THE ROLE OF STRIKE ACTION IN COLLECTIVE BARGAINING WITH MORE EMPHASIS ON THE SOUTH AFRICAN LABOUR RELATIONS

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1. Introduction

The relationship in the employment environment is unfortunately based on inequality that is vertical in terms of power. The employer is the source of authority while the employee has no authority. Historically, the employer and employee relationship was known as a master/servant relationship, and even today, this relationship is still there but in a narrowed different form. The only difference today is that, the worker/employer relationship is statutorily regulated and still the inequality is prominent. It has been established that conflict of interest is inherent in the employment relationship because of the inequality between the owners of means of production and owners of labour.[1] There are other factors that fuelled industrial conflict namely, the control/ownership over the means of production such as capital, machinery, technology, know-how, and decision-making in the enterprise, and the unequal distribution of the fruits of production. In the circle of production, the employers with the exception of labour that is owned by the employees, control almost all of the means of production.

It is an undisputed fact that conflict of interest in the workplace is based on power and subordination. It will always exist as long as there is inequality in the employment relationship. The chances that employers and employees will ever be equal partners are not possible because of the nature of the global economy. The later is driven by competition that is based on profit making. In the process, employees are exposed to exploitation, i.e low pay and poor working conditions. Therefore, the industrial conflict has to be contained or managed constructively. The question arose; how could employees protect themselves against their employers? Collective bargaining is the answer and is defined as follows:

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[1] Rycroft and Jordaan *A Guide to South African Labour Law* 114.

"A voluntary process for reconciling the conflict of interests and aspirations of management and labour through the joint regulation of terms and conditions of employment."[2]

Collective bargaining is a continuous process of give and take. It is initiated by trade unions[3] and fulfils three basic functions namely:

(a) it fulfils an economic function, in that it serves as a device for the regulation of individual and collective workplace relations, and the institutionalisation of industrial conflict;

(b) it fulfils a social function, in that it establishes a system of industrial justice which protects employees from arbitrary action by management and which recognizes their right to human dignity; and

(c) it serves a political function, in that it brings a measure of democracy to industrial life, giving employees a say in matters, that affect their work lives.

The *Labour Relations Act* 66 of 1995 as amended (LRA) has made a model provision of collective bargaining, which is set out to bring greater coherence and reduce the high levels of adversarial characteristic of collective bargaining.[4] Section 1(c) and (d) of the LRA defines the primary objects of the LRA as "to provide a framework within which employees and their trade unions, employers, and employers' organizations can;

(a) collectively bargain to determine wages, terms and conditions of employment and matters of mutual interests; and

(b) formulate industrial policies and promote orderly collective bargaining at the workplace and sector level."

The end product of collective bargaining is a hybrid of voluntarism, inducement and compulsion based on economic power. The legal rules relating to freedom of association and organisational rights are all aimed at making collective

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[2] Rycroft and Jordaan *A Guide to South African Labour Law* 116.
[3] Bendix *Industrial Relations in South Africa* 249
[4] Du Toit et al *Labour Relations Law: A Comprehensive Guide* 227.

bargaining possible. In terms of the LRA there is no general duty to bargain by employers and trade unions. An employer may refuse to engage with a trade union and in turn, the trade union can take strike action in respect of such a refusal to bargain. This is a dispute of interest and is subjected to power play. In pursuing the strike route, the union will have to comply with the provisions of the LRA in order to have its strike action protected.

It has been established that the under mentioned requirements must be in existence in order to allow collective bargaining to be effective:

- freedom of association, meaning that employees should be free to form trade unions and employers should also be able to form employers' organization;
- trade unions and employers organization should be willing to bargain;
- employees participating in protected strike should be protected by law; and
- collective agreements should be legally binding.

These requirements are statutorily protected by the *Constitution of the Republic of South Africa*, 1996[5] and *Labour Relations Act* 66 of 1995 with the exception of the duty to bargain, which is voluntary.

It is submitted that the LRA promotes a pluralistic approach to the grant of bargaining entitlements, endorsing unions, which are sufficiently representative and not necessarily enjoying majority support. The aim of LRA in this regard is to discourage a proliferation of bargaining agents at both sectoral and workplace level. The LRA fosters collaboration between the different unions, as well as between organised business and labour at central level. It is said that these objectives hope to achieve, by wielding the proverbial carrot rather than the stick, unions acting jointly and those joining councils enjoying greater

[5] *Constitution of the Republic of South Africa*, 1996 will hereinafter be referred to as the Constitution.

rights.[6] Collective bargaining is not the exclusive domain of majority unions and minority unions have also the right to bargain collectively over the recognition of their shop stewards.[7] However, according to the court, this does not mean that the same considerations are necessarily applicable in the event of a right closely associated with collective bargaining, namely, the right to disclosure of relevant information, which is in terms of section 16 of the LRA likewise, available to majority unions only.[8]

In order for the role of strike action in collective bargaining to be understood, one needs to define it first. The definition of a strike contained in the LRA reads as follows:

> "Strike 'means' the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory."[9]

The definition of a strike indicates that it has three elements or requirements namely: an action or omission of a prescribed nature, an action or omission must be concerted, and that an action or omission must have a prescribed purpose. Strike as an element of collective action may only be used to achieve collective goals of a trade union or group of employees.

