

Collective bargaining under the new Labour Relations Act: The resurrection of freedom of contract

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1 INTRODUCTION

Labour law, it has been said, is essentially concerned with the way in which the workplace is governed (Weiler 1990: 15).¹ Whereas the Labour Relations Act of 1956 was premised on the view that the workplace belongs to, and is governed by, the employer (subject to a requirement that workers should be treated fairly) the 1995 Act introduces a wholly different paradigm: it regards the worker as an “industrial citizen” who is entitled to enjoy rights and freedoms in the workplace which mirror those which the interim Constitution protects in society at large. The new Act in effect constitutes a “charter of industrial citizenship” (Grodin 1991: 1).

The purpose of this article is to establish how the new Labour Relations Act 66 of 1995² treats one source of workplace governance, that is collective bargaining and to highlight some of the implications arising from its treatment of the subject. Of particular importance in this regard are the implications of the endorsement of the principle of freedom of contract by the new Act for arbitrators, who will be required to resolve disputes arising from collective agreements. It is quite evident that the Act vigorously pursues a policy of abstentionism in relation to the bargaining process and its outcome. To that extent, its underlying philosophy is no different from that of its predecessor. However, the premises upon which the new Act’s abstentionist stance is founded differ fundamentally from those which informed the 1956 Act. Whereas the latter regulated the bargaining process without regard for the disparities which exist in the rights and sanctions of management and organised labour, the new Act sets out to establish greater balance of power between the parties in order to ensure a more effective bargaining process, greater stability, and more balanced outcomes.

1 Sources of workplace governance include State regulation; unilateral control by employers over certain aspects of the employment relationship; collective bargaining and participatory structures at workplace level.

2 Referred to as “the Act” in this article.

2 PHILOSOPHY OF THE NEW ACT

The 1956 Act was premised on a “pluralist” perspective³ of the relationship between management and organised labour. It proceeded from the assumption that there exists an equilibrium of power between the two sides which makes it unnecessary and undesirable for the State or its organs to intervene in the substantive results of collective bargaining. Within this scheme, the appropriate role of the courts was to supervise the bargaining process and, subject to certain prescriptions, to allow freedom of contract to prevail, even if the bargain was struck on terms which were unreasonable or clearly favoured one party over the other.

However, as Weiler (1984: 387) has observed, if the law tied the hands of one party to the bargaining process and yet refused to adjust the rules governing the actions of the other, it can hardly be said to exhibit neutrality regarding the results of the contest.⁴ Whatever rights organised labour wanted, had to be secured by agreement with employers or obtained from the industrial court in terms of its unfair labour practice jurisdiction.

However, in view of the Act’s ostensible abstentionist approach, intervention by the courts in the bargaining process has met with strong criticism.⁵ It was nevertheless inevitable that the disparities in the parties’ relative legal positions would have moved unions to put their faith in the courts to grant them the rights which they were unable to secure by agreement with employers or through the exercise of economic power. It was probably also inevitable that the courts, perhaps sensing that the law did not treat the parties even-handedly, would succumb to the temptation of getting involved in the fray.

As it was put in *Macsteel (Pty) Ltd v NUMSA*:⁶

“In my view the LRA creates machinery which makes collective bargaining not only possible but compulsory. Its aim is to avoid if possible, industrial strife and to maintain peace. Its operation is such that, if parties negotiate genuinely and in good faith, and their demands and offers are reasonable, settlement will be reached before disruption takes place, if not through agreement *inter partes*, then with the help of the machinery provided for in the Act. The legislature tried to create circumstances enabling the parties to negotiate freely as long as they do so diligently and reasonably. In the process it is necessary that the parties must be on an equal footing, and that the one party does not have an unfair advantage over the other, which will force it to capitulate to unreasonable offers or demands. That being so, I am of the view that any action aimed at creating an advantage for the one party over the other, disturbs the equality which the Act tries to establish, and is therefore unfair . . .”

While the approach of the new Act is also abstentionist, it is, as stated earlier, founded on entirely different premises. Its guiding philosophy is self-governance, which it seeks to promote by:

- (a) establishing a threshold of individual and collective worker rights, including the right to strike;

3 For a critique, see Rycroft & Jordaan (1992: 119).

4 See also Rycroft & Jordaan (1992: 125).

5 See, eg, Thompson & Benjamin (1995: 30ff).

6 (1990) 11 ILJ 995 (LAC) 1006B-E.

- (b) limiting the employer's power to unilaterally alter terms and conditions of employment; and
- (c) by granting the parties the largest possible measure of freedom of contract. At the same time, the Act removes the bargaining process and its outcome from scrutiny by the courts and instead subjects it to limited arbitral supervision.

