SA (Pty) Ltd*⁷⁵ the applicant union held an 84% membership of all employees at 3 different depots. The union sought organisational rights at these three depots, claiming they were separate workplaces. On the other hand, the members of this union only constituted about 2,5% of Total's workforce and a mere 6% of all employees working at Total depots. The employer's argument that all of its depots should be seen as one workplace was upheld by the Commissioner for the following reasons: the depots did not function independently; the depots were a core part of the employer's business; and if each depot was seen as a different workplace it would lead to the unnecessary proliferation in trade unions which would hamper orderly collective bargaining.⁷⁶

If the statutory definition of workplace is to be applied, then the representativeness of a trade union could play an important factor. Certain factors that could be considered are the type of business it is, in what sector it functions and if an organisational history exists.⁷⁷

It is therefore clear that a workplace under the LRA is seen as a bargaining unit and the constituency of a trade union is drawn from a workplace. A trade union's representativeness is measured by the percentage of employees it has signed as members in a specific workplace.

3.2.3 *Bargaining subject matter*

The subject matter or what may be bargained about should also be determined beforehand.⁷⁸

75 *OCGAWU v Total SA (Pty) Ltd* 1999 6 BALR 678 (CCMA).

76 Du Toit *et al Labour Relations Law* 219.

77 Section 21(8)(b) of the LRA.

78 Cheadle *Law, Democracy and Development* 150.

3.2.4 Duty to bargain in good faith

The manner in which bargaining is done can also be determined. Under the unfair labour practice regime of the Industrial Court the duty to bargain in good faith imposed upon the parties to the collective bargaining table encourages a responsibility to approach bargaining in a sincere way. This means that they have to genuinely try and hear out the demands of the other party and make an earnest effort to reach agreement on the issues in dispute. The reasoning for this is to prevent the parties from approaching the bargaining table unwilling to negotiate or bargain with the other party. This is referred to as sham bargaining.⁷⁹ The idea of good faith bargaining was explained in *SA Electrical Workers Association v Goedehoop Colliery (Amcoal)*.⁸⁰

The court referred to the mental element of negotiations and expressed the following:⁸¹

The objective behind negotiation is to secure an agreement but there is no obligation to reach an agreement or necessarily to make concessions. The parties must demonstrate throughout their interaction a serious intention to secure an agreement. Parties are not compelled to make compromises but merely to show willingness to compromise. The refusal to compromise is most certainly not in itself a breach of good faith.

Failures to negotiate or bargain in good faith can take many forms. These could be a refusal to meet with the other party at reasonable times; insistence on discussing matters which cannot be bargained over; a lack of open-mindedness or desire to reach an agreement with the other party; the lack of a sincere effort to reach a consensus or even common ground; the practice of bouldwarism (named after General Electric's former VP Lemuel Boulware who coined the term), which means that a party will formulate an offer or counteroffer which is final and they will not deviate from it; sham or surface bargaining (a party to the bargaining table will just go through the motions/procedures) and failure to provide the other party with relevant information and incompetent negotiators.⁸² These are factors that could indicate that a party to the bargaining table is not bargaining in good faith. In *Metal &*

79 Khoza *Examination of Employee Participation* 40.

80 *SA Electrical Workers Association v Goedehoop Colliery (Amcoal)* 1991 12 ILJ 865 (IC).

81 860I-J.

82 Brand "Lessons from 2011 Strike Season" 25.

*Allied Workers Union & others v Natal Die Casting Co (Pty) Ltd*⁸³ (hereafter Natal Die Casting case), Mr Fabricius established a list of questions that could be asked to determine whether a party has indeed bargained in good faith.⁸⁴

There is little doubt that 'negotiating in good faith' has as its ultimate objective the consummation of an agreement. (This aspect has been mentioned above.) The totality of all the facts available should be considered in an enquiry as to the bona fides of a party and relevant questions could include the following –

- (a) did one party merely go through the motions without any real intent of arriving at the agreement?
- (b) were concessions made which are indicative of good faith?
- (c) were proposals made that were indicative of good faith?
- (d) were dilatory tactics used?
- (e) were onerous or unreasonable conditions imposed by the party?
- (f) were unilateral changes in conditions made?
- (g) was a representative by-passed?
- (h) was sufficient information provided, upon request, to enable a party to appreciate and properly discuss the issues involved?

The court then took these questions and applied them to the facts of the case. The honourable judge found that the respondent: a) was merely going through the motions without any real intent to arrive at an agreement; b) made no proposals or concessions in good faith; and c) was purposefully trying to delay the bargaining process. Therefore it was held that the failure to negotiate in good faith was an unfair labour practice.

It can therefore be seen that where a duty to bargain exists, it must be accompanied by a duty to do so in good faith, otherwise it would undermine the whole collective bargaining process which exists to find the best possible compromise as expeditiously as possible. Bad faith bargaining would only further frustrate the party who is at the receiving end of the unfair labour practice.

Under the present LRA no similar duty exists. However taking into account the list of factors highlighted by Fabricius above can possibly be seen as part of the concept of a refusal to bargain which will entitle the trade union to refer the dispute to the CCMA or Bargaining Council with jurisdiction and if conciliation fails the union may give notice of a strike and thereafter revert to strike action.

83 *Metal & Allied Workers Union & others v Natal Die Casting Co (Pty) Ltd* 1986 7 ILJ 520 (IC).
84 542B-E.