Internationally it has been recognised that collective bargaining alone is not good enough to address labour relationships at the workplace. The imbalance of economic power is too wide between employers and trade unions/employees. Hence as a result most countries legalised the use of strike

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[6] Du Toit et al *The Labour Relations Act* of 1995 126-127.
[7] *NUMSA others v Bader Bop (Pty) Ltd and another* 2003 2 *BCLR* 182 (CC).
[8] Olivier "*Statutory Employment Relations in South Africa*" in Slabbert et al *Managing Employment Relations in South Africa* 73.
[9] Section 213 of the LRA.

action to give effect to collective bargaining. Strikes are allowed with certain qualifications. This point will be unpacked later in the discussion. A strike is meant to inflict economic harm on the employers with the aim of compelling them to accede to trade unions demands resulting from collective bargaining. Statutorily,[10] employers are not obliged to pay employees while on strike be it protected or not. The ultimate intention of a strike was captured by the Labour Appeal Court when it held that:

> "The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to the worker's demands than have his/her business harmed further by the strike. The essence of a lock-out is that the employer denies the locked-out employees the opportunity to earn their wages, thereby causing financial harm to the locked-out employees, in the hope that after a certain point, the financial harm or pain inflicted on the employees would have been so much that they would consider that they would rather agree to the employer's demands than continue to be subjected to the lock-out and to lose more wages."[11]

The impact of strike action is known that it may lead to substantial economic and social damage. It is my view that the damage, which is accompanied by the strike action, is meant to force the parties to compromise and reach an agreement because it hurts both parties although the severity of the harm is not the same.

There is a view held by some scholars that:

> "If the law were to ban strikes by employees, that would effectively end collective bargaining. It would deprive the union of the ultimate lever it has to extent it has to extract concessions from a recalcitrant employer. In the eyes of trade unionists, it would leave the employees with no more than the right to collective begging."[12]

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[10] Section 67 (3) of the LRA.
[11] *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* 2001 22 *ILJ* 414 (LAC) at 422E-G
[12] Weiler *Reconcilable Differences – New Directions in Canadian Labour Law* 67.

The purpose of this research is to demonstrate the role of strike action in collective bargaining in the South African context and how our laws regulate the use or application of strike in collective bargaining process. An attempt will also be made to compare South Africa, Germany, Belgium, and United Kingdom to establish the extent to which strike action and collective bargaining are protected and how they operate.

2. Interpretation of Section 23(2)(c) and (5) of the Constitution

The South African law recognises the importance of the role of strike action in labour relations. As a result, the right to strike and other labour law rights are protected as fundamental rights by the Constitution[13] such as the following:

- the right to fair labour practice;
- the right of workers to form and join a trade union and to participate in the activities and programmes of a trade union as well as the right of employers to form and join an employers' organisation and to participate in the activities and programmes of an employers' organization; and
- the right to organise and engage in collective bargaining.

Labour law rights are constitutionally entrenched. This means that it is difficult for parliament to change the Constitution than ordinary law. It is submitted that the Constitution is drafted with an eye to the future. It must be capable of growth and development in order to meet the changing circumstances.[14] The rights set out in section 23 of the Constitution provide a primary framework within which the labour statutes must be interpreted. The courts and others applying the statutes must distil the values underlying these rights and interpret the statutes in a way that gives effect to them.[15] Included in the rights conferred on trade unions and their members by section 23(2) of the Constitution is the

[13] The *Constitution of the Republic of South Africa*, 1996 section 23.
[14] Du Toit et al *Labour Relations Law: A Comprehensive Guide* 58.
[15] Du Toit et al *Labour Relations Law: A Comprehensive Guide* 60.

