BARGAINING IN BAD FAITH IN SOUTH AFRICAN LABOUR LAW: AN ANTIDOTE?

Fiona Leppan
BA LLB HDip (Advanced Company Law)
Certificate in Mining and Prospecting Law
Director – Cliffe Dekker Hofmeyr

Professor Avinash Govindjee
BA LLB LLM LLD
Executive Dean, Faculty of Law
Nelson Mandela Metropolitan University
Port Elizabeth

Ben Cripps
BA LLB
Associate – Cliffe Dekker Hofmeyr

SUMMARY

While good-faith bargaining is recognized in many overseas jurisdictions and by the International Labour Organisation, such a duty has not been incorporated in South African labour legislation. Given the many recent examples of labour unrest in South Africa, it is time to consider whether there should be a duty to bargain in good faith when taking part in collective bargaining. Recognizing such a duty would arguably benefit both employers and employees and South Africa as a whole.

1 INTRODUCTION

> "*The only sound approach to collective bargaining is to work out an agreement that clarifies the rights and responsibilities of the parties, establishes principles and operates to the advantage of all concerned".*
>
> Charles E Wilson

Recently South African collective-bargaining regulation has had the effect of reversing the concentration of power in the employment relationship. Trade unions acting on behalf of employees have, in certain instances, through their extended power become vehicles of economic and social disorder. Industrial action in South Africa is a daily occurrence and has had a crippling

effect on South Africa's global economic standing while further entrenching social strife.

Employers are now faced with demands made in relation to matters of mutual interest (particularly wage demands) which go beyond reason, and if employers were to accede to the demands, not only would they jeopardize their operational future but would set a dangerous precedent. Collective bargaining should result in agreement on a give-and-take basis. This cannot take place without the necessary balance in the employment relationship. In egalitarian societies, collective bargaining should ensure workplace democracy, redistribution and efficiency. The lack of a duty to bargain in good faith, coupled with the fundamental right to strike, has arguably resulted in unions wielding a power which has had an extremely detrimental effect on the South African economy.

Although hard-bargaining techniques are beneficial and have their place within the realm of labour relations, there is a thin line between "hard bargaining" and bargaining in bad faith, akin to "Boulwarism". A discussion of whether or not there should be a duty to bargain in good faith when taking part in collective bargaining is appropriate within the context of current South African labour unrest.

This contribution provides an overview of collective bargaining and the duty to bargain in good faith in South Africa. Within this purview, the American principle of Boulwarism will be considered, together with other international legal systems. The difficulties South Africa faces through the lack of a duty to bargain in good faith, as well as the inefficiencies of the current forms of protection, provide a backdrop and justification as to why the proposed solutions should be implemented.

2 OVERVIEW OF COLLECTIVE BARGAINING AND THE DUTY TO BARGAIN IN GOOD FAITH IN SOUTH AFRICAN LAW

The concept of collective bargaining is analogous to the reaching of an agreement between parties to a dispute. Within this context, it would be completely inimical to engage in collective bargaining for any reason other than to ultimately reach an agreement.

Van Niekerk describes collective bargaining as a "process in which workers and employers make claims upon each other, and resolve them through a process of negotiation, leading to collective agreements that are mutually beneficial".[1] Grogan defines collective bargaining as "the process by which employers and organized groups of employees seek to reconcile their conflicting goals through mutual accommodation". He further indicates that the dynamic of collective bargaining is demand and concession with the ultimate objective of reaching an agreement.[2]

---

1 ILO "Organizing for Social Justice-Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at work" 2004; Van Niekerk *Law@work* 2ed (2012) 369.

2 Grogan *Workplace Law* 10ed (2009) 343.

In *Metal & Allied Workers Union v Hart Ltd,*[3] the Court opined that "to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term to 'negotiate' is akin to bargaining and means to confer with a view to compromise and agreement."