3.2.5 Duty to disclose information

The disclosure of employment-related information is one of the main methods in which employee participation in the workplace can be enforced. Without the disclosure of information, effective collective bargaining could not take place. For efficient collective bargaining to take place to the benefit of every party, trade unions need to have access to employers' plans and decisions.⁸⁵ The importance of the disclosure of business information to representatives of employees has also been emphasised by the ILO. Trade unions see the disclosure of business information a way in which to get involved in the regulation of the workers' basic condition of employment and also a tool which they use to table more acceptable offers when negotiations are taking place. Employers fear the disclosure of business information because it could lead to the business's confidential trade secrets or other sensitive information getting into the hands of competitors which would seriously damage the business. Usually trade unions seek the employer's financial information during wage negotiations or retrenchments. This information will allow the trade union to establish the employer's ability to increase wages or keep confidential who have been picked for possible retrenchment when the reason given by the employer was financial.⁸⁶ If the information the trade union sought was never disclosed to it, it would have no factual base for bargaining efficiently and they would have to go purely on what the employer had disclosed to them. In the long run, this would harm the delicate relationship between employer and employee and employees would also have no other choice but to revert to industrial action which could cause the employer severe financial loss. This was illustrated in the American case of *NLRB v Truitt Manufacturing Co.*⁸⁷ where the trade union demanded a wage increase of ten cents per hour. The employer responded by saying that the workers were already being paid more than the industry norm for the area and they offered two and a half cents per hour. One of the owners told the trade union that if the company were to give the workers a raise, the company would go 'broke'. The union requested that a certified accountant go through the company's books, records and financial data.⁸⁸

85 Van der Walt and Campbell 2003 *SAJLR* 61.

86 Brand and Cassim 1980 *ILJ* 251.

87 *NLRB v Truitt Manufacturing Co* 351 US 149 (1956) 76 S Ct 753 100 L Ed 1027 (1956).

88 Dau-Schmidt 2005 *Bepress Legal Series* 10.

The company refused to offer the information. This also meant that the company had no way to substantiate their claims.

The uncontrolled copying, distributing and disclosure of a company's confidential information could have dire consequences for the employment relationship between the employer and employees. The delicate balance between the employer's right to keep certain information confidential and the union's right to have the relevant information available so it could effectively bargain must be carefully managed. In *Burmeister & others v Crusader Life Assurance Corporation Ltd*⁸⁹ Roth SM dealt with the disclosure of financial information during the retrenchment procedure.⁹⁰

I do however, agree with Mr Tiedemann that in order for there to be a meaningful consultation in the present matter, the applicants should be placed in possession of at least such of the details of the respondent's financial affairs as are reasonably necessary to enable the applicants realistically to assess their own and respondent's position in relation to their retrenchment so as to make meaningful consultation.

Although this case touched on the subject of the disclosure of information to affect meaningful consultation during retrenchment procedure, it is not all that different from the duty to disclose financial information to a union to affect meaningful bargaining. The personal interests of the parties have to weigh against the effect the disclosure of the information would have.

3.3 The new dispensation under the 1995 LRA

One big change brought upon by the LRA, was that it was founded on the principal of voluntarism as discussed in chapter 2. This basically meant that a duty to bargain was completely removed from its ambit. A case in which the court removed all uncertainty pertaining to the duty to bargain being contained in the current LRA is *Entertainment Commercial Catering & Allied Workers Union & others v Southern Sun Hotel Interests (Pty) Ltd*.⁹¹ The Entertainment Commercial Catering & Allied Workers Union (hereafter ECCAWUSA) entered into a recognition agreement with the employer (Southern Sun) in which these two parties undertook to meet annually

89 *Burmeister & others v Crusader Life Assurance Corporation Ltd* 1993 14 ILJ 1504.

90 1509I-J.

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

to negotiate over the basic conditions of employment. During one of these annual negotiations the employer demanded that the trade union's members switch from the Hospitality Industry Provident Fund to the Southern Sun Fund. Union members declined and the negotiations deadlocked. The dispute was referred to the CCMA by ECCAWUSA and claimed that the employer was bargaining in bad faith. They also launched an urgent interdict application in the Labour Court for restraining the respondents from bargaining in bad faith referring to the requirement that the union members should join the Southern Sun Fund. The applicants argued that by concluding a recognition agreement with the applicant, the respondent bound itself to bargain in good faith with the applicant. The applicants stated that this recognition agreement brought with it a contractual duty to bargain and also bargain in good faith. The Labour Court refused this argument brought by the applicants. The reason the court gave was that the current LRA does not contain the duty to bargain.⁹² Francis AJ made the following comment:⁹³

Although the concept of the duty to bargain in good faith was recognized in relation to the unfair labour practice jurisdiction of the 1956 Labour Relations Act, this is not the approach adopted in 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. In the absence of such a duty being incorporated into the Act, it was not clear on which law the applicants relied upon to say that the duty to bargain in good faith is incorporated into the recognition agreement. This approach was not helped by the applicants' bare assertion in the founding affidavit that such an implied term exists. The applicants bear at least an onus to show prima facie that such a term is implied in the recognition agreement which they have not done.

Thus, it can be said that the current LRA approaches and regulates collective bargaining on a completely voluntarist basis. The strides made in the 1980's on making the duty to bargain (and in good faith) were not contained in the current LRA. The main reason for this was the constitutional entrenchment of labour related rights contained in section 23 of the Constitution. Trade unions can now engage in industrial action whenever negotiations are deadlocked or an employer refuses to negotiate. If an employer refuses to negotiate, an advisory arbitration award must be given. In this award it must be stated whether collective bargaining should indeed take place or not, but this award is not binding on the parties. This of course means

92 Du Toit *et al Labour Relations Law* 251.
93 1098D-F.

that the trade union can induce strike action against the employer.⁹⁴ There is speculation that the right to bargain collectively contained in section 23(5) of the Constitution also includes a mutual duty to bargain collectively. In the next chapter, the specific situation that the SANDF finds itself in will be examined. Members of the SANDF are not covered by the current LRA, therefore the members of the Defence Force trade unions are also not covered.

94 Steenkamp, Stelzner and Badenhorst *ILJ* 955.

4 The courts' approach to the duty to bargain

The situation that played itself out in the late seventies and throughout the eighties once again became the focal point in labour law from 1999 throughout to 2007.⁹⁵ The question of whether military trade unionism should be instituted came into the fray from the promulgation of the Interim Constitution. In this chapter military unionism will be briefly examined and then the South African courts' approach to the answer to this burning issue will also be scrutinised.