right of every worker to strike. The Interim Constitution balanced this right to strike with an employer's recourse to lock-out for purposes of collective bargaining.[16] This right of recourse to the lock-out was excluded from the final Constitution. This exclusion was challenged during the constitutional certification process as failing to meet the requirements of CP XXVIII, requiring provision in the final Constitution of a 'right to engage in collective bargaining'. The Constitutional Court held that the right to exercise some economic power is implicit in the right to collective bargaining, but found it unnecessary to determine the nature and extent of this right. A statutory right of every employer to have recourse to the lock-out is recognized in the LRA.[17] It should be noted that recourse to lock-out action means something less than a right to strike.[18]

The employer/employee relationship in the workplace is inherently based on unequal economic power as a result, employees are at the mercy of employers. The engagement of a strike action as an economic weapon to protect employees' interests has changed the balance of power in the employment relationship. The inequality has been significantly narrowed in the workplace by the constitutional right to strike. At the time the Constitution was being certified by the Constitutional Court, employers raised their concern that their right to lock-out employees should be contained in the Constitution to counteract the right to strike and the Constitutional Court declined, indicating that the two are not balancing one another. The employers' interests are still protected by the right to organise and engage in collective bargaining.[19] The right to strike is a

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[16] Currie and De Waal *The Bill of Rights Handbook* 513.
[17] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).
[18] Olivier *Strikes, Lock-out and Related Actions* 78.
[19] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 17 *ILJ* 821 (CC).

necessary adjunct to collective bargaining, as it corrects the inherent inequality of power in the employment relationship.[20]

The right conferred on trade unions and their members by section 23(2) of the Constitution is the right of every worker to strike. The Constitution is effectively providing protection for strikers going beyond collective bargaining such as strikes promoting or defending the socio-economic interests of workers and political strikes. With regard to political strikes, the International Labour Organization Committee of Experts and International Labour Organization Committee on Freedom of Association have limited the extension of the right to strike and exclude purely political motives,[21] given the interpretation directives contained in the Constitution which stipulates that the courts must take the principles of international law into account when interpreting the Bill of Rights.[22]

Protest action with the purpose of promoting or defending the socio-economic interests of workers is regulated by section 77 of the LRA. The LRA does not protect all forms of protest action. The LRA requires that one should look to the purpose of the protest action in determining whether or not it is to be afforded legislative protection. If the purpose is purely political, it will not be protected.[23] If the purpose is to advance a socio-economic aim, it will be protected.[24] Given that employers are seldom, if ever in a position to resolve disputes of an essentially political nature, and that trade unions have other means by which they might attempt to influence the political debates, this limitation on the right to strike will probably survive constitutional challenge.[25]

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[20] Grogan *Workplace Law* 326.
[21] Curirie and De Waal *The Bill of Rights Handbook* 513.
[22] The *Constitution of the Republic of South Africa*, 1996 section 39 (1).
[23] Du Plessis *A Practical Guide to Labour Law* 364.
[24] *Government of the Western Cape Province v Cosatu* 1998 12 *BLLR* 1286 (LC)
[25] Currie and De Waal *The Bill of Rights Handbook* 513.

There are two Conventions of the International Labour Organization, which are relevant in the context of strikes. First, is the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and secondly which is of considerable importance is the International Labour Organization's Right to Organize and Collective Bargaining Convention 98 of 1949. South Africa has ratified these conventions, and is therefore bound to comply with their provisions. The LRA states in section 3 that its provision must be interpreted in compliance with the international law obligations of South Africa.[26]

The International Labour Organization's Freedom of Association Committee has interpreted Article 3 of Convention 87 of 1948 to include the right to strike. The International Labour Standards formulated and laid down ILO Conventions and Recommendation continues to play an important role in interpreting the LRA and the scope of the right to strike. The Constitutional Court has applied International Standards in reaching the decision in *National Union of Metalworkers and others v Bader Bop (Pty) Ltd and another.* [27]

The right to strike is well recognised in international instruments and is also enshrined in a number of modern constitutions. The International Convention on Economic, Social and Cultural Rights Article 8(1)(d) and the European Social Charter Article 6(4) also recognise the right to strike. The LRA accommodates and links to the Constitution in a number of ways. The LRA reflects and confirms the fundamental rights, especially the rights contained in section 23 of the Constitution. The LRA contains a dual reference to the Constitution in its interpretation clause. Section 3(a) of the LRA read with section 1(a) states that the Act (LRA) must be interpreted to give effect to the fundamental rights set out in section 23 of the Constitution, while section 3(b) states that the Act must be interpreted in compliance with the Constitution.

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[26] Basson et al *Essential Labour Law* 282.
[27] 2003 24 *ILJ* 305 (CC).