Grogan stresses the difference between the terms "bargaining" and "consultation". The importance of separating these two concepts when it comes to collective bargaining, lies in the fact that "unlike mere consultation, collective bargaining assumes willingness on each side not only to listen to and consider the representations of the other but also to abandon fixed positions where possible, in order to find common ground".[4]

One of the main purposes of the Labour Relations Act, 66 of 1995 ("LRA"), is to endorse "orderly" collective bargaining, which essentially "promotes the effective resolution of disputes".[5] It ought to be implied within labour legislation as well as the Constitution of the Republic of South Africa, 1996 ("the Constitution"), that, when engaging in collective bargaining, parties should do so in good faith. This requires both "an open mind and a sincere desire to reach an agreement".[6] However, there is no explicit legal duty to bargain in good faith under the LRA.

As the LRA does not compel collective bargaining, courts have diminished power when it comes to determining whether or not collective bargaining should take place between parties, at which level bargaining should occur (at the enterprise, or at sectoral level in a bargaining council), or how parties to a negotiation should conduct themselves.[7] As explained by the Supreme Court of Appeal in *SANDU v Minister of Defence*, "the LRA emphasises the virtues of collective bargaining but nowhere suggests that the process should be other than voluntary".[8]

Owing to the development of new categories of social demands, as well as the changing economic landscape in South Africa, collective bargaining has been referred to as a "constantly mutating institution".[9] The effect of union activities in this respect should not be overlooked. The impact of the 2014 strike by the Association of Mineworkers and Construction Union ("AMCU") in the platinum sector has highlighted this.

Although neither the Constitution nor the LRA places an obligation on parties to engage in collective bargaining, it is in the best interests of both employers and employees that amicable bargaining takes place with an emphasis on good faith. Du Toit views collective bargaining as an essential tool for both sides of the equation. Employers stand to benefit from its potential to facilitate and maintain industrial peace and stability within their operations, while workers utilize it as a "means of maintaining certain standards of distribution of work, of rewards and of stability of

---

3 *MAWU v Hart Ltd* (1985) 6 *ILJ* 478 (IC) 493.
4 Grogan *Workplace Law* 343.
5 S 1(d)(i)–(iv) of the Labour Relations Act 66 of 1995 "LRA".
6 Morris *The Developing Labor Law: The Board, the Courts and the National Labor Relations Act* Vol 1 4ed (1979) 794.
7 Van Niekerk *Law@work* 370.
8 [2006] (11) BLLR 1043 (SCA).
9 Van Niekerk *Law@work* 369.

employment".[10] Thompson accentuates the significance of the activity of collective bargaining, stating that it is more than a technique of wage determination or dispute resolution. He views it as "integral to a system that sets out to civilise the workplace, provide for fair distribution between wages and profits, keep the economy vibrant and contribute to the wider democratic order".[11]

Numerous factors may cause the unsuccessful resolution of collective-bargaining processes. Within the context of contemporary South African labour law, there is a tendency to bypass the envisioned purpose of collective bargaining, and view it merely as a procedural undertaking to ensure that an anticipated strike is deemed protected and lawful. This arises in situations where a union is bound to enter into collective bargaining as a precursor to a strike as is mandatory in terms of a collective agreement between the union and the employer.

The position has been different in the past, in terms of international law and in other parts of the world. In the LRA of 1956, not only was there a duty to engage in collective bargaining, but bargaining in bad faith constituted an unfair labour practice,[12] which is echoed in the American principle of Boulwarism.

3 BOULWARISM

In the United States of America ("USA"), it was decided as early as 1936 that simply compelling parties to meet was insufficient to promote the purposes of collective bargaining.[13] In 1936, the National Labour Relations Board ("NLRB") stated: "Collective bargaining is something more than the mere meeting of an employer with the representative of his employees; the essential element is rather the serious intention to adjust differences and to reach acceptable common ground".[14] Consequently, if one party merely "went through the motions", such conduct was condemned.[15] To address this issue, in 1947 Congress explicitly incorporated the "good faith" requirement into its national labour laws as a solution to bargaining without substance.[16]

The term "Boulwarism" has its origin in the *General Electric case*.[17] The expression is used to describe the technique utilized by the General Electric

---

10 Du Toit "What is the Future of Collective Bargaining (And Labour Law) in South Africa?" 2007 28 *ILJ* 1405 1405.

11 Thompson "*Bargaining over Business Imperatives: the music of the Spheres after Fry's Metals"* 2006 27 *ILJ* 704 705.

12 See *Metal & Allied Workers Union v Natal Die Casting Co (Pty) Ltd* (1986) 7 *ILJ* 520 (IC); *Nasionale Suiwelkooperasie Bpk v Food & Allied Workers Union* (1989) 10 *ILJ* 712 (IC); and *East Rand Gold & Uranium Co Ltd v National Union of Mineworkers* (1989) 10 *ILJ* 683 (LAC).