4.1 Public sector unionism

According to Lindy Heinecken, there are several factors which would result in the unionisation in the military.⁹⁶ This could be seen in the development of collective bargaining in the armed forces of other nations. The question is then which of these factors contributed to the unionisation within the SANDF. The first of these factors would be the promotion of trade unionism and collective bargaining within the public sector and under public sector employees. In 1993, the *Public Service Labour Relations Act*⁹⁷ as well as the *Education Labour Relations Act*⁹⁸ was promulgated to extend collective bargaining and trade unionism to public sector employees and employees in the educational sector. As a result of this extension of labour rights to these public sector employees, members of the South African Police Service (hereafter SAPS) also wanted the same rights extended to them.

In 1993, the South African Police Labour Relations Regulations were promulgated in terms of the then *Police Act*,⁹⁹ which extended labour rights to members of the then South African Police. These regulations gave members of the police force the right to form or join a trade union and take part in collective bargaining. These regulations however, did not give them the right to participate in strike action. Members of the SAPS later fell under the umbrella of the LRA. In a recent decision of the Constitutional Court, *South African Police Service v Police and Prisons Civil Rights*

95 See para 2.1.2.

96 Heinecken 1995 *African Security Review* 15.

97 *Public Service Labour Relations Act* 102 of 1993.

98 *Education Labour Relations Act* 146 of 1993.

99 *Police Act* 17 of 1993.

Union and Another,¹⁰⁰ which is of value to the situation in the SANDF, the court had to decide if all employees of the SAPS, members and non-members, were employed in an essential service and therefore would be prohibited from striking. In the court a quo, it was decided that members of the SAPS that were employed under the *South African Police Service Act*¹⁰¹ (hereafter the SAPS Act) were employed in an essential service as defined in the LRA. The Labour Appeal Court upheld a decision by the Labour Court that employees of the SAPS employed under the *Public Service Act*¹⁰² (hereafter the PSA) were not employed in an essential service.¹⁰³ The reason for this dispute arose from the national general public service strike in 2007. Employees of the SAPS that are employed under the SAPS Act as well as the PSA participated in the strike; both of these had members of POPCRU. Both the Labour Court and Labour Appeal Court held that the section 65(1)(d)(i) of the LRA must be interpreted as meaning only the policing functions of the SAPS, and not all of the support personnel as well. In the Constitutional Court the SAPS gave the following reasons why all the employees of the SAPS should be held as being engaged in an essential service:¹⁰⁴

The applicant advised 5 reasons why the SAPS should be viewed as a single, integrated essential service. First, section 199 of the Constitution refers to a "single police force". Second, the constitution of the Safety and Security Sectoral Bargaining Council, which regulates bargaining in the SAPS, does not make a distinction. Third, the contracts of service of the non-member personnel appointed under the PSA indicate they are part of the SAPS. Fourth, the treasury allocation to the SAPS makes no distinction. Finally, the Annual Human Resource Plan reflects that the workforce of the SAPS is made up of members and non-member personnel.

The respondents argued that by prohibiting the right to strike for PSA employees would be an infringement on their constitutional right to strike contained in section 23(2)(c) and it cannot be justified under section 36 of the Constitution. The Constitutional Court decided that the Labour Appeal Court had been correct in its finding that employees of the SAPS employed under the PSA may participate in strike action. This principle, that non-members, but only supporting personnel of the

100 *South African Police Service v Police and Prisons Civil Rights Union and Another* 2011 32 ILJ 1603 (CC).

101 *South African Police Service Act* 68 of 1995.

102 *Public Service Act* 103 of 1994.

103 *South African Police Service v Police and Prisons Civil Rights Union and Another* 2010 12 BLLR 1263 (LAC).

104 7 12-13.

SAPS can strike, could also be used in the SANDF. SANDF members that are seen as supporting personnel could maybe embark in strike action.

4.2 Constitutional challenge to the Defence Act

With the evolution of collective bargaining in the public sector, it was only a matter of time before the provisions of the *Defence Act* prohibiting SANDF members from forming and joining trade unions would come under constitutional scrutiny. This is the second factor Heineken refers to, namely the influence that the Constitution would have. The constitutional challenge to the Defence Act came in the form of the decision referred to as SANDU 1999 above.¹⁰⁵ Section 126B of the Defence Act was the primary target for the constitutional scrutiny.

(1) A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956): Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.

(2) Without derogating from the provisions of sections 4(h) and 10 of the Military Discipline Code, a member of the South African Defence Force who is subject to the said Military Discipline Code, shall not strike or perform any act of public protest or participate in any strike or act of public protest or conspire with or incite or encourage, instigate or command any other person (whether or not such person is a member of the South African Defence Force or an officer or employee referred to in section 83A(2) serving in the South African Defence Force or a member of any auxiliary or nursing service established under this Act) to strike or to perform such an act or to participate in a strike or such an act.

(3) A member of the South African Defence Force who contravenes subsection (1) or (2), shall be guilty of an offence.

(4) For the purpose of subsection (2)

‘act of public protest’ means any act, conduct or behaviour which, without derogating from the generality of the foregoing, includes the holding or attendance of any meeting, assembly, rally, demonstration, procession, concourse or other gathering and which is calculated, destined or intended to influence, support, promote or oppose any proposed or actual policy, action, conduct or decision of the Government of the Republic of South Africa or another country or territory or any proposed or actual policy, action, conduct or decision of any public or parastatal authority of the Republic or another country or territory or to support, promote, further, oppose or publicise any real or supposed private or public interest, object,

105 See para 1.

principle, cause, concern, demand or claim, grievance, objection or outrage or to indicate, demonstrate or display real or supposed private or public support for, opposition or objection to, dissatisfaction, sympathy, association or solidarity with, or concern or outrage regarding any such policy, action, conduct, decision, interest, object, principle, cause, concern, demand or claim, grievance, objection or outrage, or to do so in relation to any event or occurrence of national or public concern or importance or significance, or eliciting national or public concern or interest, in such manner as to attract or direct thereto, or be calculated, destined or intended to attract or direct thereto, the attention of

(i) any such Government or authority;

(ii) any other country, territory or international or multinational organization, association or body; or

(iii) the public or any member or sector of the public, whether within or outside the Republic;

"strike" means any strike as defined in section 1 of the Labour Relations Act, 1956.