Section 3(a) read with section 1(a) requires a value-based interpretation even of provisions, which are *prima facie* constitutional.[28]

The LRA has made attempts to ensure that its provisions do not infringe any of the rights contained in the Constitution especially section 23, which directly deals with labour law rights. This is especially important because to the extent that the LRA reflects and confirms some of the rights contained in the Constitution, it also means that the LRA regulates and even limits these constitutional rights. This means that the way in which the LRA reflects and confirms constitutional rights becomes important. This raises the question whether such regulation constitutes an acceptable limitation on these basic rights. For example; are the closed shops and agency shops as provided for in the LRA, an infringement of the constitutional right to join a trade union or not to join? It is my view that these provisions of the LRA need to be tested at the Constitutional Court to determine whether they comply with section 36 of the Constitution because they are definitely limiting the constitutional rights of employees.

Section 23(5) of the Constitution confers on every trade union, employer's organisation and employer the right to engage in collective bargaining. It is important to note the wording of this section and its implications for the reach of the right. The wording in the Interim Constitution was phrased as follows; 'Workers and employers shall have the right to organise and to bargain collectively.' Significantly, the wording changed in section 23(5) of the Constitution to provide a 'right to engage in collective bargaining.'[29] The Constitution also permits national legislation to regulate collective bargaining. In terms of the Interim Constitution workers and employers were legally bound to engage in collective bargaining, while under the final Constitution the right is

[28] Du Toit et al *Labour Relations Law: A Comprehensive Guide* 62
[29] Cheadle "*Labour Relations*"in Cheadle et al *South African Constitutional Law: The Bill of Rights* 388.

subjected to internal limitation clause which states that 'every trade union and every employers' organisation has the right to engage in collective bargaining. National legislation *may* be enacted to regulate collective bargaining.'[30] This provision has an internal limitation besides section 36 of the Constitution. The absence of *"shall"* in the current constitutional clause[31] of collective bargaining makes the big difference in the application of this clause. It does not have that out right compelling force of compliance as it was contained in the Interim Constitution.

The right provided by section 23(5) of the Constitution is composed of the three elements: first, the freedom to bargain collectively, that is viewed as the negative right to collective bargaining and implying that the state may not enact legislation that prohibits or has the effect of prohibiting collective bargaining;[32] secondly, the right of one of the parties to the bargaining process to exercise economic power against the opposing party (strike or lock-out). This right may further be explained by referring to the Constitutional Court decision reached in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa (first certification decision)*[33] whereby it was held that the right to bargain collectively implied the right to exercise economic power against the other party in the bargaining process. This implies that the employer may institute a lock-out against its employees. The recent court judgment in *National Union of Metalworkers and others v Fry's Metal (Pty) Ltd*[34], confirmed the earlier decision held by the Labour Appeal Court,[35] that employers can finally dismiss employees, for operational

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[30] Section 23(5) of the Constitution.
[31] Section 25(5) of the Constitution
[32] Cheadle "*Labour Relations*"in Cheadle et al *South African Constitutional Law: The Bill of Rights* 389
[33] 1996 4 SA 744 (CC).
[34] 2005 26 *ILJ* 689 (SCA)
[35] *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & others* 2003 24 *ILJ* 133 (LAC)

requirements when the employees have refused to accept changes to their terms and conditions of employment.

The LRA would seem to have removed the duty to bargain collectively which the Industrial Court earlier imposed on contending parties in the exercise of its unfair labour practice jurisdiction. It is stated that the LRA promotes collective bargaining by providing a series of organisational rights for unions and by fully protecting the right to strike. Since collective bargaining is no longer compelled by the LRA, the resolution of bargaining disputes is left to an exercise of industrial muscle. However, by extending and bolstering the right to strike, the legislature has effectively empowered unions to have recourse to the right to strike as an integral aspect of collective bargaining process.[36]

Collective bargaining is cast as a right in section 23 of the Constitution and the LRA provides the organisational framework in terms of which that right is to be exercised. The right and exercise of the right may, however be threatened by a number of aspects of the labour relations regime set out in the LRA. The most obvious threats are the introduction of minimum wage legislation and extension of collective agreements to non-parties, both of which amount to the imposition of a standard as opposed to a standard arrived at through collective bargaining.[37]

The interpretation of section 23(5) of the Constitution appears to be problematic when it has to be applied in certain sectors of our society, such as in military. The LRA does not cover the military personnel. However, it should be noted that the Bill of Rights applies to everyone who live in the Republic of South Africa. In *South African National Defence Union v Minister of Defence*[38] the Constitutional Court held that soldiers could be classified as 'akin' to

[36] Currie and De Waal *The Bill of Rights Handbook* 514.
[37] Curirie and De Waal *The Bill of Rights Handbook* 514.
[38] *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) (SANDU).