13 Morris *The Developing Labor Law: The Board, the Courts and the National Labor Relations Act* 793.

14 NLRB 1936 Annual Report 1985; and Morris *The Developing Labor Law: The Board, the Courts and the National Labor Relations Act* Vol 1 793.

15 *NLRB v Montgomery Ward & Co* 133 F.2d 676 12 LRRM 508 (9th Cir. 1943); and *Benson Produce Co* 71 NLRB 888 19 LRRM 1060 (1946).

16 Morris *The Developing Labor Law: The Board, the Courts and the National Labor Relations Act* 793.

17 *General Electric Co* 150 NLRB 192, LRRM 1491 (1964).

Company ("GE") while engaging in collective bargaining, where GE made a firm settlement offer to the other party on a "take it or leave it" basis. Problematically, this type of offer, or counter-offer, is not meant to be negotiated, resulting in no real negotiation at all.

A key component of Boulwarism is the "take it or leave it" principle. The crisp question is whether the negotiator put forward its "final and unyielding offer so early in the negotiations that he occupies the role of unilateral dictator of the terms of any agreement".[18] This was one of the grounds upon which GE was found wanting for its refusal to bargain in good faith, which constitutes an unfair labour practice in the American legal system.[19]

The Boulwaristic method of collective bargaining is likewise in conflict with the guiding policy of the ILO.

4 THE POSITION OF THE INTERNATIONAL LABOUR ORGANISATION

The International Labour Organisation ("ILO") Committee on Freedom of Association, relies on the following principles:

- "it is important that both employers and trade unions bargain in good faith and *make every effort to reach an agreement; moreover, genuine and constructive negotiations* are a necessary component … ;
- that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means *that any unjustified delay in the holding of negotiations should be avoided*; and
- while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith, *making every effort* to reach an agreement; and *agreements* should be *binding* on the parties".[20]

The ILO contemplates that good-faith bargaining is a necessary prerequisite for effective collective bargaining. Significantly, the LRA places great importance on the international obligations of the Republic. The Preamble to the LRA specifically positions it as an instrument, which aims "to give effect to the public international-law obligations of the Republic relating to labour relations".

Furthermore, section 1(b) of the LRA states that one of the LRA's purposes is to give effect to the "obligations incurred by the Republic as a member state of the ILO". Section 233 of the Constitution regulates the application of international Law. It reads: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

South African courts have expressed the importance of looking to the ILO's Conventions and Recommendations for guidance within the context of

---

18 Maxwell "*The Duty to Bargain in Good Faith, Boulwarism and a proposal – The Ascendance of the Rule of Reasonableness"* 1987 71 *Dickson LR* 544.

19 *Ibid*; see also *General Electric Co* 150 NLRB 193.

20 *CFA Digest* 1996 par 814 to 818.

labour law. The most pertinent example of this was *SA National Defence Union v Minister of Defence* ("SANDU"),[21] where the Constitutional Court made specific reference to the importance of the ILO standards in interpretation and development of South African labour law. This sentiment was again expressed by the Constitutional Court in *NUMSA v Bader Bop (Pty) Ltd*.[22]

The Constitution requires the LRA to be viewed in light of ILO standards and Recommendations, which places a specific duty on parties to bargain in good faith. Further, the duty to bargain in good faith while engaging in collective bargaining, has been codified in numerous international jurisdictions, the most notable of which will briefly be discussed.

