A legal analysis of the adversarial nature of collective bargaining

S ZIMANI

23693002

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Supervisor/Promoter: Mr MC Stoffels

Co-Supervisor:

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ABSTRACT

The principle of collective bargaining may be regarded as one of the major institutions of employment relationships as it plays a pivotal role in regulating and restoring the employment relationship between the employer and the employee. The right to strike is of importance and is central to collective bargaining as without the right to strike collective bargaining would not be effective. South African collective bargaining is characterized by an adversarial nature which means that parties "haggle and wrangle" in wanting their demands met. Several factors which range from historical facts to legislation contribute towards collective bargaining being adversarial. These adversarial aspects have caused many to question the place of this type of negotiation in today's world of globalisation. It is argued that the current adversarial collective bargaining is no longer compatible with today's corporate world, which seeks dialogue between employees and employers. The unrest that the labour industry has witnessed in the past few years can be attributed to the failure of adversarial bargaining to resolve disputes amicably which is in line with the objectives of the *LRA*. Adversarial collective bargaining presents several challenges that have varying implications which need to be addressed.

KEY WORDS: adversarial, adversarialism, collective bargaining, negotiation, unrest, implications, strikes, challenges, disputes, trade unions

OPSOMMING

Die beginsel van gesamentlike bedinging kan dalk gesien word as een van die hoofinstellings van werknemingsverhoudinge aangesien dit 'n sleutelrol speel in die regulering en herstel van die werkverhouding tussen die werkgewer en die werknemer. Die reg om te staak is belangrik en sentraal tot gesamentlike bedinging aangesien gesamentike bedinging nie effektief sal wees as die reg tot staking nie bestaan nie.

Suid-Afrikaanse gesamentlike bedinging word gekenmerk deur 'n vyandige aard, wat beteken dat beide partye stry en baklei om hulle doelwitte te bereik.Verskeie faktore, wat wissel van historiese feite tot wetgewing, dra by tot die vyandige aard van gesamentlike bedinging.

Hierdie vyandige aspekte het daartoe gelei dat baie mense vrae vra oor die plek van hierdie soort onderhandeling in vandag se globaliserende wêreld. Daar word aangevoer dat die huidige vyandige gesamentlike bedinging nie meer in pas is met vandag se korporatiewe wêreld wat dialoog tussen werknemers en werkgewers nastreef nie. Die onrus wat die arbeidsindustrie in die laaste paar jaar gesien het kan toegeskryf word aan die onvermoë van vyandige bedinging om dispute op te los op 'n vriendskaplike wyse wat in lyn is met die doelwitte van die LRA. Vyandige gesamentlike bedinging bied verskeie uitdagings wat uiteenlopende implikasies het en wat aandag verg.

SLEUTELTERME: Vyandig, vyandigheid, gesamentlike bedinging, onderhandeling, onrus, implikasies, stakings, uitdagings, dispute, vakbonde

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LIST OF ABBREVIATIONS

AMCU	Association of Mineworkers and Construction Union
BLLR	Butterworths Labour Law Report
CC	Constitutional court
CILSA	Comparative and International Law Journal of Southern Africa
CCMA	Commission for Conciliation, Mediation and Arbitration
ILO	International Labour Organisation
ILR	Industrial Law Journal
IJSS	International Journal of Social Sciences
LRA	Labour Relations Act
LAC	Labour Appeal Court
LC	Labour Court
Merc LJ	Mercantile Law Journal
MJSS	Mediterranean Journal of Social Sciences
NGO	Non-Governmental Organisations
NUMSA	National Union of Metalworkers of South Africa
NUPSAW	National Union of Public Service and Allied Workers
PER/PELJ	Potchefstroom Electronic Law Journal
SACTWU	Southern African Clothing and Textile Workers Union
SAJLR	South African Journal of Labour Relations
SAJEMS	South African Journal of Economic and Management Sciences
SATAWU	South African Transport and Allied Workers Union
SAMWU	South African Municipal Workers Union
SCA	Supreme Court of Appeal

Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid Afrikaanse Reg

1 INTRODUCTION

The principle of collective bargaining may be regarded as one of the major institutions of employment relationships as it plays a pivotal role in regulating and restoring the employment relationship between the employer and the employee. Section 23(5) of the *Constitution of the Republic of South Africa*, 1996[1] provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining. The right to strike is of importance and is central to collective bargaining.[2] It is argued that collective bargaining would not be effective without the right to strike supporting it.[3] The right to strike has been described as a component of a successful collective bargaining system.[4] It can be noted that the right to strike was designed as a tool to coerce the employer into collective bargaining,[5] but striking has become more prevalent thereby placing collective bargaining into doubt and highlighting the level of adversarialism which the process carries.

The constitutional provisions on collective bargaining are also entrenched in the *Labour Relations Act* 66 of 1995.[6] The *LRA* has several purposes which include promoting collective bargaining and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest.[7] To further this objective the *LRA* establishes organisational rights and protects the right to strike.[8] However, it is of importance to note that the *LRA* does not force collective bargaining neither does it place a duty on the courts to determine how, when and what should be bargained.[9] Collective bargaining has been left open as a voluntary process solely dependent on the parties concerned.[10] It is clear that the

1 Hereinafter the *Constitution*.
2 Budeli 2010 *Obiter* 29.
3 Du Toit 2007 *ILJ* 1405.
4 Selala 2014 *IJSS* 166.
5 Fergus 2016 *ILJ* 1540.
6 Chapter III of the *Labour Relations Act* 66 of 1995 (hereinafter the *LRA*) regulates collective bargaining in section 11 -63.
7 The preamble and section 1(d) (i) - (ii) of the *LRA*.
8 Section 12-22 of the *LRA;* Van Niekerk et al *Law@Work* 40*.*
9 Van Niekerk *et al Law @ Work* 342.
10 Collective bargaining: a policy guide (2015) ILO 3.

legislation protects and recognises the role of collective bargaining, but does not place a duty to bargain on employers or employees.[11] The commencement and the success of collective bargaining are solely dependent on the parties' willingness and skills to negotiate and where lack of it or the confrontational method of it has contributed to the recent labour unrest in the country.[12]

Botha[13] is of the opinion that good faith bargaining, orderly bargaining and labour peace should be at the heart of dispute resolution and negotiation. However, in reality South African collective bargaining is characterized by an adversarial nature.[14] Adversarialism is defined as a conflict-based relationship, where opposing parties bring their issues to the table in a confrontational manner due to conflicting interests.[15] Generally employers may have the upper hand in the bargaining process; however, trade unions that represent group of workers "engage with broader issues and may exert political pressure".[16] Parties to the negotiating process exchange demands which are tremendously low. In retaliation to low offers, trade unions use their right to strike as an arsenal, where negotiations go nowhere, thereby limiting the prospects of collective bargaining succeeding in resolving disputes.[17]

Collective bargaining is considered adversarial because it is confrontational, one part raises a set of facts for instance the employees will request a salary increase which is extremely high and the employer counters the offer with a low or unacceptable amount.[18] The history of South Africa and also that of the labour industry contributes to the nature of collective bargaining being adversarial as the *Constitution* grants and promotes labour democracy which did not previously exist.[19] Taking into account the history of South Africa, collective bargaining has been underlined by the legacy of deep

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11 *Minister of defence and others v SA National Defence Union* [2006] 27 ILJ 2276 (SCA) para 25.
12 Selala 2015 *IJSS* 120.
13 Botha 2015 *De Jure* 349.
14 Davis and Le Roux 2012 *Acta Juridica* 319.
15 De Villiers 1999 *SAJEMS* 442.
16 Du Toit 2007 *ILJ* 1405.
17 Brand "Strike Avoidance – How to Develop an Effective Strike Avoidance Strategy" 10.
18 Brassey 2013 *ILJ* 823.
19 Section 23(1) gives everyone the right to fair labour practices which brings about labour democracy. Labour democracy is an arrangement which involves workers making decisions, sharing responsibility and authority in the workplace.

adversarialism between employers and organised labour.[20] Adversarialism during negotiations has led to a lack of trust and constraints thereby limiting the potential of collective bargaining.[21] The purpose of the *LRA* of promoting labour peace, orderly collective bargaining and promoting effective dispute resolution[22] cannot be achieved with adversarial bargaining as it escalates existing labour disputes.

Adversarial collective bargaining has contributed immensely to bad faith bargaining and failure to resolve issues amicably without going the strike route.[23] It is acknowledged that striking works centrally with collective bargaining, but recently strikes have been more common than collective bargaining. The right to strike which is awarded as an aid to collective bargaining to be used as a measure of last resort has been used as a measure of first instance.[24] Strikes in recent years have been characterized by violent and destructive behaviour, and this collective violence has been normalized to the extent that it has become tradition.[25] The effect of these violent and long strikes is that they have made collective bargaining in good faith impossible.[26] Furthermore, trade unions have undermined the power of collective bargaining by embarking on unprotected strikes that have little or nothing to do with the employer.[27] There is no doubt that the right to strike is an important part of the right to freedom of association,[28] but its role in collective bargaining has become non-functional and it has contributed substantially to issues remaining unresolved.

Trade union rivalry has also fuelled the level of adversarialism that exists during collective bargaining. The rivalry can be attributed to several issues but the legislation also contributes to this through the criteria used to award organisational rights.[29]

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20 Botha 2015 *De Jure* 329.
21 Botha 2015 *De Jure* 330.
22 Section 1 of the *LRA*.
23 Selala 2014 *IJSS* 124.
24 Manamela and Budeli 2013 *CILSA* 323.
25 Botha 2015 *PER / PELJ* 28.
26 Benjamin 2014 *ILJ* 4.
27 Botha 2015 *PER/PELJ* 23.
28 Section of the *Constitution*; furthermore the right to collective bargaining stems from the principle of freedom of association and the right to organize under convention 87 and 97 of the ILO.
29 Section 11-22 of the *LRA* provides for these organisational rights. Organisational rights are privileges and duties afforded to a major trade union on an employer to enable it to carry union activities. They are set thresholds that a trade union should meet in order to obtain organisational rights, these thresholds are argued to be unfair as they undermine the interests of minor trade unions.

Recognising trade unions before they participate in collective bargaining was one of the ways to further the objective of "orderly and peaceful" bargaining.[30] The fight for recognition at the collective bargaining table resulted in one of the major strikes in the South African history of labour disputes. The Marikana strike came about, among other reasons, as a result of a dispute between the Association of Mineworkers and Construction Union (AMCU) and National Union of Metalworkers of South Africa (NUMSA) both seeking recognition to represent their members at collective bargaining.[31] In the Marikana dispute the general secretary of AMCU stated that "give me a place at the bargaining table and I will get the workers off the kopje." This depicts the adversarial nature and extent to which trade unions are fuelling adversarialism, thereby stretching the collective bargaining process and making it futile.[32]

The adversarial nature of collective bargaining has some negative implications that may be detrimental to South Africa's interests. Whatsoever that arises during collective bargaining impacts on the economic and social conditions, and the welfare of South Africa. Adversarialism also has detrimental effects on both parties and other social partners.[33] It can be argued that this to a certain extent contradicts[34] the aim of collective bargaining and the rights of employers and employees from a constitutional, social and a labour relations perspective. The negotiations are often fuelled by mistrust,[35] demeaning remarks and tensions.[36] Du Toit[37] states that the issues are "not solved but fought over" and the antagonistic atmosphere spills over into the daily goings on of business. The interests of employees are somewhat thrown to the side as trade unions and employers use their powers to engage in a counter-productive combat.[38] Hence, with an adversarial system there can never truly be a win-win situation and it is impossible to have a sensible social partnership.[39]

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30 Section 12 of the *LRA*.
31 Theron *et al* 2015 *ILJ* 849.
32 Theron *et al* 2015 *ILJ* 849.
33 Calitz 2005 *Stell LR* 168. Social partners include the community, trade unions and employees.
34 Manamela 2002 *SA Merc LJ* 731.
35 Benjamin 2014 *ILJ* 3.
36 Benjamin 2014 *ILJ* 23.
37 Du Toit 2000 *ILJ* 1553.
38 Davis and Le Roux 2012 *Acta Juridica* 320.
39 Davis and Le Roux 2012 *Acta Juridica* 320.