2.1 A threshold of rights

The Act guarantees freedom of association for both employers and workers; establishes organisational rights (subject to certain thresholds) and provides for the right to strike.

The right to associate, as provided for in the Act, involves three aspects, namely, the right to join registered organisations and to participate in their lawful activities; the right of registered organisations to plan and organise their own administration and activities; and the prohibition of any form of discrimination or differential treatment on account of a person's exercise of rights conferred by the Act.

While the Act respects the autonomy of trade unions and employer organisations,⁷ it nevertheless seeks to ensure democracy within these organisations. This is evident from the following: the constitutions of organisations must provide for ballots to be held before a strike or lock-out is called;⁸ provision must be made for appeals against termination of organisational membership or loss of the benefits of membership;⁹ and members of trade unions or employer organisations who fail or refuse to participate in a strike or lock-out may not be disciplined or have their membership terminated if no ballot was held prior to the strike or lock-out or, where a ballot was held, if the majority of members who voted did not vote in favour of the strike or lock-out.¹⁰ Unlike its predecessor, the Act makes provision for the resolution of disputes between organisations and their members arising from the organisations' constitutions.¹¹

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

As far as the right to strike is concerned, the most significant aspect of the Act's protection of strike activity is that it is both narrower and wider than that provided for under the 1956 Act. It is wider in the sense that the definition of a strike covers all forms of concerted activity aimed at remedying or

7 S 8.

8 S 95(5)(p).

9 S 95(5)(e).

10 S 95(5)(q).

11 S 158(1)(e).

resolving employment-related grievances and disputes, including a refusal to work voluntary overtime.¹² It is also narrower because not all strike activity is protected. While the previous Act made no distinction between strikes over so-called “rights” and “interest” disputes, the new Act expressly prohibits strike action over the former.¹³ However, the most important provision for current purposes is section 76, which implicitly permits the employment of temporary replacement labour in the event of a strike. (This provision should be read with section 95(5)(q) which requires the constitution of a trade union to prohibit disciplinary action against members who refuse to participate in a strike, where the strike was not preceded by a ballot or the strike did not receive majority support in a ballot.) As Weiler (1984: 387) states, it is here where the most crucial imbalance in collective bargaining can arise. The question, however, is whether the Act should ensure a fairer contest by prohibiting the use of replacement labour? To quote Weiler (1984: 413):

“I do not believe so, for two reasons. First, the employer’s right to hire replacements to reduce the impact of a strike is, to a large extent, reciprocal to the employees’ right to take other jobs in order to protect themselves against loss of income. True, most workers are unable actually to exercise this legal right . . . [However] if the labor laws forced employers to experience the loss of a strike as a real incentive to compromise at the bargaining table, fairness should require that the same legal constraints be placed on union members. But there are major problems, in both principle and practice, in trying to enforce such an intrusive restraint on workers’ freedom to support themselves and their families during collective work stoppages.

This consideration gives rise to my second objection to outlawing employers’ use of strike replacements. Were we to bar the recruitment of replacements or the strikers’ taking other jobs, the law would insulate the parties from outside competition. Such insulation runs very much against the grain of a market-based system of collective bargaining . . .”¹⁴

To the above may be added that although an employer may be entitled to hire replacements, it will not always be in a position to do so. The absence of required skills; the potential cost in terms of training; the harm done to shopfloor relations; or the potential for violent behaviour towards replacements, may cause the employer to forego the opportunity of appointing replacements. While the use of replacement labour does not deprive workers of the right to strike, a total ban on the use of replacement labour will mean that the employer is denied the right to do business. It is submitted that a substantial case would have to be made out on the basis of public policy why this should be the case. The mere fact that replacement labour may reduce the effectiveness of the strike, it is submitted, is insufficient.

In any event, the new Act does not leave workers entirely defenceless in the face of an employer’s decision to use replacements: the Act gives them a

12 It was held in *SAB v FAWU* (1989) 10 ILJ 844 (A) that a refusal to work “voluntary” overtime did not constitute a strike under the 1956 Act.