The applicant argued that section 126B(2), read together with section 126B(4), infringed the constitutionally enshrined right to freedom of expression found in section 16 of the Constitution. O'Regan J referred to the expression of Hefer JA in *National Media Ltd and Others v Bogoshi*¹⁰⁶ where the learned judge said that freedom of expression is at the heart of democracy. He also referred to Mokgoro J who in *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others*¹⁰⁷ said the following:¹⁰⁸

We must understand the right embodied in section 15 not in isolation, but as part of a web of mutually supporting rights enumerated in the Constitution, including the right to "freedom of conscience, religion, thought, belief and opinion", the right to privacy and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is both instrumental and intrinsic value.

It was obvious to the court that section 126B(2) read together with section 126B(4) infringed on the members of the SANDF's right to freedom of expression. It then had to be established if the infringement could be justified according to section 36 of the Constitution. The court referred to section 199(7) of the Constitution which states that a member of the security forces may not promote the interests of a political party

106 *National Media Ltd and others v Bogoshi* 1998 4 SA 1196 (SCA).

107 *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 3 SA 617 (CC).

108 15(27-28).

in the performance of their duties. Taking this provision into account, the court decided that the ambit of the section 126B provisions is excessive. Members of the SANDF are almost completely prohibited from engaging in discussions and to express their views. The scope of section 126B of the *Defence Act* goes far beyond what is expected according to section 199(7) of the Constitution. O'Regan J stated the following:

The scope of the prohibition under challenge suggests that members of the Defence Force are not entitled to form, air and hear opinions on matter of public interest and concern. It suggests that enrolment in the Defence Force requires a detachment from the interests and activities of ordinary society and of ordinary citizens. Such a conception of the Defence Force cannot be correct. Members of the Defence Force remain part of our society, with obligations and rights of citizenship. All section 199(7) of the Constitution requires is that they perform their duties dispassionately. It does not require that they lose the rights and obligations of citizenship in other aspects of their lives.

The second part concerned section 126B(1) of the *Defence Act* which prohibits members of the SANDF from forming and joining any trade unions. The applicants attacked this provision by arguing that it infringed on the members of the SANDF's constitutional right to form and join trade unions as contained in section 23(2). This specific provision makes use of the word "worker" and the court had to establish if the members of the SANDF can be considered workers as contemplated by the Constitution. If these members are considered "workers", then they will automatically enjoy the rights contained in section 23(2) with some restrictions due to the special nature of the military. The court examined the difference between an ordinary contract of employment and enrolment in the defence force. By examining the elements of enrolment in the Defence Force, the court found that the relationship between the members of the SANDF and the SANDU is very similar to that of an employment relationship. ILO Conventions 87 and 98 were also examined according to section 39 of the Constitution which specifies that international law must be considered when interpreting provisions of Chapter 2. The important provisions of Convention 87 are articles 2 and 9(1) respectively:

2. Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

9(1) The extent to which the guarantee provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations.

This means that the rights of members of the police and armed forces may be limited by national laws, but these limitations must also be reasonable according to section 36 of the Constitution. The main contention from the respondent was that if members of the SANDF were to be able to form and join trade unions, it would undermine discipline that is of the utmost importance in the military. Here the respondent relied on section 200(1) of the Constitution which states: "The defence force must be structured and managed as a disciplined military force." The respondent further argued that if the members of the SANDF would be given all the rights under section 23 of the Constitution, it would undermine the discipline and structure of the defence force. They especially relied on the fact that if members of the defence force who were members of a trade union, were given the right to strike, it would have grave consequences for the safety and security of the Republic of South Africa. The applicant responded to this argument by saying that it did not want to lobby for the right to strike for its members, only the abolition of section 126B of the Defence Act which stated that the members of the defence force may not participate in public action. The learned judge had the following to say:¹⁰⁹

I am not persuaded, however, that permitting members of the Permanent Force to join a trade union, no matter how its activities are circumscribed, will undermine the discipline and efficiency of the Defence Force. Indeed, it may well be that in permitting members to join trade unions and in establishing proper channels for grievances and complaints, discipline may be enhanced rather than diminished.

O'Regan J then decided that the ban on membership of trade unionism in the defence force incorporated in section 126B(1) is inconsistent with the Constitution and therefore also invalid. After this landmark decision, members of the SANDF could now form and join a trade union. This is the significant impact that section 23 of the Constitution had on trade unionism in the military in South Africa.

The third factor Heineken refers to is the pressure a dominant trade union culture has on all walks of life, especially in a nation where the past has been stained with

109 25(35-36).

labour discrimination and class distinction.¹¹⁰ South Africa is a prime example of such a society. Trade unions, as explained above, were the main driving force behind the change from the Apartheid regime to democracy as well as uplifting the plight of the black employee. Therefore, black employees see trade unions as a way in which all their rights are protected and an organisation which fights for better terms and conditions of employment, especially the impoverished majority of unskilled workers. It is only natural for the members of the SANDF to want more employment security and be wary of the exploits of the past. Being a member of a trade union affords a worker a great deal more job security. This would be the main driving force behind the need for trade unionism in the defence force. Other countries such as the United States of America have rejected the argument for the existence of trade unions in the military. In the United States, the police force is unionised but trade unionism never got off the ground in the military as they were not seen as organisations to fight for the labour rights of members of the military.