The legislature tried to counter adversarial collective bargaining and issues related which did not fall under the ambit of mutual interest which are solved through collective bargaining by introducing workplace forums.[40] Workplace forums were designed to complement the collective bargaining system which is not capable of addressing all workplace issues.[41] Workplace forums grant workers participatory decision-making powers and a voice, and deal with production issues at the workplace level.[42] The establishment of workplace forums was in line with *LRA* which advocates for employee participation in decision-making at workplaces.[43] However, the initiative of workplace forums suffered a heavy blow in its infancy due to resistance by trade unions who were supposed to contribute to its establishment at workplaces.[44] Furthermore, the requirement that an employer should have one hundred people (majoritarianism) to establish a workplace forum is also another contributing factor to its failure.[45] Therefore, what this means that problems which do not fall under the ambit of collective bargaining, remain unsolved and this contributes to the several challenges that already exist from adversarial collective bargaining.[46]

A few years ago, when the country's system of collective bargaining started it was portrayed as a success which resolved underlying tensions created by poverty, inequality and unemployment.[47] However, collective bargaining is under pressure from multiple sources such as poverty, inequality and unemployment which are seen as the core drivers of adversarial bargaining.[48] The present economic situation has made it difficult for collective bargaining to succeed especially in widely discussed issues of wages and other socio-economic benefits. The environment that collective bargaining was structured for has developed and changed as compared to the process of collective bargaining.[49] The question which remains unanswered is whether industrial unrest or

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40 Godfrey, Theron and Visser "The state of collective bargaining in South Africa" 3.
41 Godfrey, Theron and Visser "The state of collective bargaining in South Africa" 98.
42 Godfrey, Theron and Visser "The state of collective bargaining in South Africa" 99.
43 Section 1(d) (iii) of the *LRA.*
44 Botha Employee participation and voice in Companies 250.
45 Botha Employee participation and voice in Companies 251.
46 Davis and Le Roux 2012 *Acta Juridica* 316.
47 Gernetzky Business day 8.
48 Gernetzky Business day 8.
49 Du Toit and Ronnie 2012 *Acta Juridica* 207.

unsolved disputes can be attributed to adversarial collective bargaining or other challenges and shortcomings within labour legislation which are contributing as well.

This study is based on literature review of the relevant textbooks, law journals, legislation, case law, and internet sources relating to the adversarial nature of collective bargaining. This will enable the researcher to determine to what extent the adversarial nature of collective bargaining contribute to the labour unrest in South Africa. This research will critically expose the different challenges and shortfalls that exist within adversarial collective bargaining. To ascertain how the adversarial nature is contributing to the unrest in the labour industry case law, recorded strike action and literature will be critically reviewed and analysed. The outcome of this research seeks to recommend different possible solutions if any, which can be implemented to curb challenges of adversarial collective bargaining and make the concept relevant in current economic circles.

Chapter one is an introduction which gives an overview of the research. Furthermore it will elaborate on the research problem which highlights the issues to be discussed further. In Chapter two, the concept of collective bargaining will be discussed, highlighting that the form of collective bargaining in South Africa is adversarial. The chapter also looks into the historical development of collective bargaining through legislative framework until the current position and highlights how it contributes to its adversarial nature. The parties to collective bargaining are also discussed in this chapter. The characteristics of an adversarial nature are also highlighted. Chapter three critically analyses different aspects that make collective bargaining adversarial. Furthermore, it highlights how these adversarial aspects of collective bargaining contribute towards labour unrest. Moreover, Chapter four discusses the challenges of adversarial collective bargaining and the implications thereof. Chapter five focuses on the findings of the research with specific reference to chapter 3 and 4. Recommendations where applicable will be made with regard to solving the identified challenges such as dysfunctional strikes, inadequate collective bargaining skills and raising of non-collective bargaining issues.

2 THE CONCEPT OF COLLECTIVE BARGAINING

2.1 Introduction

Collective bargaining has been in existence since time immemorial. Beatrice Webb is acknowledged to have coined the term *collective bargaining* in 1890 in Britain.[50] The concept of collective bargaining was adopted in South Africa during the Apartheid era and it has since evolved to what it is in this day. Several countries have employed different measures to solve employee and employer problems that exist, but collective bargaining has proved to be very common in several countries. Since time immemorial workers had a lower hand at their places of employment which led to the development of the concept of collective bargaining.[51] Collective bargaining is the process through which employees and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial.[52] It should be noted that there are different types of collective bargaining, and it is asserted that collective bargaining in South Africa is an adversarial process that grants workers in organisations a greater voice.[53] It is in the interest of this chapter to discuss the brief history, nature and legislative framework of adversarial collective bargaining and whether it is contributing towards labour unrest.

2.2 Adversarial collective bargaining

Collective bargaining is regarded as a source of workplace governance.[54] The parties negotiate and deliberate on issues of divergent and conflicting interests[55] such as working conditions and remuneration.[56] When parties negotiate they do it in a rather antagonistic manner in order to reach a mutual resolution.[57] Adversarialism can be defined as a conflict-based relationship.[58] Collective bargaining in South Africa is

50 Du Toit 2007 *ILJ* 1405.
51 Tshoose and Tsweledi 2014 *Law, Democracy & Development* 340.
52 Van Niekerk *et al Law @ Work* 341.
53 Botha 2015 *De Jure* 329.
54 Du Toit 2007 *ILJ* 1407.
55 Botha 2015 *De Jure* 330.
56 Du Toit 2000 *ILJ* 1544.
57 Du Toit 2007 *ILJ 1407.*
58 Raju and Stilwell 2007 *Mousain* 4.

considered mainly as an adversarial process in its nature, [59] because opposing parties bring their issues to the table in a confrontational manner due to conflicting interests.[60] During negotiations parties try their best to obtain a result which is favourable to their demands, which can be done in a way that sabotages the other negotiating party. It is important to note that the different existing rules and the legislative framework have all contributed to the high adversarial nature of collective bargaining, which further impacts on whether collective bargaining issues are resolved proficiently or incompetently.[61]

2.3 Historical development of collective bargaining

Collective bargaining has existed in South Africa since the Apartheid regime; however, it was mainly accessed by the trade unions which represented whites, coloured and Indian workers.[62] Later on black workers could form and join unions which represented them but these were not protected by legislation and could not join industrial councils.[63] Although black workers which were a majority could form and join trade unions, collective bargaining was almost non-existent for them which mean they had no voice in the workplace.[64] The dual system of labour relations that existed during the Apartheid period made it difficult for workers to be represented. The Wiehahn Commission was set up by the government after the Durban strikes of 1973 and the Soweto Uprisings of 1976 to investigate industrial relations systems in South Africa.[65] Two years later, the Wiehahn Commission made some recommendations that the Labour Relations Act be amended. New unions pioneered the negotiations of recognition agreements to secure collective bargaining and other rights at individual plants and firms.[66] Post-1994, the introduction of the *Constitution* made room for a review of labour legislation. The team that was tasked with designing new industrial relations saw the need to clarify the lack of conceptual clarity as to the structure and

59 Steadman 2004 *ILJ* 1183.
60 De Villiers 1999 *SAJEMS* 442.
61 Levy and Motshabi The Dispute Resolution Digest 25.
62 Godfrey, Theron and Visser 2007 *ILR* 5.
63 Godfrey, Theron and Visser 2007 *ILR* 5.
64 Godfrey, Theron and Visser 2007 *ILR* 6.
65 Lichtenstein *From Durban to Wiehahn 9.*
66 Vettori Alternative means to regulate employment relationship 4.

functions of collective bargaining.[67] In the Labour Relations Act of 1956 the workplace belonged to and was governed by the employer, whereas the *LRA* of 1995 affords the workers' rights and freedoms in the workplace which are evidenced by collective bargaining.[68]

Collective bargaining is a principle that has been entrenched in South African labour relations for a long time.[69] In the past, it was engaged in at an industrial level but not all employees were involved because of discriminatory reasons,[70] a factor which contributes towards the adversarial nature that the process takes. Furthermore, employers were against the idea of having trade unions involved in their affairs of the workplace.[71] Therefore, the law was developed to include workers from all backgrounds and it also made collective bargaining an obligation[72] which trade unions supported.[73] On the other hand, employers wanted a more voluntary stance to maintain the upper hand, meaning they would have control of collective bargaining and the process would have a lesser or no confrontational approach.[74]

Previously the Industrial court made the duty to bargain compulsory[75] as compared to now where it is a voluntary process. Currently parties to collective bargaining carry out the process according to their own determinations and power, thereby contributing to the adversarial nature.[76] The current status quo on collective bargaining was clarified in the *South African National Defence Union v Minister of Defence*[77] when it dealt with the issue of whether an employer had the duty to bargain with a trade union. The Court

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67 Godfrey, Theron and Visser 2007 *ILR* 6.
68 Jordan 1995 *ILR* 2.
69 Du Toit 2007 *ILJ* 1417.
70 Basson et al *Essential Labour Law* 273.
71 Grogan Collective labour law 86.
72 Grogan Collective labour law 86.
73 Basson et al Essential Labour Law 275.
74 *National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd* (CCT14/02) [2002] (2) ZACC 30; 2003 (2) BCLR 182; 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC) para 13 (Hereinafter the Bader Bop case). The court held that collective bargaining is an important aspect of fair labour relations.
75 Godfrey, Theron and Visser 2007 http://poseidon01.ssrn.com.
76 Godfrey, Theron and Visser 2007 http://poseidon01.ssrn.com.
77 *South African National Defence Union V Minister Of Defence; Minister Of Defence And Others v South African National Defence Union And Others* [2007] (1) SA 402 (SCA) para 2 (hereafter the SANDU case).

concluded that neither the *Constitution* nor the Labour relations Act places a duty to bargain on any party, making the process voluntary.[78]

When the current method of collective bargaining was introduced, it was meant to be an equaliser in the disproportionate relationship of employer and employee in terms of bargaining power.[79] The premise of the entire system is that employers have more social and economic power than employees.[80] However, the power balancing has proved to be a challenge as parties fail to compromise and reach decisions during collective bargaining, which in turn results in issues remaining unresolved. In *Commercial Workers Union of SA v Tao Ying Metal Industries,*[81] Ngcobo J identified collective bargaining as an important right of employees as they cannot bargain individually. Workers are afforded the right to bargain by the *Constitution of South Africa*[82] and the *LRA*[83] so that they can join trade unions that can represent them in bargaining processes.[84] Significantly employees now have a voice and "gain a stake in the system" unlike in the past,[85] although it is debatable whether currently the employees' voices are caught up in trade union issues and their "stake" is not fully recognised as yet. Collective bargaining for employers is regarded as a 'force for social stability,'[86] however, with events dating as far back as 2007 it can be argued that adversarial collective bargaining has also contributed to social instability or unrest.

2.4 Legislative framework

2.4.1 A constitutional influence to promoting collective bargaining

The *Constitution of the Republic of South Africa* is the point of departure in terms of legislation when it comes to collective bargaining. Section 23(5) of the *Constitution of South Africa* affords trade unions, employers' organisations and employers the right to

78 *SANDU Case* para 3.
79 Du Toit 2016 *ILJ* 1.
80 Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996(1996) 17 ILJ 821 (CC) para 66 (hereafter the In re Certification case).
81 *Commercial Workers Union of SA v Tao Ying Metal Industries & others* [2009] (2) SA 204 (CC); [2008] 29 ILJ 2461 (CC) para 56.
82 Section 23(5) of the *Constitution.*
83 Chapter III of the *LRA*.
84 Holtzhausen 2012 http://ilera2012.wharton.upenn.edu.
85 Chand 2015 http://www.yourarticlelibrary.com.
86 Chand 2015 http://www.yourarticlelibrary.com.

engage in collective bargaining.[87] Additionally, national legislation is to be enacted in such a manner that it also regulates collective bargaining.[88] The right to collective bargaining is recognised and protected as was emphasised in *Food & Allied Workers Union v Ngcobo No and another*.[89] As the supreme law of the republic, any law or conduct that is inconsistent with the *Constitution* is considered to be invalid.[90] Moreover, it is stated that when interpreting any legislation the courts should give effect to the values of freedom, equality and human dignity that are enshrined in the *Constitution*.[91]

However, the constitutional right to engage in collective bargaining has been subject to a debate of several interpretations. In the series of cases of *South African National Defence Union v Minister of Defence* & *another*, the court had to determine whether the *Constitution* imposed a duty to bargain.[92] The South African Defence Union (SANDU) argued that the Minister and South African Defence Forces (SANDF) had contravened the duty to bargain in good faith as was stated in the *Constitution*.[93] In the first SANDU case, the court held that the SANDF did not have the duty to collectively bargain with the trade union.[94] Furthermore, it was held that the *Constitution* did not intend to impose any duty to collectively bargain between an employer and a trade union.[95] Consequently, it was held that there was no legislative obligation to do so.[96] However, in the second SANDU case, the High Court was of a different opinion than the court in the first instance.[97] In the second SANDU case, the court held that the *Constitution* conferred a duty on an employer to bargain with the trade union as part and parcel of the trade union being afforded the right to bargain collectively.[98] In the third SANDU case, despite the SANDF maintaining that there was no duty to bargain and that it