13 S 65(1)(c).

14 Weiler’s arguments should be seen against the background of United States law, where employers are permitted to replace strikers permanently. The right to do so was established in *NLRB v Mackay Radio & Telegraph Co* 304 US 333 (1938).

right to picket and allows for secondary action to discourage the use of replacements. In addition, unions are permitted to discipline members who ignore a strike call endorsed by the majority of union members,¹⁵ while employers are generally prohibited from disciplining any worker who refuses to do the work of someone on strike.¹⁶

2.2 Limitation of the employer's ability to act unilaterally

The new Act limits an employer's ability to act unilaterally in three ways. First, while subjecting strikes and lock-outs to the same procedures and requirements, the Act attributes a lesser status to the lock-out: whereas workers enjoy the *right* to strike, there is no equivalent right to lock-out. The practical implication of this is that while workers may not be discriminated against for exercising the right to strike, employers who decide to lock workers out may be targeted for picketing, secondary action, product boycotts, etcetera.

Second, while it permits both offensive and defensive lock-outs, the Act prohibits so-called termination lock-outs¹⁷ and bans the use of temporary replacement labour in the event of an offensive lock-out.¹⁸ Finally, in terms of section 64(4) of the Act workers and trade unions are provided with a *status quo* remedy with which they can temporarily halt the unilateral implementation of changes to terms and conditions of employment, pending compliance with agreed or statutory conciliation procedures.¹⁹

2.3 Freedom of contract

The Act recognises both freedom *to* contract as well as freedom *of* contract and consequently does not compel bargaining over terms and conditions of employment. Apart from establishing a framework for bargaining at sectoral level, protecting existing bargaining relationships,²⁰ and regulating certain forms of bargaining conduct,²¹ it is content with leaving the decision to bargain in the hands of the parties. As far as the outcome of collective bargaining is concerned, the Act generally allows the parties by agreement to "contract out" of its provisions.

15 S 95(5)(q).

16 S 187(1)(b).

17 S 187(1)(c).

18 S 76(1).

19 The provision has a strong resemblance to s 10 of the 1924 Industrial Conciliation Act.

20 Sch 7 item 13(2).

21 Instead of imposing a blanket duty to bargain in good faith, the drafters of the Act appear to have targeted the most notorious past instances of bad faith conduct for specific regulation. The outstanding examples are s 16, which compels disclosure of information, s 64(4) which regulates unilateral changes to terms and conditions of employment, and s 5 which establishes very broad protection against any form of victimisation. Employers and unions may obviously agree to include an obligation to bargain in good faith in their procedural agreements, in which event any allegation of bad faith conduct would be subject to arbitration in terms of s 24(1).

2.3.1 *The bargaining process*

Whatever compulsion there will be on employers to bargain with trade unions over terms and conditions of employment will in future be generated by workers and their unions themselves through the exercise of their organisational rights and the right to strike. However, the desire on the part of employers to institutionalise or restrain the unhindered exercise of these rights should constitute enough of an incentive for them to agree to establish formal bargaining relationships.²²

2.3.2 *Bargaining outcomes: the status and content of collective agreements*

The Act's abstentionist philosophy is most vividly illustrated by the status which it attributes to collective agreements. Provided they are entered into in writing, all collective agreements enjoy contractual status under the Act and will be binding on the parties to the agreement and their members.²³ This also applies to agreements entered into at bargaining councils.²⁴

As far as the content of collective agreements are concerned, the Act generally allows collective agreements to trump its own provisions. It even goes as far as allowing for collectively agreed limitations on certain constitutionally guaranteed rights. For example, section 64(1)(a) prohibits a strike where a collective agreement determines that the issue in dispute is not strikeable. By agreement between an employer and a majority union, such a limitation may also be extended to workers who do not belong to the union concerned, thereby also depriving them of the right to strike over that particular issue. Similarly, trade unions which do not represent the majority of employees in a workplace may be deprived of the right to organise on the shopfloor if an employer and majority union agreed in terms of section 18 to grant exclusive rights to the majority union.

3 RESOLUTION OF COLLECTIVE BARGAINING DISPUTES: THE ROLE OF ARBITRATORS

By formulating the residual unfair labour practice concept in narrow terms, the drafters of the Act deliberately attempted to shield the collective bargaining process from intrusion by the courts. Yet it provides for arbitral intervention (of an advisory nature) where a dispute concerns a "refusal to bargain", and for compulsory, binding, arbitration of all disputes involving the "interpretation or application" of collective agreements.

22 The special dispute resolution mechanism provided for in s 64(2) may provide an added incentive for employers to recognise a representative union. The section provides for compulsory advisory arbitration prior to any industrial action being embarked upon, where the issue in dispute concerns an alleged "refusal to bargain". This includes a refusal to recognise a trade union.

23 S 23.

24 Where, however, the agreement is extended by the minister to non-parties, it will take on the character of subordinate legislation and will apply to such non-parties as a matter of law, provided the requirements for their extension have been met (s 32).

