

The Right to Bargain Collectively

Introduction

[1] This article seeks to address the right to bargain collectively. In his position paper titled “Collective bargaining and the Labour Relations Act (LRA) 66 of 1995”, Halton Cheadle highlighted that, ¹“the right to bargain collectively is shorthand for a range of rights and freedom associated with the institution of collective bargaining. Among others, he distinguished the following rights and freedoms:

[2] The freedom to bargain collectively and “the right to use collective economic power in pursuit of a demand.”

[3] Subsequently, my article will address the legislative framework, protection of the right to collective bargaining and the factors that determine the outcome of collective bargaining.

Legislative framework

The 1998 ILO Declaration of Fundamental Principles and Rights at Work upholds the position of effective recognition of the right to bargain collectively. Further, it is a constitutional right to engage in collective bargaining in terms of the provision of the Bill of Rights.

[4] The Constitutional Court has dealt with this issue in the matter dealing with whether or not a military trade union, South African National Defence Union (SANDU), was entitled to compel the Defence Force to engage with it in collective bargaining in a Military Bargaining Council. The court had the following to say about the direct enforceability of Constitutional Rights, after

¹ Halton Cheadle, Collective Bargaining and the LRA

analysing the issue: ²[52] Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under s 23(5) should in the first-place base his or her case on any legislation enacted to regulate the right, not on s 23(5). If the legislation is wanting in its protection of the s 23(5) right in the litigant's view, then that legislation should be challenged constitutionally.”

[5] ³“The Constitutional Court arrived at a conclusion that the claim of SANDU around its rights to collective bargaining did not involve a constitutional challenge but relied on the enforcement of the regulations governing bargaining in SANDF. Subsequently, the court interpreted the realm of the right to engage in collective bargaining set out in section 23(5) of the Constitution.”

[6] The Labour Relations Act 66 of 1995 was also promulgated among others; ⁴“to promote (i) orderly collective bargaining; (ii) collective bargaining at sectoral level; (iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.”

Protection of the Right to Collective Bargaining

[7] It is common cause that an individual employee and an individual employer do not have equal bargaining power. Because of unequal bargaining power, mechanism should be implemented to protect the individual employee against exploitation. The Constitution of the Republic of South Africa provides for the right to form Trade Unions and employee organisations that can bargain with the employer for acceptable conditions of employment. ⁵“Principles such as freedom of association, the right to bargain collectively and to be protected

² South African National Defence Union v Minister of Defence and Others 2007(5) SA 400 (CC)

³ South African National Defence Union v Minister of Defence and Others 2007(5) SA 400 (CC)

⁴ The Labour Relations Act 66 of 1995

⁵ ILO's values

against victimisation because of union activities are acknowledged worldwide as fundamental human rights.” Collective bargaining therefore plays a major role in the determination of wages and affect the labour market and the broader economy in South Africa.

[8] ⁶“Bargaining powers are, however, not only determined by the formation of unions, but also by the extent to which the bargaining is centralised within different sectors, for instance in a bargaining council. South Africa’s system of bargaining councils allows Trade Unions and the Employers substantive control over the labour and product markets, which might be to the eventual disadvantage of the consumer and the unemployed worker.”

Factors that determine the relative power of the collective bargaining

[9] ⁷“Some of the most important factors that determine the relative power of the collective bargaining are as follows:

- a. The unemployment position and the effect of the outcome of collective bargaining on employment do not seem to be always important considerations in collective bargaining in South Africa.
- b. Demand conditions, profitability and productivity. In buoyant market conditions or when labour productivity is increasing, the employer will more readily grant wage increases. In recessionary conditions, an employer might be more willing to face a strike than give a substantial wage increase.
- c. The elasticity of demand for the employer’s product. If the demand is inelastic, i.e. the demand does not vary much with the price increases, the employer will grant wage increases more readily and will pass the

⁶ The South African Labour Market Theory and practice, Fifth edition by Frans Barker

⁷ The South African Labour Market Theory and practice, Fifth edition by Frans Barker

cost increases on to the consumer through higher prices. If the demand is very elastic, any wage increase leading to a price increase will sharply reduce the demand for that product and the employer will be more resistant to wage demands. For instance, consumers tend to be very price sensitive if there is intense competition between producers, which means that any individual producer will attempt to keep wage and cost increases to a minimum.

- d. In monopolistic conditions employers will also grant wage increases more readily because they can usually recover higher costs arising from wage increases by increasing the prices of their products.
- e. The export orientation of both employers and unions. If both employer and unions are very conscious of the importance of exports and aim to keep local products highly competitive in international markets, market forces will play a bigger role and bring more economic realism to collective bargaining than otherwise.
- f. The employer's capacity to deal with a strike. If production can, for instance, be easily varied or stopped, or sufficient inventories have been built up to provide for uninterrupted marketing during the strike, the employer will be less willing to grant high wage increases. Similarly, if the Employer does not have a large component of highly specialised workers but can make use of temporary workers during a strike, the Employer might decide to take his or her chances with a strike.
- g. The standard of living of the workers. Relatively low standards might influence the union to fight harder for a high wage increase and might also make the employer more sympathetic in this regard. The same applies if the inflation rate is relatively high."

Recommendations and Conclusion

[10] As much as it is inevitable to ignore Halton Cheadle's conclusion that, "the collective bargaining model espoused by the LRA is under attack."

[11] Collective bargaining can only function effectively if it is conducted freely and in good faith by all parties.

[12] Further, the following principles should be followed:

- a. Parties must ensure that efforts are advanced to reach an agreement. The frank and constructive negotiations are carried out.
- b. Attempt to avoiding unjustified delays.
- c. Hold with high esteem the agreements concluded and implement them in good faith.
- d. The pre-actual negotiation phase comprises of information sharing, consultation, joint assessments.
- e. The parties must ensure that the implementation of the agreement is monitored post signing.