The fourth important factor behind the drive for military unionisation is the decline of the status in the military. Heinecken takes Britain as an example. The British military enjoys a high status in British society. In the British military, salaries coincide with those in the private sector and the reason for this is that the military officer makes great sacrifices and therefore his interests should be protected. This makes a trade union in the British military superfluous. In a country such as South Africa, the situation is quite different. The status of the military has slowly declined and being a member of the defence force is not as enticing or lucrative as it once was. Heinecken quotes Weibull:¹¹¹

The external world's view of the officer's job, here defined as the sum effect of how politicians value military expertise in relation between mission and means and the image of the officer's profession in the public eye, is judged as the most dissatisfying factor ... and where one's contribution is supposed to add much to the common good, the strong dissatisfaction with feedback from society must be looked upon as a warning concerning officers' future commitment to their work.

110 Heinecken 1995 *African Security Review* 17.

111 Weibull *Current Sociology* 71.

It is further stated by Harries-Jenkins that military trade unionism is a direct result of the decline of the status of the military.¹¹²

When there is a significant loss of privilege and status of the military in society, trade unions are then formed as a pressure group to re-establish the privileges formerly held by the armed forces.

Another important factor for the formations of trade unions in the armed forces is the organisational change within the military. Being a member of the armed forces is no longer seen as a calling, but more of an occupation. Members are therefore constantly seeking to better the basic conditions of employment. The military is not seen as a calling, but merely as a way in which to obtain a better financial situation for the member, thus it is seen as just another job.¹¹³

The last factor which plays a role in the unionisation of the armed forces is that the perception must be there that unions in the military are needed. This need is enhanced when there is the perception by members of the armed forces that the government or the military itself cannot sufficiently protect the employment security of the member or promote to better their basic conditions of employment. The systematic deprivation of service benefits is a major driving factor behind the need members have to form and join a trade union.¹¹⁴

4.3 The SANDU-judgements

4.3.1 A short introduction

After the SANDU 1999 decision, the Minister of Defence issued new regulations to create a framework for the collective bargaining about to take place for the first time within the SANDF. These regulations formed part of Chapter XX of the General Regulations of the South African Defence Force. Chapter XX is named "Labour Rights" and contains all the regulations dealing with individual and collective labour relations within the military. Requirements and procedures were set out for the registration of a trade union as well as the establishment of the Military Bargaining

112 Harries-Jenkins "Trade Unions in Armed Forces" 61.

113 Heinecken 1995 *African Security Review* 18.

114 Heinecken 1995 *African Security Review* 18.

Council (MBC) and the Military Arbitration Board (MAB). The MBC would be the key instrument in concluding collective agreements between the SANDF and a Military Trade Union (hereafter MTU). If a dispute between the employer (the SANDF) and a MTU is not resolved in the MBC, then the dispute would go to arbitration in the MAB. The main objective of the MBC as set out in its Constitution is as follows:

Negotiate and bargain collectively to reach agreement on matters of mutual interest between the employer and members represented by admitted Military Trade Unions (MTU) in the Council, and to prevent and resolve disputes between the employer and such Military Trade Unions by means of negotiation, consultation or otherwise, including, but not limited to the utilisation of procedures for dealing with disputes.

Before the MBC was established, SANDU wrote the SANDF imploring the employer to manage the status quo between the two parties until any disputes could be resolved in the MBC. The reason for this stance was that SANDU knew the SANDF were busy setting up new staff policies and SANDU was concerned that the policies would be implemented before any bargaining or consultations with them had taken place.

The Constitutional Court SANDU decision originated from five applications. Two of these were heard by Van der Westhuizen J (SANDU I) in the High Court, two more were heard by Smit J (SANDU II) and the last one was heard by Bertelsmann J (SANDU III).

4.3.2 SANDU I

SANDU I, reported as *SA National Defence Union v Minister of Defence & others*,¹¹⁵ concerned two separate applications. The first of these applications concerned the new staffing policy that the SANDF wanted to implement unilaterally. The SANDF withdrew this proposed staffing policy and therefore this was no longer a dispute. The only point the High Court had to decide on was the costs. The second application concerned the refusal of the SANDF to bargain with SANDU. The draft order furnished by SANDU's attorneys set out that the refusal of SANDF to bargain with SANDU was an infringement of regulation 36 of Chapter XX of the General

115 *SA National Defence Union v Minister of Defence & others* 2003 24 ILJ 1495 (T) (hereinafter SANDU 1).

Regulations of the South African National Defence Force and the Reserve, regulation 63 saying that any member trade union of the MBC has the right to participate in conclusion of collective agreements and section 23 of the Constitution.¹¹⁶ SANDU argued that there is a duty to negotiate in good faith on the SANDF and the Minister of Defence; SANDU wanted an order forcing the SANDF to return to negotiations in the MBC. The respondents argued that neither the Constitution nor the relevant statutes impose a duty to bargain on the issue of policy:¹¹⁷

Section 23(5) recognizes ‘the right to engage in collective bargaining’ whereas section 27(3) recognized ‘the right to bargain collectively’. The significance is that whereas section 27(3) recognized the right to bargain collectively, with a corresponding duty on the other side, section 23(5) permits collective bargaining and thus recognizes a freedom rather than a right. Whereas this freedom may not be violated, in other words no one may be prevented from bargaining collectively, a duty is not imposed on anyone to participate in collective bargaining.

The respondents emphasised the voluntary nature of collective bargaining under the Constitution. Van der Westhuizen J summarizes the argument forwarded by the applicants:¹¹⁸

The first is that section 23 of the Constitution recognizes a carefully balanced package of rights, freedoms and duties related to labour relations, starting with the recognition of everyone’s right to fair labour practices in section 23(1). This package includes the right to strike in section 23(2)(c). The right to strike is a potentially powerful tool in the hands of workers to persuade employers to negotiate and participate in collective bargaining. However, as far as the military is concerned the right to strike is not recognized and strikes are in fact specially prohibited. Therefore, the balance is disturbed to the detriment of employees. In order to restore this balance there has to be a duty on the employer to participate in collective bargaining.