87 Section 23(5) of the *Constitution* of South Africa.
88 Section 23 (5) *Constitution* of South Africa, 1996.
89 *Food and Allied Workers Union v Ngcobo No and Another* [2014] (1) SA 32 (CC) para 27.
90 Section 2 of the *Constitution* of South Africa.
91 Section 39 of the *Constitution* of South of Africa.
92 *South African National Defence Union v Minister of Defence & another* [1999] (4) SA, (2003) ILJ (T), [2006] 27 ILJ (SCA), [2007] 9 BLLR (CC) para 18.
93 *South African National Defence Union v Minister of Defence & another* [1999] (4) SA, [2003] ILJ (T), [2006] 27 ILJ (SCA), [2007] 9 BLLR (CC) para 18.
94 *South African National Defence Union v Minister of Defence & another* [1999] (4) SA 469 para 62.
95 *South African National Defence Union v Minister of Defence & another* [1999] (4) SA 469 para 62.
96 *South African National Defence Union v Minister of Defence & another* [1999] (4) SA 469 para 62.
97 *South African National Defence Union v Minister of Defence & another* [2003] ILJ 1495 para 103.
98 *South African National Defence Union v Minister of Defence & another* [2003] ILJ 1495 para 103.

could still proceed with policies in pursuance of public interest, the High Court ruled that it still had a duty to bargain.[99] As such, the SANDF was deterred from implementing any policies pending the arbitration judgment.[100]

On appeal, Conradie J argued that the constitutional right to engage in collective bargaining was subjected to more than one possible interpretation.[101] However, it highlighted that section 233 of the *Constitution* states that when interpreting any legislation it should be consistent with international law.[102] In this regard, reference was made to two International Labour Organisation conventions, namely *Freedom of Association and Protection of the Right to Organise* No. 87 (1948) and *the Right to Organise and Collective Bargaining Convention* No. 98 (1949).[103] As a member of the International Labour Organisation, South Africa as a member state undertakes an obligation to respect, promote and realize the effective recognition of the right to collective bargaining.[104] From these conventions, Conradie J concluded that central to taking cognizance and protecting the role of collective bargaining, the *Constitution* does not impose a duty to bargain.[105] On appeal the constitutional Court abstained from making a finding on that ruling.[106] It was submitted that in determining whether there is a justiciable duty to bargain, the court is faced with controversial industrial relations issues which have been regulated in various ways in the past in South Africa. Hence, this is the position in South Africa today. When ascertaining the scope of the right to engage in collective bargaining and the duty to bargain, the interpretation of this right is derived from the *Constitution*, legislation and other international instruments or foreign law.

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99 *South African National Defence Union v Minister of Defence & another* [2003] ILJ 1495 para 103.
100 *South African National Defence Union v Minister of Defence & another* [2003] ILJ 1495 para 104.
101 *South African National Defence Union v Minister of Defence & another* [2006] 27 ILJ (SCA) para 5.
102 *South African National Defence Union v Minister of Defence & another* [2006] 27 ILJ 2276 (SCA) para 5; S233 of the *Constitution* of South Africa of 1996.
103 Freedom of association and protection of the Right to Organise No. 87 (1948); Right to Organise and Collective Bargaining Convention No. 98 (1949).
104 Collective bargaining: a policy guides (2015) ILO 10.
105 *South African National Defence Union v Minister of Defence & another* [2006] 27 ILJ 2276 (SCA) para 25.
106 *South African National Defence Union v Minister of Defence & another* [2007] 9 BLLR 785 (CC).

2.4.2 The Labour Relations Act

The *Constitution* makes provision that collective bargaining be regulated by legislation, which is realised through the *LRA.* One of the objectives of the *LRA is to* promote a framework of collective bargaining as a means to address issues that affect employees which include determining wages, terms and conditions of employment and other matters of mutual interest.[107] Moreover, the *LRA* aims to encourage orderly collective bargaining.[108] However, it can be argued that "orderly collective bargaining" is close to non-existent in South Africa as evidenced by high violence, threats to walk out and walk outs during collective bargaining meetings.[109] It appears there is no enforceable duty to bargain in South African law which rather negates the effectiveness of collective bargaining.[110] The *LRA* does not elaborate on the nature of collective bargaining, the process, between which individuals and what topics that are dealt with in the process.[111] It is for this matter that the *LRA* is criticised because not only does it fail to furnish legislated collective bargaining, it also fails to be comprehensive on the nature and scope of the negotiation process which could be the reason for the inefficiency of adversarial bargaining.[112]

2.5 Criticism of the legislative framework

The legislation which regulates collective bargaining is facing scrutiny that has caused questions about the future of the process, especially in the current situation where strikes which are violent are rampant in South Africa.[113] The *Constitution* provides for freedom of association, organisational rights, collective bargaining and the right to strike, thus the rights are legally inviolable.[114] Furthermore all these rights are essential for a free market;[115] however, the challenge is that due to the current socio-economic

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107 Section 1 of the *LRA* of 1995.
108 Section 1 of the *LRA* of 1995.
109 Brand 2015 http:// www.bowman.co.za.
110 Van Niekerk *et al* *Law @ Work* 385.
111 *LRA* of 1995; Van Niekerk *et al Law @ Work* 385.
112 *LRA* of 1995, Van Niekerk *et al Law @ Work* 385.
113 Brand 2015 http:// www.bowman.co.za.
114 Brand 2015 http:// www.bowman.co.za.
115 Brand 2015 http:// www.bowman.co.za.

status the rights cannot be properly exercised or regulated.[116] The *LRA* and the *Constitution* only grant the right to bargain, it does not prescribe how it should be exercised or concluded,[117] and hence the parties always end at loggerheads or courts, which sad reality evidences the adversarial nature of South African collective bargaining. The *LRA* is not firm on the duty to bargain; neither does it give the labour court powers to compel parties to enter into collective bargaining as compared to the 1956 *LRA* where the labour courts could compel an employer to bargain with a sufficiently represented trade union.[118]

In the case of *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd*,[119] the powers of the court to compel a party to bargain were tested. In this case the court dismissed the application, but stated that an obligation to bargain could arise expressly or impliedly from a collective agreement.[120] In the event that the *Constitution* or the *LRA* contained more information regarding collective bargaining the concept could be more effective and there would be certainty and order in the labour industry than it is now. The power that the negotiating parties have and the lack of enforcing legislation is contributing to the adversarial nature of collective bargaining thereby making it ineffective.

2.6 The adversarial nature of collective bargaining

As mentioned above, collective bargaining is a voluntary process where employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation.[121] Collective bargaining is considered adversarial because it is confrontational; one party raises a set of facts, for instance the employees will request a salary increase which is extremely high and the employer counters the offer with a low or unacceptable amount.[122] It can also be argued that collective bargaining has been characterised as adversarial because at most the parties always wait to meet at

116 Brand 2015 http:// www.bowman.co.za.
117 Grogan *Workplace Law* 369.
118 Grogan *Workplace Law* 369.
119 *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd,* [2000] 21 ILJ 1090 (LC) Para 67.
120 Grogan *Workplace law* 369.
121 Grogan *Workplace law* 371.
122 Brassey 2013 *ILJ* 823.

the last minute when their issues have reached a boiling point which makes it very difficult for parties to take each other's considerations into account. These negotiations encompass issues which deal with working conditions, terms of employment and regulating employment relationships.[123] Amongst other issues these include demands for higher wages, improved employment conditions or amendments to current collective agreements.[124] These issues are deemed to also fall within the ambit of matters of mutual interest between both parties.[125] The main objective of collective bargaining is to reach a mutually acceptable agreement and subsequently concluding a collective agreement.[126] However, Botha[127] argues that traditional collective bargaining is not a means to facilitate joint decision-making but rather it is designed to assist the parties in negotiating the terms and conditions of employment.

2.6.1 Parties involved

There are usually three parties or more present in collective bargaining, namely trade unions, employers and employers' organisations. What makes the bargaining 'collective' is the presence of a trade union(s) that represent(s) the interests of employees as a collective.[128] Trade unions are recognised as the voice of workers. In collective bargaining they are tasked to represent the needs of employees to the best of their ability, although this can be debated due to the events of the recent years.[129] It can be argued that trade union efforts have been diluted with political motives and selfish gains.[130] In the event that there is more than one trade union that wishes to bargain collectively with an employer, the *LRA* gives preference to a union which has sufficient

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123 Article 2 of the *Collective Bargaining Convention* No. 154 (1981).
124 Botha 2015 PER/*PELJ* 1813.
125 Botha 2015 PER/ *PELJ* 1813.
126 Ferreira 2008 *Journal of Public Administration* 192.
127 Botha 2015 PER/*PELJ* 1813.
128 Vettori *Alternative means to regulate employment relationship* 103.
129 Events which have put the capabilities of adversarial collective bargaining to solve issues in the spotlight include the transport strike of 2007 and the Marikana disputes which resulted in lives being lost, several working days and remuneration.
130 Brassey 2013 *ILJ* 831.

representation,[131] arguably it recognises majoritarianism as compared to workers' interests.

2.6.2 Resolving disputes

The bargaining council is used as a mechanism to conduct and promote collective bargaining.[132] Bargaining councils' mandate is to serve as a forum for the negotiation of terms and conditions of employment for members of the union and at times for all employees engaged in that sector.[133] A bargaining council comprises registered trade unions and employers' organisations;[134] they have the power and function of concluding and enforcing collective agreements.[135] However, due to the majoritarian principle,[136] most agreements are concluded with major unions, thus side-lining minority trade unions' views and interests and showcasing adversarialism in practical terms.

The issues to be discussed during collective bargaining are clearly left for the parties to decide as the *Constitution* and the *LRA* say little about collective bargaining. It is argued that the *LRA* is facilitative rather than prescriptive[137] as it does not prescribe issues to deliberate on. Collective bargaining is intended for employers and representative trade unions for matters of mutual interest rather than disputes of right.[138] The *LRA* does not distinguish between mutual interest and dispute of right, but it is generally accepted that matters of mutual interest are those issues which collective bargaining aims to resolve.[139] Matters of mutual interest are very broad in the labour sector; however, a dispute of interest occurs when one party claims a benefit to which it is not entitled in law which the other part is not prepared to grant.[140] It should be noted that for the reason that the other party is not prepared to give the right it brings the adversarial

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131 Section 18 of the *LRA;* Van Niekerk *et al law at work 346;* Sufficient representation refers to those that do not have their members as majority neither are they also a minority.
132 Van Niekerk *et al Law @ work* 350.
133 Van Niekerk *et al Law @ work* 350.
134 Section 27(1) of the *LRA.*
135 Section 28(1) (a)-(b) of the *LRA.*
136 Malan 2010 *TSAR* 436; the majority wishes should prevail, despite the opinions of the minority.
137 Cameron, Cheadle and Thompson 7.
138 Grogan *Workplace law* 341.
139 Grogan *Workplace law* 341.
140 Grogan *Workplace law* 341.

concept into play as now parties will compete to outdo each other, resulting in unresolved issues or unrest.

One of the primary objectives of the *LRA* is to promote orderly collective bargaining,[141] hence collective bargaining was put in place to make the process orderly. It should be noted that not every disgruntled member is called to bargain but through the unions the employees get to voice their concerns. Moreover, the right to strike accompanies the right to collectively bargain.[142] The right to bargain collectively is drawn from the principle of freedom of association and the right to organize which are constitutionally recognised.[143] The right to strike is a fundamental aid of collective bargaining, as without the potential for strike there would be no serious endeavour to negotiate and conclude a collective settlement.[144] Brassey[145] is of the view that collective bargaining should be free from any strikes or lockouts which are coercive, but this notion is found not to have a place in South Africa as it is generally agreed that strike action is a power game with the party's strenuous behaviour leading to agreements. On the other hand, it is argued that striking is part of the discipline and it makes collective bargaining work by forcing decisions on differences that might otherwise drag long.[146]

2.7 Conclusion

Collective bargaining is a concept that has developed broadly in different countries finding recognition in international law. The concept of collective bargaining is seen as a tool that has value for employers as well as workers.[147] Collective bargaining can be done on different levels and there are several types of the process; however, from the discussion it was noted that in South Africa the process is highly adversarial and occurs mainly at sectoral level. Collective bargaining is a process that is constitutionally and statutorily protected and promoted, with the *LRA* maintaining that it is a voluntary

141 Section 1 (d) (i) of the *LRA.*
142 Section 23(2) (C) of the *LRA.*
143 Selala 2014 *IJSS* 159.
144 Selala 2014 *IJSS* 159.
145 Brassey 2013 *ILJ* 826.
146 Brassey 2013 *ILJ* 826.
147 Bendix *Industrial Relations in South Africa* 252.

process free from interference.[148] The reason for less interference is to promote the interests of employees and employers from third forces; however, the influence of other forces cannot be denied.[149] As was discussed, collective bargaining is notoriously adversarial, and the consequence of it is aggression and violent strikes are sparked.[150] The "winner takes all" approach towards collective bargaining contributes to its unpopularity due to the economic, social and political strains that it has caused.[151] The following chapter analyses in depth the reasons or causes of adversarial bargaining and the consequences thereof.