5 FOREIGN JURISPRUDENCE

5 1 Canada

Within the context of collective bargaining, section 50(a)(i) the Canadian Labour Code, ("the Canadian Code") creates an explicit duty to bargain in good faith by stating: "the bargaining agent and the employer must … bargain collectively in good faith".[23]

The Public Service Labour Relations Board ("PSLRB") in *Professional Association of Foreign Service Officers v Treasury Board,*[24] held that "parties must enter into serious, open and rational discussions with the real intent of entering into a mutually acceptable collective agreement". The PSLRB further indicated that the duty to bargain in good faith is defined by the manner in which the parties conduct themselves during the bargaining process, and if a party's condition is not conducive to the full exchange of positions, such conduct will violate the duty to bargain in good faith.

5 2 Great Britain

The British labour system views the duty of good faith as an implicit duty, arising as an implied term in an employment contract. It suggests that neither party should take steps that would destroy or seriously damage the relationship of trust and confidence between them.

In *Prudential Staff Pensions Limited v The Prudential Assurance Company Limited*,[25] Newey J, of the High Court of Justice, Chancery Division, found that the test as to whether or not a party had negotiated in good faith was whether it had acted irrationally or perversely in taking a discretionary decision.

The British system distinguishes between two different forms of such a duty, namely contractual duties arising under the employment relationship and a duty of good faith in the exercise of discretionary powers. The latter is

21 (1999) 20 ILJ 2265 (CC).
22 [2003] 2 BLLR 103 (CC).
23 Canada Labour Code R.S.C. 1985 C. L-2 http://laws-lois.justice.gc.ca.
24 (2013 PSLRB 110).
25 [2011] EWHC 960 (Ch).

known as the Imperial duty following *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*,[26] ("Imperial Tobacco"), where Sir Nicolas Browne-Wilkinson V-C first formulated the duty. In terms of the Imperial duty, an employer must not act irrationally or perversely in the sense that no reasonable employer could act in that way.

In terms of the contractual duty, an employer must treat its employees fairly in the conduct of its business, and in this treatment of employees, the employer must act reasonably and in good faith; it must act with due regard to trust and confidence. In a recent decision, *IBM United Kingdom Holdings Ltd and another v Dalgleish and others*, ("IBM case"),[27] the learned Judge found that in making decisions on matters of mutual interest, employers are required to consult with employees and work in a spirit of cooperation.

5 3 Selected SADC perspectives

Section 31 of the Malawian Labour Relations Act, 1996 creates a general duty to bargain in good faith, and reads as follows: "*All parties to the negotiation of a collective agreement shall bargain in good faith and make every reasonable effort to conclude a collective agreement"*.

Section 8 of the Zimbabwean Labour Relations Act, 1985 reads as follows: "An employer commits an unfair labour practice if, by act or omission, he [or she] [...] refuses to negotiate in good faith with a workers' committee or a trade union which has been duly formed, and which is authorized in terms of this Act to represent any of his [or her] employees in relation to such negotiation."

It is therefore evident that numerous jurisdictions, also in our region, have created such a duty. Owing to lack of regulation in this regard, South Africa faces several difficulties in the effective conduct of collective bargaining.

6 DIFFICULTIES WITH BARGAINING IN BAD FAITH IN SOUTH AFRICA

6 1 Antagonistic negotiations and strike violence

John Brand submits that the threat of violence during strike action is triggered by bad-faith bargaining. He emphasizes the fact that bargaining in good faith is a universal standard when it comes to negotiation tactics.[28] Brand considers it unfortunate that the LRA fails to enforce a duty to bargain in good faith within the domain of collective bargaining. Through this duty, Brand believes the number of violent strikes would fall, as parties would engage in effective mutual-gain negotiation as opposed to adversarial bad-faith negotiations.[29]

---

26 [1991] 1 WLR 589.
27 [2014] EWHC 980 (Ch).
28 Brand "Strike Avoidance – How to Develop an Effective Strike Avoidance Strategy" August 2010 23rd Annual Labour Conference.
29 *Ibid*.

6 2 The impact of bad-faith bargaining on productivity development

Protracted industrial action, which may result from a lack of good faith in collective bargaining, ultimately leads to a loss of profits, effectively decreasing investment and growth. This, in turn, can lower productivity growth and ultimately effect workers, as employers across the majority of sectors will inevitably turn to technological advancements to reduce the need for a large workforce. Mining companies have already indicated their intention to just this by constructing mechanical mines. Owing to South Africa's reliance on mining exports, there is need to establish incentives to attract increased investment, instead of repelling it by allowing inherently unbalanced and harmful forms of bargaining on labour issues.