The learned judge further summarised the applicant’s argument:¹¹⁹

Secondly, insofar as it might be true concerning relations in the private sphere that the prevailing philosophy is one of voluntary participation in collective bargaining (which was all but conceded by counsel for the applicant), the same could not apply to a relationship between employees and the state, as employer. The free exercise of a choice as to bargain or not to bargain does not make sense when there is only [one] possible partner to bargain with, namely the state as a very powerful entity.

116 1499B-F.
117 1507H-I.
118 1508B-D.
119 1508C-F.

Workers would be left without protection, should the employer in such a case decide not to negotiate. The right, or even freedom, to engage in collective bargaining would be meaningless in such a situation, when the only potential partner is unwilling to participate in a collective bargaining process.

The court decided that here is no correlative duty to bargain according to the right to engage in collective bargaining. The learned judge decided that the argument that the right to strike was not available to military personnel was flawed, because there are other forces that could be utilised to convince a bargaining partner to negotiate. Therefore, the court decided that there is no constitutional or statutory duty to bargain collectively.

4.3.3 SANDU II

The two applications launched in July 2002 and heard together by Smit J were reported as *SA National Defence Union v Minister of Defence & others*.¹²⁰ The applicant challenged certain regulations of Chapter XX of the General Regulations of the South African National Defence Force and the Reserve. The applicant also sought an order declaring that the SANDF had a duty to bargain with it at the MBC on the regulations and all matters of mutual interest.¹²¹ Smit J disagreed with Van der Westhuizen J and decided that section 23(5) imposes a correlative duty to bargain with a union on the employer. The learned judge also held that the regulations of Chapter XX imposed a duty on the SANDF to bargain with a union. The regulations that confer this duty is regulation 3(c) and 36 respectively:

3. The objectives of these Regulations are to provide for –

(c) collective bargaining on certain issues of mutual interest;

&

36. Military trade unions may engage in collective bargaining, and may negotiate on behalf of their members, only in respect of –

(a) the pay, salaries and allowances of members, including pay structure;

120 *SA National Defence Union v Minister of Defence & others* 2004 4 SA 10 (T) (hereinafter SANDU II).

121 Cheadle *et al Current Labour Law* 2007 48.

(b) general service benefits;

(c) general conditions of service;

(d) labour practices; and

(e) procedures for engaging in union activities within units and bases of the Defence Force.

Importantly, relating to the duty to bargain the judge held the following:¹²²

It is declared that the first respondent is under a duty to negotiate with the first applicant within the Military Bargaining Council and otherwise on all matters of mutual interest (including the contents of, and amendments to, the General Regulations promulgated or to be promulgated in terms of the Defence Act) that might arise between the first respondent in his official capacity as the employer on the one hand, and the first applicant and/or its members on the other side.

The court further held that the challenged regulations were inconsistent with the Constitution and therefore they were invalid. The SANDF then appealed this decision to the Supreme Court of Appeal.

4.3.4 SANDU III

The SANDF wanted to unilaterally implement policy changes called the Revised Implementation Measures: Transformation and Restructuring of the Department of Defence. SANDU again approached the High Court seeking an interdict to restrain the SANDF to implement this policy unilaterally. The SANDF implemented this policy on the 21st of May 2003 without any previous consultation with SANDU. When this policy was introduced, SANDU requested that the Department of Defence negotiate and bargain with it over this restructuring and transformation policy. The Department of Defence refused to bargain with the union and after this SANDU referred the dispute to the MBC. Still, the Department of Defence refused to bargain with the union. The union then referred the dispute to arbitration and while the arbitration was still pending, the Department of Defence noted that it intended to implement the policy with immediate effect. Thus, the application for an interdict was launched by

122 41E-G.

SANDU. This matter was heard by Bertelsmann J and unreported.¹²³ The respondent argues that it did not need to consult with the union on issues of policy and that it had a right to implement policies unilaterally because it was in the public interest. Bertelsmann J granted the order interdicting the Department of Defence from implementing the restructuring policy on the basis that the dispute between it and the union had already been referred to the dispute resolution structures (the MBC and the MAB). The respondent appealed this order to the Supreme Court of Appeal.

4.3.5 *Supreme Court of Appeal*

All of the appeals mentioned above were heard together before the Supreme Court of Appeal in *South African National Defence Union v Minister of Defence and Others; Minister of Defence and Others v South African National Defence Union and Others*.¹²⁴ The reason for this was that all of the appeals had a central issue relating to all of them: Was there a duty on the SANDF to bargain with SANDU? Conradie JA considered the arguments raised by SANDU's counsel in SANDU I. He made the following statement:¹²⁵

There is merit in this contention insofar as it suggests that the right to bargain is meaningless unless it is reinforced by some mechanism to drive the parties to the bargaining table. Ideally, economic retribution should fulfil this function, but in situations where socially it would be too costly or dangerous to permit parties to assail each other economically, the law provides for an alternative. The alternative is not for a court (or other tribunal) to compel the parties to bargain. The alternative is compulsory arbitration. That is the device employed to resolve disputes in essential services in the civilian sector. Counsel for SANDU nevertheless maintain that this way of resolving workplace conflicts is so wholly deficient that it cannot replace collective bargaining, and that one cannot from the availability of an arbitration remedy conclude that there is no duty to bargain.

The learned judge compared the military with an essential service. The collective bargaining management in the essential services are not unconstitutional and this system is very similar to the one put in place for disputes in the military. Secondly the

123 *South African National Defence Union and Others v Minister of Defence* (T) Case No 15790/2003, 14 July 2003, unreported (hereinafter SANDU III).

124 *South African National Defence Union v Minister of Defence and Others; Minister of Defence and Others v South African National Defence Union and Others* 2007 1 SA 402 (SCA). (hereinafter the *Supreme Court of Appeal* case)

125 21A-C.

judge said that the process of arbitration is a powerful motivator for parties to settle, because the chance that a third person may decide the outcome of the dispute is not ideal for the parties. The court then found that where the right to strike is removed or prohibited, a duty to bargain is not automatically instituted in its place.