While the phrase “refusal to bargain” is defined in section 64(2), the meaning of the phrase “interpretation or application” of collective agreements is left undefined. Non-compliance with a collective agreement seems to fall within the ambit of the phrase, but termination or suspension of the agreement arguably does not. This is because specific provision is made in Section 64(2)(b) for advisory arbitration if the dispute concerned the “withdrawal” of recognition of a bargaining agent. As the withdrawal of recognition inevitably involves the termination of the recognition agreement, any dispute involving the latter is therefore subject to advisory – as opposed to binding – arbitration. Otherwise, however, the phrase “interpretation or application” of a collective agreement would seem to cover every conceivable dispute arising from or in connection with a collective agreement.

This potentially gives arbitrators very broad scope for intervention in the content of collective agreements. For example, they may be required to determine whether the conduct of a party constitutes a breach of an agreement and what remedies to award. Furthermore, they may be required to imply particular terms into collective agreements in order to ensure “business efficacy”. Finally, given that all contracts are subject to a requirement that their content must be lawful – that is, not contrary to law or public policy – arbitrators will have very wide scope indeed to develop public policy in the collective bargaining sphere.

What norms should inform arbitrators in the development of the new collective bargaining jurisprudence? As I have tried to indicate, in relation to collective bargaining the Act strongly endorses the principle of freedom of contract. This implies, first, that arbitrators should refrain from making an agreement for the parties by, for example, implying terms which the parties themselves did not contemplate. Where terms are implied, it should be done with a view to give efficacy to the agreement or to safeguard the fundamental rights of individual workers.

As regards the latter, conflicts are bound to arise between the interests of the parties to a collective agreement and the rights of individual workers. Here arbitrators will need to strike a balance between the conflicting interests and fashion appropriate remedies. This could, for example, be done by implying a duty of fair representation into every collective agreement to ensure the equal treatment of workers who are covered by an agreement but who are not members of the relevant trade union; or by requiring that any limitation of fundamental rights should be justified in terms of business necessity or protection of the union's collective exercise of rights.

It could be argued that arbitrators ought to play a far more intrusive role because bargaining outcomes cannot be viewed in isolation from the bargaining process or the structural inequalities which may exist between the parties. Contracting parties, it has been said, “are heavily influenced by the laws of property, inheritance, corporation, incorporation, and the like, all of which shape the resources that parties can deploy in the supposedly free market” (Weiler 1990: 385).

From a policy point of view, however, distributional inequalities should not be the concern of adjudicators engaged in the resolution of collective

bargaining disputes²⁵ as they – and the tools they use – are generally ill-equipped to devise a better solution to a problem they may believe have been dealt with unfairly in the parties' own agreement. This, coupled with the new Act's abstentionist stance and its attempt to equalise the parties' opportunities for the effective use of economic power, again suggests that arbitrators ought generally to refrain from going beyond the terms of a collective agreement when they are engaged in the resolution of a dispute involving the application or interpretation of collective agreements.

4 CONCLUSION

The 1995 Labour Relations Act requires disputes concerning the interpretation and application of collective agreements to be resolved through conciliation and arbitration. When arbitrating such disputes, commissioners may be tempted, particularly because their terms of reference are not decided by the parties to the dispute, to adopt an interventionist approach in regard to the terms of collective agreements. However, this article tried to demonstrate that such an approach would be inappropriate in view of the Act's non-interventionist philosophy. Given this, as well as the fact that the Act seeks to ensure a more even distribution of rights between management and organised labour, the principle which should guide arbitrators in their endeavour to resolve disputes arising from collective agreements is that of freedom of contract.

Sources

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25 For Weiler, the way to reduce inequitable outcomes in collective bargaining is by placing "appropriate legal limits on the economic weapons either side may use". For a similar argument, see Rycroft & Jordaan (1992: 125). Ewing (1995: 114ff), on the other hand, argues for the State to play a more intrusive role in the outcome of collective bargaining. He states: "Although it may be unfashionable (and perhaps even heretical) to say so, one of these [roles] relates to the outcomes of the collective bargaining process, whether in terms of the minimum rates of settlement, or relatives between different groups of workers . . . For the fact is that if collective bargaining as a process is to be seen or developed as an instrument of democratic socialism to secure a public goal, it is difficult to argue that it should be treated as an incident of 'civil rights', that is to say as a purely private bargain between two autonomous parties, subject to the ebb and flow of the market. Democratic socialism may not now mean social equality, but it does mean social equity, and as such there must be a perception about what, for example, an equitable wage structure should look like."

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