Within the context of dismissals, based on operational requirements, Thompson believes that "when operational requirements are demonstrated but the parties cannot agree on change during negotiations (or consultations), fairness must operate as the controlling criterion in determining whether the normally protected collective bargaining process should yield to business claims carrying the dismissal sanction". He states that "this is fairness of a different kind, with a deliberate policy orientation. The fairness factor should be deployed to weigh up the competing public-interest claims of collective bargaining and economic development, and the competing private interests of employees and employers, within the scheme of the LRA and the Constitution."[30]

7 INADEQUACY OF EXISTING REMEDIES IN SOUTH AFRICAN LAW: EQUATING THE REFUSAL TO BARGAIN WITH THE DUTY TO BARGAIN IN GOOD FAITH IN SOUTH AFRICAN LAW

In terms of section 64(2)(d)(iii) of the LRA, a refusal to bargain includes a dispute about bargaining subjects. A number of judgments may lead one to believe that the concept of "a refusal to bargain" is a statutorily-recognized example where parties are deemed to be bargaining in bad faith. This is particularly true when assessing the meaning given to the expression "bargaining subjects" by courts.

In *ECCAWUSA v Southern Sun Hotel Interests (Pty) Ltd* ("ECCAWUSA"),[31] the court held that the appropriateness of a demand made pursuant to collective agreements are not issues which courts should determine, unless the demand is "so unconscionable or so outrageous" that it could be concluded that a party had no intention to negotiate at all.[32] Likewise, in *Greater Johannesburg Transitional Metro Council v IMATU*, the court stated,

> "that a strike should be deemed unprotected if the demand upon which it is based is so irrational that the strike merely constitutes a 'blunt instrument'

30 Thompson 2006 27 *ILJ* 705.
31 (2000) 21 ILJ 1090 (LC).
32 *ECCAWUSA v Southern Sun Hotel Interests (Pty) Ltd supra* par 30.

> used by employees. However, because of the constitutional protection of the right to strike, the applicants would have to demonstrate very clearly on the facts, that the demands are irrational to that extent".[33]

Consequently, demands made that are capable of being considered outrageous or untenable may fall within the ambit of acceptable "bargaining subjects" for purposes of section 64(2)(d)(iii). The refusal to bargain in terms of section 64(2) of the LRA requires the dispute to be managed through advisory arbitration.[34] If an employer fails to refer a dispute concerning a union's outrageous or untenable demands to advisory arbitration prior to the union issuing its 48-hours strike notice, the employer will be restrained from doing so in the future. Justification for this provision is wanting. In certain circumstances, an employer will rely on future negotiations to reach a justifiable settlement of the dispute. Employers who follow this direction and fail to resolve the dispute will be precluded from using the unreasonable nature of the demand as a ground upon which to refer the matter to advisory arbitration, even though they were acting in good faith.

Furthermore, both parties to the collective-bargaining table should assess and appreciate the position of their adversary. Demands made which fail to take that position into account cannot be said to be reasonable. Demands that are clearly unaffordable would therefore fall within the range of section 64(2), particularly if the union, making the demand, fails to compromise from its initial request.

8 POSSIBLE SOLUTIONS TO BARGAINING IN BAD FAITH IN SOUTH AFRICAN LAW

8 1 Explicitly including the duty to bargain in good faith in recognition agreements

Section 23(1) of the LRA reads: "A collective agreement binds – (a) the parties to the collective agreement …"

As mentioned previously, although a duty to bargain in good faith was a requirement in terms of the LRA of 1956, it is no longer required in terms of the LRA of 1995. Nevertheless, this should not be interpreted as implying a "blanket ban" on the regulation of bargaining in either good or bad faith. This merely means that there is no automatic right or duty to engage in collective bargaining in good faith, except where it is an express requirement in terms of a collective agreement.

By virtue of the fact that the LRA has generally given parties entering into a collective agreement a relatively extensive discretion regarding their freedom to contract, it is conceivable that, if parties agree to administer their relationship with continuous good faith, they should be bound to do so, and any conduct inconsistent with the requirement would be deemed a contravention of the collective agreement itself.