148 Davis and Le Roux 2012 *Acta Juridica* 316.
149 Brand 2015 http:// www.bowman.co.za.
150 Davis and Le Roux 2012 *Acta Juridica* 323.
151 Botha 2015 *PER/PELJ* 3.

3 FACTORS CONTRIBUTING TOWARDS ADVERSARILIASM

3.1 Introduction

Collective bargaining is a constitutional right,[152] which is statutorily regulated by the Labour Relations Act (*LRA*).[153] One of the purposes of the *LRA* is to promote collective bargaining and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine wages, terms and conditions of employment, other matters of mutual interest and to formulate industrial policy.[154] Furthermore the *LRA* seeks to promote orderly collective bargaining at sectoral level.[155] What is noteworthy is that the *LRA* does not have much to say about the nature of collective bargaining, except its aims. The nature of collective bargaining in South Africa has been described as adversarial because parties negotiate and deliberate on issues of divergent and conflicting interests[156] such as working conditions and remuneration.[157] They do so in a rather antagonistic manner in order to come to a mutual resolution.[158] Adversarial labour relations have dominated the South African landscape throughout Apartheid and beyond and have made any form of codetermination almost impossible.[159] Therefore, this chapter critically analyses adversarial concepts that exist within collective bargaining in South Africa and the role that they play in fomenting labour unrest.

3.2 Lack of Regulative Content

The *LRA* is the main legislation that deals in depth with collective bargaining and lays a framework for it. As was mentioned in paragraph 2.4.2, the *LRA* only states the category of the people who have the right to collective bargaining, but does not place a duty to bargain on the employer or the employees.[160] The legislation which regulates

152 Section 23(5) of the *Constitution.*
153 Section 1(d) (i) of the *LRA*.
154 Section 1 (c) (i)-(ii) of the *LRA*.
155 Section 1(d) (i) of the *LRA*.
156 Botha 2015 *De Jure* 330.
157 Du Toit 2000 *ILJ* 1544.
158 Du Toit 2007 *ILJ* 1407.
159 Davis and Le Roux in *Reinventing labour law* 316.
160 Van Niekerk *et al Law @ Work* 341.

collective bargaining is with some challenges that has caused many to question the future of the process especially in the current industrial situation in South Africa.[161] The *LRA* and the constitution only grant the right to bargain, but does not prescribe how the bargaining process should be exercised or concluded.[162] The *LRA* is not firm on the duty to bargain neither does it give the labour court powers to compel parties to enter into collective bargaining as compared to the 1956 *LRA* where the labour courts could compel an employer to bargain with a sufficiently represented trade union.[163] In the case of *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd*,[164] the powers of the labour court to compel a part to bargain were tested. In this case the court dismissed the application, but stated that an obligation to bargain could arise expressly or impliedly from a collective agreement.[165] Therefore if the *Constitution* or the *LRA* contained more information regarding collective bargaining the concept could be more effective with less unrest or uncertainties. What is clear from the *LRA* is that collective bargaining should be done in matters of determining conditions of employment, wages and other matters of mutual interest.[166] The question which one needs to answer is what constitutes matters of mutual interest or which matters can be discussed at the bargaining table. The following sections will discuss adversarial aspects of collective bargaining and how they contribute to labour unrest.

3.3 Matters of mutual interest

The term 'matters of mutual interest' appears in the *LRA* on the description of issues which qualify to be taken for collective bargaining.[167] The *LRA* does not provide a concise definition on what 'matters of interest' mean, but gives the labour court a discretion to determine what it could mean. Whereas in the previous *LRA of 1956* mutual interest was defined as "any matter affecting, or connected with remuneration,

161 Du Toit 2007 *ILJ* 1407.
162 Grogan *Workplace Law* 369.
163 Grogan *Workplace Law* 369.
164 *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty)* Ltd,[2000] 21 ILJ 1090 (LC) para 87.
165 *Entertainment Commercial Catering & Allied Workers Union v Southern Sun Hotel Interests (Pty) Ltd,* [2000] 21 ILJ 1090 (LC) para 87.
166 Section 1 (d) (i) of the *LRA*.
167 Section 1(c) (i) of the *LRA*.

or other terms of conditions of employment, or any matter whatsoever that is of mutual interest to employees and employers",[168] the current *LRA* creates a challenge in that the definition is widely interpreted which has contributed to collective bargaining being adversarial in nature as employers and trade unions still have to debate about the issues being suitable for discussion under collective bargaining. The term was drafted in wide terms, which has the effect of varying interpretations by the courts, and these interpretations may be subjective and ultimately include socio-economic issues.[169] In various circumstances collective bargaining discussions have failed to resume due to disagreements on matters to be discussed if they constituted 'matters of mutual interest'.

The current *LRA* seems to cast a very wide net in terms of the meaning of 'matters of mutual interest'. The suggestion is that the true meaning of 'matters of mutual interest' might be broader as compared to the 1956 *LRA.* The concept of mutual interest assumes the existence of an employment relationship and a mutuality of interest shared by the employer and employees.[170] In the case of *City of Johannesburg Metropolitan Municipality v SAMWU and others,*[171] the court defined mutual interest as 'whatever can be fairly and reasonably regarded as calculated to promote the well-being of trade concerned'. This definition has been used in pre-1995 *LRA* decisions and is still applicable after the new *LRA*.[172] However, it can be argued that the challenge with this mostly used definition is that employers and employees have different needs that concern the wellbeing of a trade, as each one has different intentions. Issues which are non-trade concerned are still being raised, affecting the process of collective bargaining as parties still have to go to the courts to determine if the issues are matters of mutual interest. The involvement of the courts to determine if the matters are of mutual

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168 Section 24(1) of the *LRA* of 1956.

169 Khadija "A discussion on the meaning of the concept of 'a matter of mutual interest in the context of the right to strike;" socio-economic matters are those issues that are related or concerned with the interaction of social and economic factors.

170 Manamela 2012 *Merc LJ* 111.

171 *City of Johannesburg Metropolitan Municipality v SAMWU and others* [2011] 7 BLLR 663 (LC) para 67.

172 *Rand Tyres and Accessories (Pty) Ltd and Appel v Industrial Council for the Motor Industry* (Transvaal), Minister for labour and minister for justice [1941] TPD 108 para 115. The widely used definition of 'mutual interest was coined in this judgement which has been referred to in several cases.

interest contributes to collective bargaining being adversarial as the court process is long and strenuous.[173]

The chances of parties raising issues which are political or socio-economic for collective bargaining are very high as the matters are closely related. The purpose of the inclusion of matters of mutual interest is to distinguish matters that are distinctive to the employment relationship from those that are socio-economic or political in nature.[174] A question that should be asked to determine if the issues can be bargained collectively is whether the dispute relates to socio-economic or political issues, for if the answer is in the affirmative, it disqualifies the matter from collective bargaining.[175] A socio-economic issue should therefore not be considered a matter of mutual interest and should not be an issue that a trade union or an employer can bring for collective bargaining. In *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union & Others,*[176] the employer refused to bargain collectively with the trade unions stating that a request for an increased equity shareholding by employees did not constitute a matter of 'mutual interest' that can be negotiated. The court held that a demand may still be a matter of mutual interest even if it is not a term and condition of employment.[177] However, due to lack of a definitive explanation on what are matters of mutual interest, it is likely that this was a matter that was socio-economic in nature as the offer for shares was as a result of a social obligation the company was aiming to fulfil.[178]

The issues to be discussed during collective bargaining are clearly left for the parties to decide as the Constitution and the *LRA* says little about collective bargaining. It is

173 Grogan *Workplace law* 365.
174 Khadija "A discussion on the meaning of the concept of a matter of mutual interest in the context of the right to strike." 9.
175 Khadija "A discussion on the meaning of the concept of a matter of mutual interest in the context of the right to strike.9.
176 *Itumele Bus lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union & Others* [2009]30 ILJ 1099(LC) para 90.
177 *Itumele Bus lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union & Others* [2009] 30 ILJ 1099(LC) para 111.
178 Khadija "A discussion on the meaning of the concept of 'a matter of mutual interest in the context of the right to strike." Shares were offered by the company to the employees as part of an initiative to transform BBBEE status in order to secure a 5 year deal.

argued that the *LRA* is facilitative rather than prescriptive[179]as it does not prescribe issues to deliberate on. Collective bargaining is intended for employers and representative trade unions for matters of mutual interest rather than disputes of right.[180] The *LRA* does not distinguish between the two disputes, but it is generally accepted that matters of mutual interest are those issues which collective bargaining aims to resolve.[181] Matters of mutual interest are very broad in the labour sector; however, a dispute of interest occurs when employees claim a benefit to which they are not entitled in law and which the employer is not prepared to grant.[182] It is argued that collective bargaining is left for 'core areas' of the managerial prerogative, thus it does not involve codetermination over key issues as they are left entirely to the management.[183] It should be noted that for the reason that the employer is not prepared to give the right it brings the adversarial concept into play as now parties will compete to outdo each other, thereby leading to uncertainties in the labour industry.

3.4 The right to strike

The right to strike is an important tool of the right to collectively bargain, it is inextricably linked to the process of collective bargaining.[184] The right to strike is an essential component of employees' right to freedom of association and one of the weapons wielded by trade unions when collective bargaining fails.[185] The right to strike is granted by the *Constitution* as a fundamental right to fair labour practices.[186] The *LRA* recognises striking as:

> The partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.[187]

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179 Cameron, Cheadle and Thompson 7.
180 Grogan *Workplace law* 341; A trade union is representative when its members are not a majority but constitute a figure that can represent at collective bargaining.
181 Grogan *Workplace law* 341.
182 Grogan *Workplace law* 341.
183 Le Roux and Rycroft *Reinventing Labour Law* 316.
184 Le Roux and Rycroft *Reinventing Labour Law* 316.
185 Budeli and Manamela 2010 *CILSA* 308.
186 Section 23(2) of the *Constitution*.
187 Section 213 of the *LRA*.

The right to strike is a two-edged sword, while workers have the right to strike, non-striking workers and the employers also possess rights recognised within the rules locally and internationally.[188] It is debated that the right to strike is the most evident proof that collective bargaining is highly adversarial, more so, the way in which employees strike makes the adversarial nature of collective bargaining even clearer.[189]

3.4.1 Importance of the right to strike in collective bargaining

The legislature had a clear objective of including the right to strike to balance the powers of the parties, and it was also included because striking is viewed as a stimulus to social dialogue in industrial relations.[190] As Brand[191] sometimes refers to it "collective bargaining without the right to strike is collective begging". The right to strike was made part of collective bargaining as a guarantor for employees because there is a real possibility of its eventuality.[192] Therefore at the beginning of the negotiation process the employer is already faced with a challenge that the employees might strike which does not level the negotiating table, thereby making the process adversarial.

The right to strike is indispensable in labour law relations and strikes at the heart of the employment relationship and the need to balance the interests of the parties.[193] The purpose of striking is to provide a solution to prevalent disputes regarding a "matter of mutual interest between employer and employee".[194] This entails that where a conflict cannot be resolved through collective bargaining the trade unions and employees find recourse in striking. According to the *Constitutional* Court in *NUMSA & others v Bader Bop (Pty) Ltd*,[195] a strike is a vital element in collective bargaining. One would agree with the Court since collective bargaining and the right to strike are fundamental principles that are a product of the disproportionate bargaining power between employer and employee.[196] Therefore, as Myburgh[197] states, it is rather ironic that there

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188 Odeku 2014 *MJSS* 698.
189 Tenza 2015 *Law, Democracy and* Development 2.
190 Odeku 2014 *MJSS* 698.
191 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
192 Selala 2014 *IJSS* 160.
193 Manamela and Budeli *CILSA* 2013 323.
194 Section 213 of the *LRA*.
195 *NUMSA v Bader Bop (Pty) Ltd [*2003] 24 *ILJ* 305 (CC) para 367.
196 Du Toit and Ronnie 2012 *Acta Juridica* 207; Ismail and Tshoose 2011 *PER / PELJ* 160.

should be a threat of conflict in order to attain industrial peace, and the peace depends on the threat of conflict.

In the *In Re Certification* case,[198] an argument was raised that effective collective bargaining can only be achieved once the parties use their right of economic power against one another as adversaries. Furthermore, in *National Union of Public Service and Allied Workers Obo Mani and Others v National Lotteries Board the Constitutional Court* identified the aspect that it is inherent - that parties can be strategically confrontational when bargaining.[199] However, limitations are to be imposed where strikes cause detriment to persons and property.[200] Therefore, both parties "haggle and wrangle"[201] in wanting their demands met. At the end of it all, employers may derive from it the maintenance of "industrial peace" while employees are afforded appropriate working conditions and stability of employment.[202] Against the backdrop of this discussion the "haggle and wrangle" to prove economic power contributes immensely to the labour unrest.

