“Solidarity for Ever”

Collective bargaining – rights and duties

By Johanette Rheeder

Protected strikes have since the first dawn of the strike day been plagued by violence, wrongful death, looting, protest marches, damage to property and intimidation. The **Marikana** incident is still, four years later, fresh in our minds and people are still suffering the consequences of this very unfortunate and shocking event. Unions and employers are ever more battling with the demand for better wages and the seemingly unbridgeable gap between demand and offer, sometimes rendering the intended power play of the Labour Relations Act (LRA) foul of its intention of peacefully balancing rights, for the benefit of employee and employer. When negotiating, the objective is to find an expedient, mutually acceptable solution that partially satisfies both parties. Compromising might mean splitting the difference, exchanging concessions, or seeking a quick middle-ground position. Different negotiation tactics will then be applied to achieve settlement as close as possible to that parties’ mandate. If the parties cannot settle, protected strikes, protest marches, picketing and secondary strikes are used to force the hand of the employers. Various types of destructive collective bargaining behaviour can also take place during these processes such as intimidation, violence, assault, damage to property and common misconduct.

There are three main ways in which a trade union may acquire organisational and bargaining rights. Firstly, the sufficiently representative union can use the procedures set out in the LRA to acquire the basic organisational rights afforded by sections 12 to 16. The process to acquire those rights is set out in sections 21 and 22 of the LRA. The union will have the organisational rights which include access to the workplace for meetings, deduction of levies, time off for union office bearers and access to information. These rights however still do not include the right to bargain or negotiate on wages.

The union and the employer can also conclude a recognition agreement in which the trade union is recognised as a bargaining agent on behalf of a certain group of employees - the bargaining unit - and, this agreement will also then regulate the recognition as well as the collective or organisational rights. These rights are normally assigned to the majority union. The recognition agreement normally and if properly negotiated, will allow the parties much more scope to regulate their own relationship. It is therefore important for employers and unions to enter into a recognition agreement once the union has reached a stage where it is strong enough to engage the employer in meaningful power play.

A trade union can also acquire organisational rights at an employer, regardless whether the union is sufficiently represented at that particular employer or not. This is when a trade union is party to a Bargaining council. Section 19 provides that registered trade unions that are parties to a Bargaining council automatically have the right of access to the employer’s premises and the deduction of trade union subscriptions in respect of all workplaces within the registered scope of the council.

Section 4 of the LRA also affords every employee the right to form and belong to a union. This section mirrors section 23 of the Constitution which affords all employees the constitutional right to form and belong to a Union. Section 23(5) of the Constitution grants every employer and every employee the right to engage in collective bargaining. It is this sub section that sometimes gives raises the argument that this right has a corresponding duty on an employer to engage in collective bargaining. These organisational rights afforded by the LRA however, should be distinguished from the collective bargaining process the employer and employees and its union engage in, which is a voluntary process.

In the case of ***SANDU v Minister of Defence & others; Minister of Defence & others v SANDU & others***[1] the appeal arose from three judgments of lower courts. Common to all three appeals was the issue of whether the SANDF was obliged to bargain collectively with SANDU. SANDU mainly relied on section 23 of the Constitution, which confers on trade unions *inter alia* a right to “engage in collective bargaining”. The Supreme Court of Appeal (SCA) considered various international models. It found that the voluntarist approach that emerges from these international instruments has characterised our labour dispensation since its liberalisation with the amendments to the Industrial Relations Act 1956 when all workers were permitted to organise and to strike in 1979. The SCA mentioned that voluntarism does not mean that employers and employees necessarily negotiate voluntarily. Often they negotiate in order to avert the economic pressures brought about by a strike or a lock-out. This pressure is one of the principal driving forces behind the voluntarist system. The SCA found that when regard is had to the objectives of the LRA, it becomes clear that the legislature understood that its role was to do no more than provide a framework for collective bargaining and the fact that the legislature had only provided for advisory arbitration in disputes relating to collective bargaining clearly indicates that the Act does not envisage an enforceable duty to bargain.

In ***NEWU v Leondard Dingler (Pty) Ltd & another***[2], the employer cancelled all collective agreements between itself and the union after the union was deregistered and lost its case in the Labour Court. In this case, the union asked the Labour Court to declaration that irrespective of whether the union was registered or not, it retained the right to engage in collective bargaining with the employer. Therefore, what the union was effectively trying to do was to directly enforce its right in terms of section 23(5) of the Constitution to engage in collective bargaining on the basis that the employer has a corresponding duty to bargain. The intention of the legislature and the essence of the Labour Relations Act(LRA), in the context of collective bargaining, is voluntarist and no court will make such a ruling. This means that the employer can refuse to bargain with the union, therefore, there is no legally enforceable duty on an employer to bargain, unless the employer agreed to recognise and bargain with the union in a recognition agreement. Without such an agreement, the union must use its collective muscle to get the employer to the bargaining table – therefore, it must call its members to strike, or threaten to do so, to engage the employer in collective bargaining.

Once engaged in collective bargaining, a union also cannot escape the conduct of its members, officials and shop stewards and can be held liable for delictual damages due to the fault of the union, which caused a loss to the employer. A union can be held liable for the acts of its members, if the employer can prove that there was a wrongful act committed by its employees, the union members, and that the union is legally liable for its member’s actions (it is called vicarious liability). The wrongful act must constitute an offence and must have caused a loss to the employer. The employer will also have to prove that the union, or its shop stewards, authorized, instigated or ratified the commission of the wrongful act, before the union could be held liable.

In the case of *Algoa Bus Company / SATAWU & others*[3], the Labour Court held that the provision that compensation for unlawful strikes must be “just and equitable” mean that it must be fair. While the provision entitling employers to claim compensation for unlawful strikes was designed to compensate them for losses actually suffered, the amount awarded need not necessarily do so. In this case, the strike did not last as long as the applicant had stated, therefore the applicant was not entitled to the full amount claimed (full amount of damages). An unprotected strike or illegal conduct can be barred by way of an interdict in the labour court and if breached can lead to contempt proceedings in the labour court, which is penal in effect. Claims of damages can also be brought by employers, third parties and the public who fall prey to unprotected strikes or to criminal behaviour of union members whilst on strike. The labour court has exclusive jurisdiction to order just and equitable compensation to employers for any loss attributable to the strike, lock-out or conduct, after having regard to certain factors. The purpose of this is not punitive but to compensate the employer for losses actually suffered. The employer will have to prove the extent of the loss.

By Johanette Rheeder, Director at Johanette Rheeder Inc. & LabourSmart Training (Pty) Ltd

www.jrattorneys.co.za / www.labourssmart.co.za / info@labourssmart.co.za

[1] (2006) 15 SCA 4.5.1 and [2006] 11 BLLR 1043 (SCA)

[2] (2011) 20 LC 11.3.1

[3] (2009) 18 LC 1.18.2 and also reported in [2010] 2 BLLR 149 (LC)