Further the Court considered SANDU's arguments that certain regulations of Chapter XX impose a duty to bargain. Counsel for SANDU argued that if regulations for collective bargaining are put in place, then it would be useless if there was not a duty to bargain imposed upon the employer. The court decided that no legally enforceable duty to bargain is created by the regulations:

In my view one cannot read an intention to impose judicially enforceable bargaining on the SANDF into the regulations. If no resolution to a dispute on a matter of mutual interest is reached because the SANDF refuses to bargain, that dispute may, after a failed attempt at conciliation by the MBC, be referred to the MAB. There is a remedy whether or not there has been bargaining.¹²⁶

4.3.6 *Constitutional Court*

O'Regan J decided on the matter in the *Constitutional Court* case. SANDU was seeking the following orders be made: to stop the employer (SANDF) from withdrawing from the MBC and then unilaterally imposing preconditions on SANDU before it will return to the bargaining table; the order that certain of the regulations in Chapter XX are unconstitutional; an order stating that there is a duty on the SANDF to bargain with SANDU on matters of mutual interest and an order declaring that the SANDF are not allowed to implement a new policy before a dispute over the policy was not referred to the MAB and heard. The main question however was if there was a duty to bargain imposed on the SANDF to bargain with any military trade unions.

The court had to decide if section 23(5) of the Constitution imposes a correlative duty to bargain on the SANDF, or if a duty to bargain is established by the regulations of Chapter XX or by the Constitution of the MBC. The Constitutional Court had to decide whether SANDU could directly rely on the provisions of section 23(5) or if it first had to challenge the constitutionality of the legislation enacted in accordance with section 23(5) of the Constitution. According to the High Court in *NAPTOSA and*

126 29G-H.

*Others v Minister of Education, Western Cape, and Others*¹²⁷ the provisions of the LRA must first be constitutionally challenged before relying upon the provisions of the Constitution. In this case, there was legislation promulgated in terms of section 23(5) of the Constitution to handle labour relations in the military, namely Chapter XX. Counsel for SANDU did not challenge the provision, but relied on them. Therefore the court held that they cannot directly rely on the Constitution.

The court further held that the SANDF may not withdraw from the MBC and then impose regulations for its participation in the MBC. The reason that the SANDF withdrew was as a result of the letter sent from SANDU threatening the SANDF with labour unrest by stating the following:¹²⁸

Due to the many frustrations encountered between SANDU and the Employer, SANDU is strongly pressured by its members to embark into national labour unrest in order to make known to management, the public, Parliament and Government the treatment SANDU and its members are receiving from the Employer. In our last effort to avoid SANDU and its members to embark on national labour unrest, we now call on your office to urgently meet with SANDU in order to try and defuse the tension between this union and the Employer.¹²⁹

Even after SANDU apologised for their strongly worded letter the SANDF still did not want to return to the MBC to continue bargaining. The court held that although the way in which SANDU acted was unacceptable, the SANDF should have followed another route instead of withdrawing and imposing regulations for its participation.

The Constitutional Court was strongly opposed to the argument by SANDU that there is a duty on the SANDF to bargain with SANDU over the contents of Chapter XX. The court stated that it is not necessary for the legislator to bargain with a union on the contents of regulations or law. It may be appropriate for employers in the public-sector to bargain with a union over regulations that directly affect the collective bargaining structure between the union and the employer, but this was not the case. Therefore, the Constitutional Court found that there was no duty to bargain on the SANDF to bargain on the regulations.

127 *NAPTOSA and Others v Minister of Education, Western Cape, and Others* 2001 2 SA 112 (C).

128 Cheadle *et al Current Labour Law* 2007 44.

129 Cheadle *et al Current Labour Law* 2007 44.

SANDU also wanted an order declaring that the SANDF may not unilaterally implement new policy without exhausting dispute resolution procedures. Even though the SANDF was not planning on implementing this policy again, the court found it wise to discuss this matter should future disputes arise. This was indeed the central question to this whole debate. The Constitutional Court looked at certain regulations of Chapter XX, beginning with regulation 3(a) and 3(e). Regulation 3 sets out the objectives of Chapter XX:

3. The objectives of the Regulations are to provide for –

(a) fair labour practices;

(e) generally to provide for an environment conducive to sound and healthy service relations.

Regulation 36 states:

36. Military trade unions engage in collective bargaining, and may negotiate on behalf of their members, on in respect of –

(a) the pay, salaries and allowances of members, including the structure;

(b) general service benefits;

(c) general conditions of service;

(d) labour practices; and

(e) procedures for engaging in union activities within units and bases of the Defence Force.

After scrutinising these regulations, the Constitutional Court found that by unilaterally implementing new policies the SANDF is not providing an environment for sound and healthy labour relations within the military, especially seeing the strained relations between the SANDF and SANDU.

The SANDF still argued that these regulations don't put a duty on it to exhaust all the dispute resolution procedures before implementing new policy. The Court found the following:¹³⁰

It is clear therefore that SANDU has established that the Department of Defence is not entitled to implement unilaterally a policy which falls within the permissible bargaining topics identified in regulations 36 before exhausting the dispute procedure provided for in the regulations and the Constitution of the MBC.

4.4 Possible constitutional challenge

It would be appropriate to examine if a duty to bargain might in future come into play if a constitutional challenge is launched against the LRA. Section 23(5) of the Constitution is again emphasised. In *National Union of Mineworkers and Another v Eskom Holding Soc Ltd*¹³¹ Moshona AJ commented on this matter and held that the constitutional right to engage in collective bargaining is just that, engaging. The learned judge went on to comment that the national legislation that has to be enacted to regulate collective bargaining is obviously the LRA. He asked the question whether the section 23(5) rekindles a duty to bargain. The judge held that in the Supreme Court of Appeal case the SCA held that there were at least three possible interpretations to the term engage:¹³²

It may mean that contemplated national legislation to regulate collective bargaining must impose a duty to bargain on employers, or it may mean that the national legislation must provide a framework for collective bargaining, or it may merely mean that legislation may not prohibit collective bargaining.