3.4.2 Shortcomings of the right to strike in collective bargaining

The right to strike was provided to serve as balancing factor for employer's beneficial position. The right to strike is also 'limited' by employers beneficial position, which is also limited by employers right to lock out as well as the principle of 'no work, no pay'. Instead of removing these aspects totally from right to strike during collective bargaining, these aspects need to be investigated and reconsidered. These aspects should be investigated In *Stuttafords v SACTWU* the labour court held that the reasons for including strike action into the process of collective bargaining is to cause economic harm to the employer so that the employer can give in to employees' demands.[203] This in its own contributes to the process being adversarial as it aims at punishing rather than resolving the disputes at hand. Furthermore this is counterproductive to

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197 Myburgh 2004 *ILJ* 966.
198 The *In re Certification* case para 63.
199 *National Union of Public Service and Allied Workers Obo Mani and Others v National Lotteries Board* [2014] (3) SA 544 (CC) 195 (hereafter the National Lotteries Board case).
200 The National Lotteries Board para 194.
201 Grogan Collective labour law 86.
202 Du Toit 2007 *ILJ* 1405.
203 *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LAC) para 56.

employees' interests in that they do not have resources to sustain their strikes for any protracted period of time, thus if the strike is prolonged they will eventually stop even if their demands have not been met.[204] The right to strike has become a major tool being used by the trade unions to arm-twist and force the employers to go into negotiations with the employees making the collective bargaining process hostile.[205] Moreover, the right to strike on the employee's side is intended to coerce the employer into giving in to their demands and this might be futile if the strike takes too long as employees cannot sustain themselves.[206] Whilst on the employer's side, the strike can also be futile as there are economic losses encountered. Therefore this contributes to a slow realisation of collective bargaining moving from adversarialism to cooperation as collective bargaining was considered as a factor that would contribute to cooperation.[207]

From the above discussion it was noted that the right to strike is a fundamental aid to the concept of collective bargaining. Against the backdrop of this discussion, the right to strike is part and parcel of the process of collective bargaining in which parties with different objectives try to reach an agreement. In the opinion of the author the inclusion of the right to strike contributes immensely to collective bargaining being adversarial. Strikes in South Africa have proved to be very violent, destructive, unconstructive and costly which in turn defeats the purpose of collective bargaining.[208] It has also been proved that both workers and employers suffer whenever strike action is implemented.[209] Parties engaged in the process of collective bargaining, especially the trade unions, tend to abuse the right to strike by threatening to or out rightly embarking on a strike,[210] thereby coercing the employer to agree to terms that are not favourable or making the negotiation process stale and in turn making collective bargaining futile and the labour industry chaotic.

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204 Le Roux and Rycroft *Reinventing Labour Law* 320.
205 Botha 2015 *De Jure* 340.
206 Davis and Le Roux 2012 *Acta Juridica* 312.
207 Le Roux and Rycroft *Reinventing Labour Law* 320.
208 *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LAC) para 56.
209 Factsheet 2013 https://www.thisisgold.co.za; For instance the Chamber of Mines in 2013, calculated that a strike across the gold industry resulted in loss of revenue of R349 million per day, loss of taxes of R9 million per day, loss of wages and salaries of R100 million per day and loss of sales by suppliers to the mining industry of R43 million per day.
210 Odeku 2014 *MJSS* 698.

3.5 No statutory duty to negotiate in good faith

Good faith bargaining and peace should be the essence of labour negotiations.[211] The duty to bargain in good faith is not recognised by labour legislation, but it is an attribute that many have recommended towards successful collective bargaining. The *LRA* does not impose a duty on the employer or employee to negotiate in good faith.[212] A complicating feature of the current collective bargaining is the extent and nature of what can only be described as 'bad faith bargaining.' The current *LRA* does not recognise all of the jurisprudence of the old Industrial Court which contained a piece on the duty to bargain in good faith.[213] Previously the duty to bargain in good faith was inserted as a measure to deal with the broad concept of 'unfair labour practise.'[214] Therefore the Industrial court went as far as setting out a criterion that was indicative of the exercise of good faith bargaining and used this criterion when issuing an order to either side, or to both sides to bargain in good faith.[215] The criteria which existed in the pre-1995 *LRA* are non-existent in the current *LRA*. The current stance on collective bargaining has resulted in negotiations typified by unions tabling extreme demands and then showing an unwillingness to make any move.[216]

3.6 Dissemination of information

Information is very important for successful collective bargaining. It can be argued that collective bargaining is a re-active process, whereby parties' arguments are based on certain information that they know or do not know.[217] The initiating party is likely to be reacting to information given or not given, thus arguments are likely to be made of honesty and speculative information again.[218] The employer is obliged to share relevant information with the trade union or employee representative and in good faith consider their proposals for collective bargaining.[219] However, a challenge always rises when the

211 Botha 2015 *De Jure* 349.
212 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
213 Levy and Motshabi The dispute Resolution Digest 20.
214 Levy and Motshabi The dispute Resolution Digest 20.
215 Levy and Motshabi The dispute Resolution Digest 20.
216 Levy and Motshabi The dispute Resolution Digest 20.
217 Botha 2015 *De Jure* 28.
218 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
219 Vettori Alternative means to regulate employment relationship 104.

trade unions require information which is meant for the management that cannot be shared with the employees. The denial can be justified as giving out the information can cause a clash with the execution of duties between employers and employees. On the other hand the trade unions and the employees argue that failure to voluntarily give the information leads to blind bargaining, as they are not negotiating without actual facts as information is not freely given. It has been noted that in most collective bargaining meetings there is a withholding of information by all parties,[220] and this is done to sabotage the other party or to benefit the party withholding information. Since there is no statute which mandates the parties to bargain in good faith the process becomes calculative and beneficial to the smart team. Furthermore, there is manipulation of information and exaggerated motivation at the negotiation table which are all characteristics of bad faith bargaining.[221] Further investigative tactics or efforts to obtain information can result in insults or halting the process. In turn the voices of the workers are muted and they are not fully represented. Withdrawal of information makes the negotiating process competitive, making it difficult to compromise and reach an agreement showcasing the adversarial nature of collective bargaining. This leaves issues unresolved and causes tensions in the labour industry.

3.7 Power struggle

The process of collective bargaining requires parties to come together and present their different concerns in order to reach an agreement, thus a dialogue should take place. Botha[222] describes the nature of collective bargaining as re-active rather than pro-active. In line with the notion that that the process is re-active parties have a bigger chance of ignoring or overlooking important factors that could benefit both sides. It is submitted that the conduct of the parties is very important because it influences the outcome of the process. However, it has been noted that parties tend to focus on their positions, trying to outdo each other by making it difficult to explore the values and purposes of collective bargaining. When parties focus on their powers, it depicts collective bargaining as a zero sum activity focused on dividing existing resources, which visibly

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220 Grogan *Workplace Law* 341.
221 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
222 Botha 2015 *PER /PELJ* 3.

depicts its adversarial nature.[223] Furthermore, when negotiating parties showcase their powers, the workers voices and concerns are forgotten thereby defeating the objective of collective bargaining of giving workers voices.[224] The success of collective bargaining more often than not depends on the willingness of the parties involved to compromise on their positions whilst negotiating. Therefore if parties are not willing to set aside their differences the process might be futile, in turn affecting the labour industry which highlights the adversarial nature of collective bargaining. The outcome is dependent on the power relations between the two parties which in turn are determined by the socio-economic, political and legal contexts within which collective bargaining takes place.[225] Hence those without socio-economic, political and legal power bear the consequences of adversarial bargaining which is usually a setback for the labour fraternity.

It has long been held that employers usually have more bargaining power than employees.[226] Over time disputes regarding labour relations have proved to be a form of power struggle between employee and employer. It has been argued that removing the dominant power of capital (employers or investors) is not easily achievable.[227] In *Re Certification of the Constitution of the Republic of SA, 1996,* the constitutional court held that:

> Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers.[228]

In this context, it is clear that a balance is needed to ensure effective bargaining, hence the need for workers to act collectively. In power struggles of any nature, the party with the most power does not willingly give away its position, hence it becomes a contentious process.[229] Similarly, in collective bargaining, the trade unions are involved in this power struggle with the employers in order to enforce the demands for the

223 Brassey 2013 *ILJ* 823.
224 Section 1 of the *LRA*.
225 Selala 2014 *IJSS* 166.
226 In re Certification of the Constitution of the Republic of SA, [1996] 17 ILJ 821 (CC) para 66.
227 Davis and Le Roux 2012 *Acta Juridica* 308.
228 *In re Certification of the Constitution of the Republic of SA,* [1996] 17 ILJ 821 (CC) para 66.
229 Domhoff 2013 www.ucsc.edu.

workers. This then makes collective bargaining an adversarial process where two parties compete with each other in order to assert their position.

3.8 Political past

The historical background of the South African labour contributes immensely towards collective bargaining being adversarial. It can be argued that the adversarial nature of collective bargaining is a product of the political past of South Africa. Due to South Africa's particular history, collective bargaining has been "underlined by the legacy of deep adversarialism" between employers and organised labour.[230] In collective bargaining, the attitude of the parties, mainly trade unions, has been crucially influenced by the traumatic historical experiences through which present labour relations have been shaped.[231] Previously, it was engaged in at an industrial level but not all employees were involved due to discriminatory reasons.[232] The dual system of labour relations that existed during the Apartheid period made it difficult for workers to be represented in collective bargaining. It was only after a wave of strikes in late 1970s that new unions pioneered the negotiations of recognition agreements to secure collective bargaining and other rights at individual plants and firms.[233] The mistrust of the employer is deeply rooted within these previously disadvantaged groups because of the political past of South Africa. This mistrust has contributed to bad faith bargaining which is a setback for collective bargaining. It is unfortunate that collective bargaining processes involve these elements from the past and this makes it an adversarial process which has great challenges for the labour industry as discussed below in 4.2.

3.9 Trade unions

Trade unions play an essential role during collective bargaining as they represent the employees. The *LRA* recognises and provides for the formation and registration of three institutions to represent employers and employees in the collective bargaining process,

230 Botha 2015 *De Jure* 350.
231 Du Toit 1995 *ILJ* 790.
232 Basson et al Essential Labour Law 273.
233 Vettori Alternative means to regulate employment relationship 4.

viz. trade unions, employers' organisations and workplace forums. Botha[234] summarises the role of trade unions as:

> Beyond their functions of defending and vindicating, unions have the duty of acting as representatives working for 'the proper arrangement of economic life' and of educating the social consciences of workers so that they will feel that they have an active role, according to their proper capacities and aptitudes, in the whole task of economic and social development and in the attainment of the universal common good.

It is this role that the trade unions are expected to execute at the bargaining table, but of late trade unions have shown and executed different characteristics. Trade union rivalry as well as disorderly and violent conduct during collective bargaining has contributed to the process being highly adversarial.[235]

3.9.1 The trade unions' contribution to the adversarialism of collective bargaining

Trade unions are indirectly contributing towards collective bargaining being adversarial, although the reasons for their contribution are legislative. The *LRA* regulates and sets a framework for the registration of trade unions.[236] The *LRA* confers various organisational rights on trade unions, depending on whether they are registered, whether they are members of bargaining councils, and on the degree of support they enjoy among workers in a workplace.[237] The 'thresholds' for the acquisition of organisational rights are also prescribed by the *LRA*,[238] unions must be 'sufficiently representative' to acquire organisational rights as set out in the *LRA*.[239] However, a challenge that arises from the acquisition of these rights is that the legislation recognises the majority which are granted the organisational rights, thereby neglecting the minority. Brand[240] argues that there is a lack of an appropriate organisational rights regime which shows a discouragement of industrial democracy, meaning the minority is hardly recognised. Trade unions have contributed towards the industrial unrest through the fight for organisational rights. For instance, the fight for recognition at the collective bargaining

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234 Botha 2015 *De Jure* 353.
235 Botha 2015 *De Jure* 353.
236 Botha 2015 *De Jure* 353.
237 Section 12-16 of the *LRA*.
238 Section 11 of the *LRA*.
239 Section 12-15 of the *LRA* - deals with sufficiently representative and explains briefly.
240 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.

table resulted in one of the major strikes in the history of labour disputes. The Marikana strike was among other reasons a result of a dispute between AMCU and NUMSA trade unions seeking recognition to represent their members during collective bargaining.[241] In the Marikana dispute the general secretary of AMCU stated that "Give me a place at the bargaining table and I will get the workers off the kopje". This depicts the adversarial nature and extent to which trade unions are fuelling adversarialism thereby stretching the collective bargaining process and making it futile.[242]

Furthermore, unions contribute toward collective bargaining being adversarial in that Unions often walk out on negotiations at the end of the employer's response to their demands and declare a dispute.[243] The unions assume that real negotiations will probably take place only once the employers are faced with an imminent or actual strike action.[244] The effect is that it is not easy to deal with unions as in most cases they are only concerned with the welfare of the workers and their demands on the table regardless of whether or not the employer can meet such demands. Some proposed demands may not be feasible or realistic from the perspective of the employer. For instance, in *NUMSA & others v Fry's Metals (Pty) Ltd,* the Supreme Court of Appeal held that employees may fairly be dismissed following bargaining deadlock about proposed changes to working practices, provided those changes serve genuine operational requirements and dismissal is not conditional.[245] This then makes the adversarial nature of collective bargaining a hindrance to progress to some extent - especially where no party is willing to compromise.