---

[33] *Greater Johannesburg Transitional Metro Council v IMATU* [2001] 9 BLLR 1063 (LC) par 43.

[34] S 64(2) LRA.

This argument is based on the fact that parties are currently able to limit certain constitutionally-entrenched rights by collective agreement. For example, section 64(1)(a) limits the constitutional right to strike where a collective agreement determines that the issue in dispute is of such a nature that employees are not permitted to engage in strike action.

In *ECCAWUSA*, the court had to determine whether or not a court could compel parties to bargain in good faith. The Applicant's argument was based on the principle that "implicit in a contractual duty to bargain is a duty to bargain in good faith". Francis AJ dismissed this argument because the Applicants bear at least the onus to show *prima facie* that such a term is implied in the recognition agreement. He stated:

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

The inclusion of such a provision in a recognition agreement has the potential to benefit both parties to the agreement, and to overcome the hurdle set by *ECCAWUSA*. Both would be bound by the duty; a balance of power would be attained. It would also serve to promote the development of an employment relationship, based on principles such as trust, mutual gain and fairness.

8 2 Classifying bargaining in bad faith as an unfair labour practice in terms of the Constitution

Finally, it could be argued that employers have the right to fair labour practices in terms of section 23(1) of the Constitution, and bargaining in bad faith constitutes a contravention of such right.

Section 23(1) of the Constitution provides "everyone" with the right to fair labour practices, not just employees. Cheadle opines that "labour practices are the practices that arise from the relationship between workers, employers and their respective organisations".[35] These are not limited to practices between employers and its employees, but include practices between employers and unions, which represent employees.

Although the LRA codifies specific conduct as constituting an "unfair labour practice",[36] the definitions have been viewed as having "limited use … at arriving at a conception of what a 'fair labour practice' is within the context of section 23(1) of the Constitution".[37]

An important consideration regarding the interpretation and application of section 23(1) is the principle of fairness. In determining what constitutes fairness, one must consider the objectives and purpose of the legislation to

---

35 Cheadle "Labour Relations" in Cheadle *et al* "*South African Constitutional Law: The Bill of Rights"* (2002) 365.

36 S 186, 187 and 188 of the LRA.

37 Currie and De Waal "*The Bill of Rights Handbook"* 5ed (2005) 504.

which it applies in light of section 1 of the LRA.[38] Currie and De Waal submit that any interpretation of fairness should involve weighing up the interests of employees / unions and employers / employers organizations, and ensuring that greater importance is not placed on the interests of one over the other. In *National Education Health and Allied Workers Union v University of Cape Town* ("*NEHAWU"*),[39] the Constitutional Court ("CC") examined the right to fair labour practices. Ngcobo J, stated:

> "Our Constitution is unique in constitutionalising the right to fair labour practice. However, the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of both workers and employers, inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept".[40]

NEHAWU emphasised the role of the legislature in giving content to the right to fair labour practices. Ngcobo J, in the *First Certification* judgment,[41] emphasized the following point: "The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in section 23 are honoured."[42]

Landman, while commenting on the broad parameters of the concept "fairness" and "labour practices" in the context of section 23(1), stated that "unfair labour practices have crept into the heart of our labour law jurisprudence and it may be expected that it will continue to grow, as long as lawful unilateral action is regarded by our courts, in their capacity as custodians of industrial justice, as unfair and unequitable".[43]

Landman's statement makes it clear that the opening implementation of a final demand by a trade union is equivalent to "unilateral action", and although their activities cannot be deemed unlawful, courts should view these as detrimental to industrial peace. The constitutional principle of fairness is embodied within the LRA, and serves as an underlying value upon which labour relations should be assessed. This creates an obligation to interpret whether or not a union's conduct throughout the process (leading

---

38 "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are – (a) To give effect to and regulate the fundamental rights conferred by Section 27 (now Section 23) of the Constitution; (b) To give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation ("the ILO"); (c) To provide a framework within which employees and their trade unions, employers and employers organisations can – (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) To promote – (i) orderly collective bargaining; (ii) collective bargaining at a sectoral level; (iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes."