The judge then referred to the *Constitutional Court* case where the Constitutional Court confirmed the decision of the Supreme Court of Appeal that there is no legally enforceable duty to bargain in South African Law. The judge however held that according to the Constitutional Court, this could however change if a constitutional challenge to the LRA is launched "in so far as the alleged right to bargain in good faith is concerned".¹³³

130 74-75.

131 *National Union of Mineworkers and Another v Eskom Holding Soc Ltd* 2012 33 ILJ 669 (LC).

132 16(25-26).

133 17(26-27).

5 Conclusion

5.1 Overview

As stated above, South Africa follows a voluntary model of collective bargaining. The LRA's main goal was to address the inequalities between the employer and the employee. This voluntarist approach by the LRA means that it is largely left up to the bargaining parties (employer and trade union) to use economic weaponry (strike action or lock-out) to influence the result of the collective bargaining process.¹³⁴ The LRA also afforded organisational rights to trade unions who are sufficiently representative or a majority in the workplace or bargaining unit. As stated in Chapter 2, a subtle hint of a duty to bargain is placed on the employer when a trade union issues it with a written notice when it wants to exercise any of its organisational rights. There is a duty placed on the employer to conclude a collective agreement with said trade union over the manner in which the trade union can exercise its rights in the workplace/bargaining unit.

Section 2 of the LRA excludes members of the SANDF and section 126B(1) of the *Defence Act* also prohibited members of the SANDF to form and join trade unions. After section 126B(1) of the *Defence Act* was declared unconstitutional, a labour relations regime was instituted for collective bargaining within the defence force by Chapter XX of the General Regulations of the South African National Defence Force.

5.2 Duty to bargain or not?

The purpose of this research was to establish if a duty to bargain was indeed enshrined in the military's labour relations framework with regard to the decisions of the court right up until that of the Constitutional Court, as explained in the previous chapter.

First, it would be wise to have another look at the highest authority in South Africa, the Constitution. As seen in the previous chapter, SANDU relied heavily upon section 23(5) of the Constitution. SANDU erred in their argument by relying directly

134 Belcher *Promotion of Collective Bargaining* 25.

on the provisions of the Constitution instead of challenging the specific legislation or regulations promulgated to give effect to its provisions. These were contained in Chapter XX of the General Regulations of the South African National Defence Force. Counsel for SANDU should have challenged the constitutionality of these regulations and not relied upon the provisions of section 23(5). This was made clear by the High Court in the NAPTOSA case. Section 23 of the Constitution orders the promulgation of legislation to the effect of the provisions of the Constitution regarding labour related matters and these specific legislation or regulations can be tested against the provisions of section 23 to see if it fulfils these fundamental rights.

The military has introduced a tailor-made system of collective bargaining to suit the delicate relationship between the members of a MTU and the SANDF. This system is naturally different from the framework for collective bargaining that the LRA had put in place.

Included in the framework under the *Defence Act* and Chapter XX a Military Bargaining Council has been established. The parties to the MBC are bound by its rules and regulations. In the aftermath of the court saga it has been established that the SANDF is not allowed to determine certain prerequisites before they will engage in bargaining with a MTU. The court has also held that the SANDF cannot withdraw itself from the bargaining process as long as the process is still running and whilst withdrawing itself make unilateral changes to working conditions as it sees fit.

Thompson makes the argument that these specific statutes and regulations impose contingent duties to bargain without making express reference to a duty to bargain.¹³⁵ The SANDF is compelled to take part in negotiations at the MBC with a sufficiently representative trade union (SANDU) and it cannot withdraw and unilaterally impose changes to working conditions. If SANDF refuses to bargain with said trade union, the matter is referred to compulsory arbitration which then takes the place of industrial action. This follows the system of collective bargaining provided for to the workers in the essential services where it would be dangerous and costly to allow these workers to embark on industrial action. The argument is that the regime of collective bargaining under the *Defence Act* and its regulations follows the

135 Cheadle *et al Current Labour Law* 2007 58.

compulsory model of collective bargaining where a duty to bargain is imposed and judicially enforced. The award made by the MAB through compulsory arbitration can in terms of regulation 81 of Chapter XX, apply to make the arbitration award an order of the High Court.

According to the definition of a duty to bargain discussed in Chapter 2, the duty to bargain imposes a legal duty upon the employer to bargain in good faith with a recognised trade union over bargaining subjects for the appropriate bargaining unit. If a military trade union has reached the threshold requirement of 15000 members and it has a certificate of registration and a registered constitution, it may apply to the MBC to become a party. If the trade union becomes a party, the SANDF must conclude a collective agreement in respect of the issues set out in regulation 36 of Chapter XX. Regulation 69(4) states that unless the collective agreement provides for it, no party to the agreement may unilaterally withdraw from it.

It can clearly be seen that if a military trade union is registered, has a registered constitution and has met the required membership threshold, it would likely become a party to the MBC and the SANDF would then be obliged to bargain with it over the matters set out in regulation 36 and conclude a collective agreement to regulate these matters. Therefore it seems that there is a duty to bargain imposed by Chapter XX on the SANDF to initially bargain with a trade union over the matters set out in regulation 36. These matters are limited but according to Thompson one would be hard pressed to find any matter of mutual interest that is not covered by the matters that are set out in regulation 36.¹³⁶

As can be seen in Chapter 4, the LRA is open to a constitutional challenge in so far as the right to bargain in good faith is concerned.¹³⁷ The duty to bargain may therefore still exist in South African law.

136 Cheadle *et al* *Current Labour Law* 2007 51.

137 See para 4.4.

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