3.9.2 Conclusion

From the above discussion it can be noted that the South African labour system, especially collective bargaining is characterised by an adversarial nature.[246] There are several aspects that cause collective bargaining to be adversarial and some of these can

241 Theron; Godfrey and Fergus 2015 *ILJ* 849.
242 Theron; Godfrey and Fergus 2015 *ILJ* 849.
243 Davis and Le Roux 2012 *Acta Juridica* 320.
244 Davis and Le Roux 2012 *Acta Juridica* 320.
245 *NUMSA & others v Fry's Metals (Pty)* Ltd [2005] 26 ILJ 689 (SCA) para 52.
246 Davis and Le Roux 2012 *Acta Juridica* 319.

be attributed to the 'shortfalls' within the *LRA*.[247] Furthermore the right to strike which was enacted to support collective bargaining when it fails is at the centre of the debate. It is debatable whether a radical change in the approach to collective bargaining is needed in South Africa due to the high incidence of strike-related violence.[248] The nature of collective bargaining and the way it is regulated poses some challenges for the labour market, moreover, there could be several implications as a result of these adversarial aspects. The following chapter addresses some of the challenges and implications that emanate from the adversarial nature of collective bargaining.

247 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
248 Ngcukaitobi 2013 *ILJ* 836.

4 CHALLENGES AND IMPLICATIONS OF ADVERSARIAL BARGAINING

4.1 Introduction

There are several types of collective bargaining in existence, which include interest-based collective bargaining and co-operative bargaining. It is noteworthy that the process of collective bargaining is highly adversarial in South Africa.[249] Collective bargaining has been characterised as adversarial due to its confrontational nature. For instance, the employees will request a salary increase which is extremely high and the employer counters the offer with a low or unacceptable amount.[250] There are several aspects that contribute towards collective bargaining being adversarial in South Africa such as the history of the country, degeneration of negotiation competencies, legislative shortfalls, and bad faith bargaining among others. The purpose of this chapter is to analyse the challenges posed by the adversarial nature of collective bargaining and how they contribute to labour unrest. Also, the implications that emanate from adversarial bargaining are discussed, focusing on the economic and social partners.

4.2 Challenges of adversarial collective bargaining

Collective bargaining is celebrated internationally as it is seen as a tool to advance the voice of workers and promote the co-existence of employees and employers through negotiating.[251] In the security sector disputes of 2007 and the Marikana conflict to mention a few, trade unions and employers failed to reconcile their conflicting goals or exercise mutual accommodation which has raised doubts about the continued importance and influence of collective bargaining.[252] The failure by parties to conclude viable agreements has led to wide attacks of the whole concept as method of resolving industrial issues peacefully without strikes. Gernetzky,[253] acknowledges collective bargaining as a concept which was very successful a few years ago as it managed to defuse underlying tensions created by poverty, inequality and unemployment, but now the system is under pressure from multiple sources and poverty, inequality and

249 The adversarial nature of collective bargaining was dealt with in paragraph 3.2.
250 Brassey 2013 *ILJ* 823.
251 Ferreira 2008 *Journal of Public Administration* 192.
252 Christianson *et al Law @ Work* 341.
253 Gernetzky *business day* 8.

employment which are noted as the core drivers of collective bargaining. Furthermore, it has become progressively questionable to what extent adversarial collective bargaining and the right to strike can continue serving their purposes in an era of what is widely called 'globalization.'[254] It is also argued that due to the evolution in the workplace and flexibility in the market, the effectiveness of the legislative framework concerning collective bargaining process in South Africa is questionable.[255] The following discussion looks into some of the challenges that arise from collective bargaining legislation and those that are as a result of adversarial bargaining.

4.2.1 Lack of proper bargaining guidelines

One of the purposes of law is to regulate and guide relations in a society.[256] Where the law is not clear or does not provide proper guidance it becomes a major setback for both state and society.[257] This is the case with adversarial collective bargaining. The *LRA* has been criticised for failing to develop appropriate guidelines on collective bargaining processes, delineating the roles of key players and monitoring the implementation and enforcement of collective agreements.[258] In addition, the CCMA or the Labour Court has no power to designate appropriate bargaining units within a workplace.[259] Furthermore, there is no prohibition of pattern bargaining, negotiating sessions are different.[260] There is no standard procedure that can be followed that will always result in negotiating a successful agreement.[261] The lack of consistency makes the implementation of collective bargaining rigid and lack uniformity. Hence it creates uncertainty in the future application of collective bargaining as well as its future prospects. Eventually, those partners that are represented in this process will lack confidence in the system.

254 Du Toit and Ronnie 2012 *Acta Juridica* 197.
255 Botha 2015 *PER/PELJ* 1813.
256 Steenkamp and Bosch 2012 *Acta Juridica* 139.
257 Steenkamp and Bosch 2012 *Acta Juridica 139.*
258 Godfrey and Bamu 2012 *Acta Juridica* 241.
259 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
260 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
261 AFGE Field Services Department https://www.afge.org/Documents/collective_barg_guide.

4.2.2 Trade unions

A shortcoming of the provision of organisational rights in the *LRA*[262] is a threat to the successful operation of the collective bargaining process. There is a lack of an appropriate organisational rights regime which discourages industrial democracy.[263] Consequently trade unions have lost the focus of representing the needs of the employees as they fight their own battles against a system which upholds majoritarianism.[264] The consequence is that minor trade unions will take out their disappointment for not obtaining organisational rights on the employer. It is not easy to deal with trade unions as in most cases they are only concerned with the welfare of the workers and their demands on the table regardless of whether or not the employer can meet such demands.[265] Some proposed demands may not be feasible or realistic from the perspective of the employer. For instance, in *NUMSA & others v Fry's Metals (Pty) Ltd,*[266] the Supreme Court of Appeal held that employees may fairly be dismissed following bargaining deadlocks about proposed changes to working practices, provided those changes serve genuine operational requirements and dismissal is not conditional.

4.2.2.1 Organisational rights

Organisational rights are part and parcel of collective bargaining as they were created to offer sufficiently representative trade unions a proper base or platform from which to convince an employer to collectively bargain.[267] Therefore, they provide trade unions with a proper platform from which to engage with the employer. It is argued that organisational rights available to representative and majority unions in terms of the *LRA* seem to be a challenge in that they are not an end in themselves, but rather a means to an end of collective bargaining.[268] The principle of majoritarianism which the *LRA* boldly supports causes hardships or prejudices to the rights of minority unions and their members. In *Kem-Lin Fashions CC v Brunton & Another*[269] the court said that the will of

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262 Section 11-18 of the *LRA.*
263 Le Roux and Hanif 2015 *Without Prejudice* 33.
264 Snyman 2016 *ILJ* 865.
265 Botha 2015 De Jure 27.
266 *NUMSA & others v Fry's Metals (Pty) Ltd* [2005] 26 ILJ 689 (SCA) para 52.
267 Snyman 2016 *ILJ* 867.
268 Snyman 2016 *ILJ* 868.
269 *Kem-Lin Fashions CC v Brunton & another* [2001] 22 ILJ 109 (LAC) para 19.

the majority should prevail over that of the minority as it is good for orderly collective bargaining, thereby sideling minority unions. Furthermore, the power of the majority was cemented in *Ramolesane & Another v Andrew Mentis & Another* where the court also found that the will of the majority prevailed over and bound the minority.[270] Therefore, it is evident that chances of minority unions having their matters or issues heard are very limited no matter how important they could be.

4.2.2.2 Dysfunctional strikes

In the minority judgement of *SA Transport and Allied Workers union and others v Moloto and Another,*[271] *it* was held that the right to strike is also an extension of the collective bargaining process. The importance of the right to strike is supported by the widely-used mantra that "collective bargaining unaccompanied by the right to strike is more like collective begging". The nature of strikes in South Africa is that they are very violent and very long.[272] The violent way in which strikes occur is argued to be dysfunctional towards collective bargaining. Although the *LRA* does not expressly state that strikes should be functional to collective bargaining,[273] the argument exists that strikes should be a reminder to parties to engage thoughtfully and seriously with each other. This will help to focus their minds on the issues of collective bargaining and the employer to consider the consequences of not reaching an agreement.[274] However, most strikes have lost the plot on the contribution that they make to collective bargaining. This causes a general unrest in the labour industry. This notion is supported by the minority judgement in the SATAWU case which says that "strike as part of collective bargaining results in chaos and disturbs the desired balance of labour relations that is fair to both employees is unsustainable."[275] Moreover, the right to strike is not an end in itself but also a means to an end as part and parcel of the collective

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270 *Ramolesane & another v Andrew Mentis & another* [1991] 12 ILJ 329 (LAC) 336A.
271 *SA Transport and Allied Workers union and others v Moloto and Another* [2012] 33 ILJ 2549 (CC) para 33; the majority judgement at para 61 also agreed that strike is an integral part of collective bargaining. [Hereinafter the SATAWU case].
272 Ngcukaitobi 2013 *ILJ* 836.
273 Fergus 2016 *ILJ* 1539.
274 Fergus 2016 *ILJ* 1538.
275 *SA Transport and Allied Workers union and others v Moloto and Another* [2012] 33 ILJ 2549 (CC) para 33.

bargaining process. Thus the contribution that it is playing in casting doubt on collective bargaining cannot be ignored.

4.2.3 Inadequate negotiating skills

Du Toit and Ronnie[276] submit that inadequate dispute resolution techniques also cause violence. Sometimes the negotiation process between trade unions and employers is prolonged and is not successfully regulated.[277] Additionally, this is intensified by negotiating in bad faith. This indicates that there is a flaw within the collective bargaining system. These are some of the reasons why the outcome of the teachers' strike in 2010 was disastrous.[278] It took long to resolve issues and as a result, tensions escalated between the government and trade unions.[279] Furthermore, it can be argued that due to the lack of a properly resourced body to educate social partners about economics or provide reliable economic information,[280] the parties negotiated blindly, thereby neglecting to address real issues. Therefore this makes collective bargaining an impossible mechanism for resolving workplace issues between employees and employers.[281] The resultant implication is that disputes are not effectively resolved or not solved at all causing further tension between the employer and the employee. This has various negative impacts which may include the employer resolving to terminate some employees' contracts as a way of avoiding any further disputes.

4.2.4 Raising of non-collective bargaining issues

A challenge that exists within collective bargaining and contributes to its adversarial nature is the failure to distinguish between collective and non-collective bargaining issues. The *LRA* mentions "matters of mutual interest" in the section dealing with strikes.[282] Matters of mutual interest are not defined, and the term is wide enough to include disputes of interest or disputes of right - inter alia, such matters include issues relating to the terms and conditions of employment, such as employee remuneration,

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276 Du Toit and Ronnie 2012 *Acta Juridica* 196.
277 Tenza 2015 *Law Democracy & Development* 212.
278 Amtaika 2013 *International NGO Journal* 111.
279 Amtaika 2013 *International NGO Journal* 111.
280 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
281 Steenkamp and Bosch 2012 *Acta Juridica* 142.
282 Section 213 of the *LRA*.

service benefits and compensation.[283] In several instances employees approach the employer with non-collective bargaining issues. In *NUPSAW v National Lotteries Board,* during collective bargaining employees demanded to view the contract or his resignation of which the court established that this was not a matter of collective bargaining, but a managerial issue.[284] The legislature introduced workplace forums in an effort to counter some of these challenges.