39 2003 (3) SA 1 (CC).

40 *NEHAWU supra* par 33.

41 *In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

42 *NEHAWU supra* par 35.

43 Landman 2004 ILJ 812; see also Le Roux 2002 CLL 91.

up to their eventual right to embark on a protected strike, as well as the attitude adopted during wage negotiations and throughout the strike), is justifiable on the basis of fairness.

Furthermore, failure to adopt the "fairness" requirement throughout the collective-bargaining process could result in an unfair labour practice. As a dispute in wages is undisputedly a matter of "mutual interest" between an employer and employee, the wage negotiations which transpire as a result of the dispute would logically be considered to be a labour practice. A failure to act reasonably and justifiably (i.e. to act in bad faith) during such wage negotiations could therefore constitute a contravention of the principle of fairness essential in labour practices.

Although the LRA regulates conduct by an employer which may be deemed an unfair labour practice, it fails to recognize any form of conduct by employees or a trade union as constituting an unfair labour practice towards an employer. However, this does not limit an employer's right to seek a remedy, based on the Constitutional right to fair labour practices.

The wording of section 23(1) of the Constitution indicates that "everyone" is entitled to fair labour practices. In *NEHAWU*, the CC dismissed the notion that the term "everyone" excludes juristic persons, and merely applies to natural persons. Quoting the CC in the *First Certification* judgment, the Court held: "In the First Certification judgment, this Court rejected the contention that 'everyone' in Constitutional Principle II refers only to natural persons. It held that 'many universally-accepted fundamental rights will be fully recognized only if afforded to juristic persons as well as natural persons'. The crucial question is whether the right to fair labour practices is available to employers who are juristic persons. There is nothing in the nature of the right to fair labour practices to suggest that employers are not entitled to that right."[44]

This principle has been recognised in several other judgments. In *NEWU v CCMA* ("*NEWU 1*") the LC noted that section 23(1) confers the right to fair labour practices on "everyone", and even though the concept is not defined in the Constitution, all that can be said about the constitutional right is that it is based on fairness. This means that an action may breach the Constitutional right to fair labour practices, even if it is lawful.[45] The Court stated that a practice which is contrary to that contemplated in section 23(1) may qualify as an unfair labour practice. Engaging in collective bargaining in bad faith, which is unfair to the employer, may, in other words, give rise to an unfair labour practice. Further support for this may be found in *Mans v Mondi Kraft Ltd*, where the Court commented that the right to fair labour practices enshrined in the Constitution protects both the employer and employees.[46]

At least one other key argument needs to be overcome for the suggested view to prevail. In *NEWU v CCMA* ("*NEWU 2*"), it was alleged that the LRA is unconstitutional in that it does not afford employers the same right to fair labour practices as it does to employees. The LAC found that the LRA is not unconstitutional in this respect. It must be noted, however, that employers

44 *NEHAWU supra* par 36.
45 [2004] 1 BLLR 165 (LC).
46 [2000] 21 ILJ 213 (LC).

pressing the abovementioned line of argument would *not* be challenging the constitutionality of the LRA, but merely requesting courts to acknowledge that an employer is also entitled to the right to fair labour practices, especially in a situation where the strength of unions has increased since the advent of democracy in South Africa.

9 CONCLUSION

The imposition of a duty to bargain in good faith would not only provide employers with necessary protection in such circumstances, but it would further serve to protect the interests of employees regarding intransigent employers.

Recognizing such a duty would arguably benefit both sides. Deeming conduct by either party which amounts to bargaining in bad faith an unfair labour practice on constitutional grounds, would add value to the rationale and proper functioning of collective bargaining, ensuring that both sides to the agreement comply with the principle of fairness and the purposes of the LRA.

Establishing a good-faith requirement in collective-bargaining regulation by the Labour Court could assist in ensuring that industrial disputes are resolved amicably and in a manner, which promotes the conclusion of agreements. This would not only result in a greater willingness to invest in South African resources, but also ensure dependable production outcomes, unlocking the potential economic development, which South Africa possesses. The results of such an approach would in addition alleviate the social problems plaguing our society.