4.3 Workplace forums

Collective bargaining system is based upon a liberal market system.[285] Due to several developments in the corporate sector, the continuation of a rigid adversarial system is incongruent with the direction suggested by several scholars that the new corporate project should take.[286]The labour relations regime provides for the establishment of institutions that promote social dialogue and joint decision making such as the workplace forum.[287] Workplace forums are designed to give the workers a voice by dealing with non-distributive issues that is not dealt with in adversarial collective bargaining.[288] These include matters such as changes in the organisation of work, streamlining, the introduction of innovative technologies and work techniques, health and safety in the workplace.[289] It is important to note that it was clearly articulated in the *Explanatory Memorandum to the Labour Relations Bill* that workplace forums were designed to augment collective bargaining and not replace it.[290]

Workplace forums are regulated by the *LRA.*[291] A workplace forum established in terms of the *LRA* seeks to promote the interests of all employees in the workplace, whether or not they are trade union members.[292] The *LRA* provides that a workplace forum may be established in any workplace in which an employer employs hundred or more

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283 Botha 2015 *PER/PELJ* 1813.
284 *NUPSAW v National Lotteries Board* [2014] 75 (CC) para 171.
285 Botha 2015 *PER/PELJ* 1816.
286 Botha 2015 *PER/PELJ* 1816; O'Regan 1990 *Acta Juridica* 119 and Du Toit 1993 *Stell LR* 332 in this regard.
287 Chapter V of the *LRA*.
288 Botha 2015 *PER|PELJ* 1816.
289 Botha 2015 *PER|PELJ* 1816.
290 Explanatory Memorandum to the Labour Relations Bill.
291 Chapter V of the *LRA.*
292 Section 84 of the *LRA.*

employees.[293] This therefore means that an employer with less than hundred employees cannot make use of workplace forums. Thus joint problem solving and participation on certain subjects is not available to smaller employees and they are left with one option of resorting to adversarial collective bargaining. The provision for workplace forums by the *LRA* can be accredited to the need to respond to the challenges brought about by globalisation, which requires cooperation between employees and employers.[294] This is something adversarial collective bargaining could not do. Although workplace forums tried to solve the challenges presented by adversarial bargaining, it has its own fair of challenges that has seen it being unsuccessful.

4.3.1 Challenges of workplace forums

Workplace forums failed to take off due to several issues. Brassey[295] opines that the effectiveness of the legislative provisions which created the workplace forum was bedevilled by mistrust on the part of both employees and employers. Employers were worried that their managerial duty could be undermined in the workplace forum, while employees and trade unions feared that collective bargaining could be compromised.[296] Moreover, it is contended that trade unions feel that workplace forums will still increase inequality in the workplace as the employer could still exercise more bargaining power over vulnerable employees.[297] Additionally, it has been concluded that workplace forums have proved to be unsuccessful because the nature and status of any agreement reached between the employer and workplace forum are not addressed in the *LRA.*[298] Therefore it can be noted that a gap still exists because issues that cannot be resolved through adversarial collective bargaining are still not being negotiated as workplace forums are unsuccessful.

293 Section 80 of the *LRA.*
294 Botha 2015 *De Jure* 1818.
295 Brassey 1999 *ILJ* 5.
296 Davis and Le Roux 2012 *Acta Juridica* 318.
297 Botha 2015 *PER/PELJ* 1829.
298 Botha 2015 *PER/PELJ* 15.

4.4 Implications of adversarial collective bargaining

The adversarial nature of collective bargaining has proved in several circumstances detrimental to the parties involved. As was noted above, most collective bargaining processes are hampered by strikes.[299] The results of strikes have not been beneficial to all parties as lives are lost, financial opportunities are strained and working days are lost. Collective bargaining does not only have an economic benefit, but it also builds society and binds the social structures together as it allows employees and employers to agree regarding employment matters. The impact of adversarial collective bargaining is also felt by the nation as a whole. This section analyses the implications that adversarial collective bargaining has on different areas.

4.4.1 Economic implications

The results of collective bargaining impacts on the economic world, and in turn the well-being of the Republic of South Africa. However, the adversarial nature of collective bargaining has some negative implications that may be detrimental to South Africa's interests especially the economy.[300] For instance, the security sector strike of 2007 was a disaster that escalated strikes.[301] During this strike production was low, jobs and lives were lost. Furthermore, one cannot forget the industrial strike that occurred in Marikana in 2012, leaving so many workers dead.[302] Such cases increase uncertainty and repel significant foreign investment in the Republic of South Africa.[303] The condition of South African labour relations is a matter of great interest to the international investment community, thus investment is unlikely to be forthcoming if the state of such relations is or professed to be volatile.[304] For instance, after the sectoral strike in the Republic's motor industry, Bayerische Motoren Werke (BMW) announced that it would not be setting up a new plant in South Africa as it had suffered huge losses.[305] Therefore, if huge multinational corporations such as BMW make decisions of this nature, then

299 See paragraph 4.2.2.2 which discusses dysfunctional strikes.
300 Benjamin 2014 *ILJ* 23.
301 Godfrey et al 2007 http://poseidon01.ssrn.com.
302 Anstey 2013 *SAJLR* 133.
303 Levy and Motshabi The state of labour dispute resolution in South Africa 19.
304 Levy and Motshabi The state of labour dispute resolution in South Africa 25.
305 Levy and Motshabi The state of labour dispute resolution in South Africa 25.

undeniably it will be a great cause of concern for other investors. Most multinational companies will find this a reason to move their investments to other places where their investments are not affected by strikes.

In 2012, South Africa made world headlines as a result of the Marikana strike as it was contended that several human and economic rights were breached.[306] These included the right to life[307] and the right to fair labour practices[308] Godfrey, Theron and Visser[309] are of the view that such negative effects signify the fact that the *LRA* has failed in limiting adversarialism. Additionally, Summers[310] argues that if employers and employees only perceive each other as adversaries, then there is no way a country's economy can be improved. Moreover, trade unions also find themselves embroiled in political tensions with the state[311] at the expense of the employers and employees. Consequently, collective bargaining can be counterproductive as a process.[312]

4.4.2 Social implications

Adversarialism also has detrimental effects on both parties and other social partners.[313] It can be argued that this contradicts the aim of collective bargaining and the rights of employers and employees from a constitutional, social and a labour relations perspective.[314] The negotiations are often fuelled by mistrust,[315] demeaning remarks and tensions.[316] Du Toit states that the issues are "not solved but fought over" and the antagonistic atmosphere spills over into the daily running of the business.[317] The interests of employees are somewhat thrown to the winds as trade unions and employers use their powers to engage in a counterproductive combat. [318] Hence, with

306 Brassey 2013 *ILJ* 828.
307 Section 11 of the *Constitution.*
308 Section 23(1) of the *Constitution.*
309 Godfrey *et al* 2007 http://poseidon01.ssrn.com.
310 Summers 1995 *ILJ* 809.
311 Anstey 2013 *SAJLR* 139.
312 De Villiers 1999 *SAJEMS* 442.
313 Calitz 2005 *Stell LR* 168.
314 Manamela 2012 SA *Merc LJ* 731; the aim of promoting orderly collective bargaining.
315 Benjamin 2014 *ILJ* 3.
316 Benjamin 2014 *ILJ* 23.
317 Du Toit 2000 *ILJ* 1553.
318 Davis and Le Roux 2012 *Acta Juridica* 320.

an adversarial system there can never truly be a win-win situation and it is impossible to have a sensible social partnership.[319]

Trade unions have economic, political and social power that enables them to negotiate the well-being of vulnerable employees in the employment context.[320] However, trade unions are at times accused of being responsible for encouraging illegal strikes by employers.[321] In *FAWU obo Kapesi and Others v Premier Foods Ltd t/a Ribbon Salt River*,[322] the applicants embarked on a strike demanding centralised bargaining. The court held that there was nothing wrong about the fact that the strike had occurred since it was protected[323] and it was deeply-rooted in labour law.[324] However, it was the violent manner in which the strike was conducted that the court held was damaging to the "legal foundations upon which labour relations in this country rest".[325] It was unreasonable for the trade union to embark on violent strikes, rather than a peaceful one, to force the employer to give in to the demands.[326]

It should be noted that the community is also deemed a significant social partner as it benefits from the services of firms and businesses within it.[327] The community also has vital interests which are not usually on the bargaining table but are essential to the public.[328] Adversarial bargaining that consequently leads to violence can be detrimental to the community. In *FAWU and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*[329] it was reported that non-strikers were physically assaulted and killed and property destroyed. Therefore, if collective bargaining goes beyond employment-related

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319 Davis and Le Roux 2012 *Acta Juridica* 320.
320 Botha 2015 *De Jure* 341.
321 Benjamin 2014 *ILJ* 14.
322 *FAWU obo Kapesi and others v Premier Foods Ltd t/a Ribbon Salt River* (C640/07) [2010] ZALC 61; (2010) 31 ILJ 1654 (LC); [2010] 9 BLLR 903 (LC) (4 May 2010) para 3(hereafter the *FAWU obo Kapesi* case).
323 The *FAWU obo Kapesi* case para 2.
324 The *FAWU obo Kapesi* case para 2.
325 The *FAWU obo Kapesi* case para 6.
326 The *FAWU obo Kapesi* case para 6.
327 Pillay 2012 *ILJ* 818.
328 Pillay 2012 *ILJ* 818.
329 *FAWU and others v Premier Foods Ltd t/a Blue Ribbon Salt River* (C 722/2012) [2012] ZALCCT 36; [2012] 12 BLLR 1281 (LC); (2013) 34 ILJ 1171 (LC) (7 September 2012) para 4.

issues and leads to property being damaged and people's lives being threatened it becomes futile.[330]

Additionally, adversarial collective bargaining is also detrimental to social partners as it breaks employment relationships and trust and leads to loss of jobs either voluntarily or involuntarily. In the case of *NUPSAW v National Lotteries Board,*[331] the C.E.O resigned voluntarily but the resignation could be attributed to the collective bargaining process. During the process workers had demanded to view his contract and demanded that he resign as they could not work with the manager whom they merely disliked. Therefore from this case it is evident that adversarial collective bargaining contributed to breaking the employment relationship of the C.E.O and other employees. Moreover, adversarial collective bargaining escalates unemployment.[332] This is so as it does not create an environment of cooperation and participation of employees in the workplace due to its confrontational nature, which leads to voluntary or involuntary resignations.[333] Therefore, it can be argued that there is no stability in the manner in which collective bargaining is conducted.

4.5 Conclusion

The adversarial nature of collective bargaining has challenges that carry adverse implications for the social partners and South Africa at large. Brand[334] argues that the challenges that collective bargaining is experiencing can be attributed to some shortcomings in the *LRA*. The legislature introduced workplace forums in order to address issues that can be solved through adversarial collective bargaining. However workplace forums did not meet with any significant degree of success.[335] Therefore a *lacuna* still exists within the labour industry when it comes to methods of resolving disputes because issues that were resolved for workplace forums are left hanging leading to more conflict. Moreover the violence which has characterised a number of

330 Le roux and Hanif 2014 *Without Prejudice* 30.
331 *NUPSAW v National Lotteries Board* [2014] 75 CC para 78.
332 Maree 2007 http://www.humancapitalreview.org.
333 Manamela 2002 *SA Merc LJ* 731.
334 Brand 2015 https://www.conflictdynamics.co.za/.../SEIFSA.
335 Davis and Le Roux 2012 *Acta Juridica* 318.

strikes in recent years, mostly in the public sector, has cast doubt on the effectiveness of the *LRA* in resolving labour disputes.[336]

The challenges that result from the adversarial collective bargaining also has great implications for the labour market and the country at large. The question that needs to be answered is whether the South African dispute resolution, especially collective bargaining, is acceptable and viable in the world market. It is argued that the level of labour unrest, unresolved conflicts and uncertainties in the labour industry repels economic development. Furthermore, the social implications of adversarial bargaining are too extreme as witnessed during the Marikana strikes, where human rights were also violated. In conclusion it can be said that South Africa's labour relations are troubled and legislation particularly with regard to collective bargaining appears to have failed.[337]

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336 Section 1(d) of the *LRA*; Du Toit and Ronnie 2012 *Acta Juridica* 195.
337 Levy and Motshabi *The state of labour dispute resolution in South Africa* 25.

5 RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

Despite all the different levels of bargaining that exist, collective bargaining in South Africa is mainly done at a sectoral level,[338] and it is highly adversarial. The adversarial nature of collective bargaining presents several challenges that are detrimental to South Africa and other social partners.[339] The challenges emanate from different roots as some can be attributed to legislative shortcomings, economic and social changes such as globalisation, whilst others are procedural.[340] The objectives of the *LRA* to advance 'orderly collective bargaining' and 'effective dispute resolution'[341] have been clouded by various challenges. There is a need to improve collective bargaining or to address the challenges that are posed by adversarial nature to suit the changed social and economic developments. This chapter suggests some recommendations to some of the challenges of collective bargaining, Furthermore it will conclude on what this research has discussed and established.

5.2 Recommendations

The following recommendations are made:

5.2.1 There is need for a shift from adversarialism to codetermination

Labour law since its inception has been based on the foundation that the relationship between labour and capital is adversarial. Therefore labour law should within the confines of a legal framework enable the respective social powers enjoyed by the parties to determine the outcome of their conflict.[342] Collective bargaining inherited this foundation and has been characterised as highly adversarial which has made any codetermination impossible. South African history and that of labour law has contributed immensely to collective bargaining being adversarial; however, this has had

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338 Vettori *Alternative means to regulate employment relationship* 41.
339 See paragraph 4.4.2 for more information on this.
340 See paragraph 4.2 on more challenges.
341 Section 1(d) of the *LRA.*
342 Davis and Le Roux 2012 *Acta Juridica* 309.

great challenges and implications for the employers and employees.[343] It is argued that there be a move from adversarialism to co-determination. Co-determination refers to a concept for employee consultation and participation in certain cases in company decisions at both establishment and company or group level within private sector companies in the country.[344] Adversarial collective bargaining does not empower trade unions and employees with greater power concerning decision-making with respect to the course, plans and policies of the business.[345] Due to this reason co-determination, or joint decision-making over key decisions relating to the running of the business is not covered by collective bargaining.[346] Workplace forums[347] were established to achieve codetermination but they have not been successful. Du Toit and Ronnie[348] suggest that employers and trade unions should rethink the practicality of determining issues with adversarial bargaining as it has the potential to impact radically on how employers and workers relate to each other and may mitigate some of the unrest caused by adversarial collective bargaining.

5.2.2 Exploring alternative bargaining methods

Another way to advance the interests of employers and trade unions without the challenges or the unrest associated with adversarial collective bargaining would be to take part in Interest-based Bargaining (IBB).[349] IBB is a move from adversarial collective bargaining. It focuses on parties' interests rather than their proposed positions, making it possible to explore their interests and to learn whether these interests are shared or complementary.[350] IBB involves a good-faith effort by both sides to understand the other side's needs, interests and concerns.[351] IBB provides a framework that loosens the severity of collective adversarial bargaining where each

343 On challenges and implications please refer to paragraph 4.2 and 4.4 respectively.
344 Page *Codetermination in Germany a beginner's guide* 5.
345 Botha 2015 *PER /PELJ* 1816.
346 Botha 2015 *PER /PELJ* 1816.
347 See paragraph 4.3 for more on workplace forums.
348 Du Toit and Ronnie 2012 *Acta Juridica* 216.
349 Brand "How to develop an effective strike avoidance strategy"3.
350 Kaboolian and Sutherland 2005 *Win-Win* 17.
351 Kaboolian and Sutherland 2005 *Win-Win* 19.

party comes to the table with a set of desired terms that it believes is the only way to satisfy its own interests.[352]

IBB eliminates the adversarial nature of collective bargaining in that there is no win or lose situation. All partners are stakeholders in a pluralist society rather than enemies that have to be defeated on an ongoing class.[353] To achieve better results through mutual gain negotiation major parties from both sides should undergo joint training in modern negotiation theory and practice.[354] This would help in improving their negotiation skills which would reduce the level of unresolved disputes and tensions. Furthermore, IBB also requires that parties to negotiations be acquainted with risk analysis skills in order to recognise their dependence and their independence and accept that they have overlapping and different interests.[355] It is argued that if both parties are exposed to the fact that in reality it is possible to achieve outcomes which are of greater value to both parties than the win or lose outcomes or labour unrest which typically result from adversarial collective bargaining, then it is far easier to achieve optimum outcomes.[356]

To eliminate adversarial collective bargaining, employers and trade unions are recommended to engage in an alternative of "interest arbitration" where a third party is involved in the process.[357] The role of an interest arbitrator would be to intervene where the parties reach a dead end and the issues of a collective bargaining agreement become unresolvable.[358] The arbitrator would help solve the problems by determining how the future affairs of the parties will be governed[359] and also encourage the parties to negotiate without fixing any mandates.[360] The government of the Republic of South Africa has considered the introduction of an interest arbitration clause that can require

352 Brand "How to develop an effective strike avoidance strategy" 20.
353 Kaboolian and Sutherland 2005 *Win-Win* 17.
354 Brand "how to develop an effective strike avoidance strategy"6.
355 Brand 2015 http://www.conflictdynamics.co.za.
356 Brand "How to develop an effective strike avoidance strategy"5.
357 Tenza 2015 *Law Democracy & Development* 229.
358 Tenza 2015 *Law Democracy & Development* 228.
359 Tenza 2015 *Law Democracy & Development* 228.
360 Tenza 2015 *Law Democracy & Development* 228.

trade unions and employers to end a strike that is detrimental to economic stability and the public social welfare.[361]

5.2.3 Enforcing good faith bargaining

In order to curb violence during strikes, one has to understand what causes the increase of conflict.[362] Du Toit and Ronnie[363] submit that inadequate dispute resolution techniques also cause violence. Sometimes the negotiation process between trade unions and employers is prolonged and is not successfully regulated.[364] Additionally, this is intensified by negotiating in bad faith. This indicates the unrest that is created by an adversarial collective bargaining system. These are some of the reasons why the outcome of the teachers' strike in 2010 was disastrous.[365] It took long to resolve issues and as a result, tensions escalated between the government and trade unions, thereby causing unrest in the fraternity.[366]

A system of good faith negotiations has to be established to eliminate adversarial collective bargaining.[367] Botha[368] submits that formidable results can be obtained from collective bargaining if in addition there is a system that upholds good faith, and it also ensures enforcement of the respective collective agreements. Pursuant to exercising good faith both parties should acknowledge each party's representation and respect each other's commitments.[369] Subsequently both parties commit themselves to the concessions reached in the collective agreement.[370]

5.2.4 Limitation of the right to strike during collective bargaining

Despite tensions caused by bad faith bargaining, it can be argued that strikes are the major highlight of the adversarial nature of collective bargaining. Violence during strikes

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361 Tenza 2015 *Law Democracy & Development* 228.
362 Rycroft "What can be done About Strike-Related Violence?" 15.
363 Du Toit and Ronnie 2012 *Acta Juridica* 196.
364 Tenza 2015 *Law Democracy and Development* 212.
365 Amtaika 2013 International NGO Journal 111.
366 Amtaika 2013 International NGO Journal 111.
367 Rycroft "What can be done about Strike-Related Violence?" 16.
368 Botha 2015 *PER/PELJ* 6.
369 Collective bargaining: a policy guide (2015) ILO 42.
370 Collective bargaining: a policy guide (2015) ILO 42.

is "an abuse of the right to strike".[371] In terms of section 36 of the *Constitution*[372] a right can be limited in terms of the law of general application provided the limitation must be reasonable and justifiable. The Constitutional Court in *South African Police Service v Police and Prisons Civil Rights Union*,[373] held that the right to strike, even though constitutionally protected, is not absolute. The Court held, in agreement with the Labour Appeal Court, that the South African Police cannot engage in strikes since they are involved in essential services, which is one of the limitations in terms of the *LRA.*[374] The rationale was that the police have a duty to protect public interests and ensure safety and if this is not achieved, considering that strikes tend to be violent, fundamental rights would be negatively affected. One would tend to agree with the Court because the risk of halting or pausing police duties is a dangerous one and the police are constitutionally and statutorily bound to protect the public. It is suggested that the judiciary should be given authority to pre-empt strike violence.[375] Currently there is no provision of inherent authority and thus the courts can only play a role if a matter is brought before them.[376] Therefore, it would be interesting and effective to see the courts play such a role.

Du Toit and Ronnie[377] argue that, with regard to 2014 *LRA* amendments in labour relations, the violence that keeps recurring in strikes makes one question the extent of efficiency of the *LRA.* They refer to some suggestions made of having strikes prohibited by the state in certain circumstances as well as previously proposed amendments to the *LRA* to have the CCMA suspend strikes where the public interest demands it.[378] However, one tends to agree with Du Toit and Ronnie that there is a need to revise the aspects of dispute resolution and strikes, "eliminating dysfunctional barriers rather than introducing new ones". [379]

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371 Manamela and Budeli 2013 *CILSA* 324.
372 Section 36 of the *Constitution*.
373 *South African Police Service v Police and Prisons Civil Rights Union* [2011] (6) SA 1 (CC) para 20.
374 *South African Police Service v Police and Prisons Civil Rights Union* [2011] (6) SA 1 (CC) para 30.
375 Tenza 2015 *Law Democracy & Development* 225.
376 Tenza 2015 *Law Democracy & Development* 228.
377 Du Toit and Ronnie 2012 *Acta Juridica* 195.
378 Du Toit and Ronnie 2012 *Acta Juridica* 195.
379 Du Toit and Ronnie 2012 *Acta Juridica* 196.

5.3 Conclusion

Collective bargaining is a Constitutional right[380] that is regulated by the *LRA*.[381] Despite the *LRA* provisions regulating Collective bargaining, the process is mainly voluntary and is adversarial in nature. The adversarial nature of collective bargaining dates back to the struggle for social justice and dictatorial regimes in South Africa during the mid-1970s.[382] The legislative framework which regulates collective bargaining has remained unchanged despite a lot of changes occurring, specifically 'globalisation'[383] which has impacted heavily on collective bargaining.[384] In particular it has become progressively debatable to what extent collective bargaining and the right to strike can continue serving their purposes in an era that is widely called globalisation.[385] Due to these changes, adversarial collective bargaining has presented a lot of challenges in adapting to constantly changing conditions. It can be argued that the unrest in the labour industry can be attributed to the failure of adversarial collective bargaining to resolve all disputes.[386]

Whilst collective bargaining is bedevilled by some legislative shortfalls that pose a lot of challenges, the adversarial nature has its own fair challenges to different stakeholders. The discouragement of industrial democracy through lack of an appropriate organisational rights regime[387] has widened the tensions amongst unions, causing them to lose focus on real collective bargaining issues. Furthermore, adversarial collective bargaining has been made popular and tolerated as there is no system or legislation that promotes good faith bargaining and efficient enforcement of collective bargaining agreements.[388] Therefore this has placed the objective of the *LRA* of promoting economic development, social justice, resolving disputes effectively, labour peace and

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380 Section 23(5) of the *Constitution*.
381 Chapter III of the *LRA*.
382 Du Toit 2007 *ILJ* 406.
383 The term *globalisation* is understood to mean, the rise of a new global division of labour in addition to the internationalisation of trade and investment; Hepple 2005 *Law Democracy & Development* 137.
384 Du Toit 2007 *ILJ* 407.
385 Dicken Global shift: Reshaping the global Economic Map 9.
386 Thompson *Business day* 4.
387 Brand 2015 http://www.conflictdynamics.co.za.
388 Botha 2015 *PER/PELJ* 1816.

democracy in the workplace through collective bargaining[389] in limbo as parties find it difficult to trust each other.

Strikes which are mainly violent have been the highlight of the adversarial nature of collective bargaining. The objective of coupling the right to collective bargaining and the right to strike was summarised in *Stuttafords v SACTWU* as being responsible for inflicting economic harm on the employer so that the employer can accede to employees' demands.[390] However, the exercise of the right to strike has gone far beyond inflicting harm on the employer, as incidents of violence and intimidation have largely characterised strikes in many quarters of employment disputes in South Africa.[391] As Cheadle *et al* [392] have also observed, it is one of the ironies of collective bargaining that the very object of industrial peace should depend on the threat of conflict, thereby highlighting the level of adversarialism in the process. The notion that striking is an integral part of the system of collective bargaining is not disputable,[393] but perhaps the legislature needs to address the flaws and the dysfunctionality of strikes towards collective bargaining to eliminate the adversarialism, discontent and gain more confidence in the process.

In conclusion, it is difficult to eliminate adversarialism but it is imperative to control the process of collective bargaining to avoid dysfunctional conflict that may eventually undermine the position of organised labour and further promote the individualisation of employment.[394] Adversarial collective bargaining if not properly conducted can lead to a rise in labour disputes, with economic and social costs.[395] It is also argued that due to the evolution in the workplace and flexibility in the market, the effectiveness of the adversarial collective bargaining process in South Africa is questionable.[396] It is recommended that perhaps a process that is more participatory in nature which delineates distributive and non-distributive issues would suffice better than the

389 Section 1 of the *LRA*.
390 *Stuttafords v SACTWU* [2001] 1 BLLR 47 (LC) para 89.
391 Selala 2014 *IJSS* 121.
392 Cheadle et al The New Labour Law 213.
393 Myburgh 2004 *ILJ* 962.
394 Du Toit and Ronnie 2012 *Acta juridica* 217.
395 *Collective bargaining: a policy guide* (2015) ILO 5, discussed in paragraph 4.2 on challenges.
396 Botha 2015 *PER/PELJ* 1813.

adversarial collective bargaining process.[397] Du Toit[398] questions the social need of adversarial collective bargaining if it requires legal protection. He argues that collective bargaining has rather met its demise due to effects of globalisation on the global economy which has also led to the decline of trade union membership.[399]

397 Botha 2015 *PER/PELJ* 1813.
398 Du Toit 2007 *ILJ* 1409.
399 Du Toit 2007 *ILJ* 1417.

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