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JOB SECURITY: A LEGAL DUTY TO CONSULT OR NEGOTIATE ?

by

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TABLE OF CASES CITED

TABLE OF STATUTES AND SUBSIDIARY LEGISLATION

TABLE OF ABBREVIATION AND ACRONYMS

A	Appellate Division
ADE	Attlantis Diesel engines
AJ	Acta Juridica
ARB	Arbitration
Assa	Association of Sociology in South Africa
Aust.LJ	Australian Law Journal
BJIR	British Journal of Industrial Relations
BML	Business Mens'Law
BR	Bilateralism Review
CCAWUSA	Commercial Catering and Allied Workers Union
CLL	Contemporary Labour Law
CLLJ	Comparative Labour Law Journal
CLLIRJ	Comparative Labour Law and Industrial Relations Journal
CWIU	Commercial Workers Industrial Union
CULR	Catholic University Law Review
EL	Employment Law
Ergo	East Rand Gold and Uranium Company Limited
FAWU	Food and Allied Workers Union
Har.CRCLLR	Harvard Civil Rights -Civil Liberties Law Review
HICLR	Hastings International and Comparative Law Review

IC	Industrial Court
ILB	Innes Law Briefs
ILJ	Industrial Law Journal
ILJ (UK)	Industrial Relations Journal, United Kingdom
Inter.Per.Org.Demo.	International Perspective and Industrial Democracy
IPMJ	Institute of Personnel Management Journal
IRJSA	Industrial Relations Journal of South Africa
ISA	Indicator South Africa
LAC	Labour Appeal Courts
LQR	The Law Quarterly Review
LLB	Labour Law Briefs and Court Reports
LRA	Labour Relations Act
Mawu	Metal and Allied Workers Union
MBL	The Co-Determination Act -Sweden
MLR	The Modern Law Review
Min.LR	Minnesota Law Review
NAAWU	National Automobile and Allied Workers Union (Now Numsa)
NULWC	National Union Leather Workers
NUM	National Union OF Mineworkers
NUMSA	National Union of Metalworkers of South Africa
NUTW	National Union of Textile Workers
PD	People Dynamics
PPWAWU	Paper,Printing,Wood and Allied Workers Union
PSLRA	Public Servants Labour Relations Act
SACTWU	South African Clothing and Allied Workers Union

SAJLR	South African Journal of Labour Relations
SALB	South African Labour Bulletin
Stel.LR	Stellenbosch Law Review
TGWU	Transport and General Workers Union
UCT	University of Cape Town
ULP	Unfair Labour Practice
UWC	University of Western Cape
UWCUWU	University of Western Cape United Workers Union

ABSTRACT

This dissertation investigates whether or not there is a duty on the employer to negotiate with workers on issues that affect their employment security.

The research focuses on why there is no duty on the employer to negotiate with workers in regard to retrenchment,closure and transfer of undertakings.It also examines the factors that are obstacles to the existence of such a duty. Furthermore, the effects of such non - negotiation on the workers' job security and on efficiency as well as productivity of the undertaking are looked at.It also evaluates whether the results suggest that unilateralism in these respects is making a useful contribution to the realisation of the principal aim of the LRA -industrial peace.

The method of investigation has largely been literature review and to a certain extent comparative.It analyses primary and secondary sources. Theoretical guidance was drawn from critical studies in labour law and industrial relations.

The study reveals that there is no duty on the employer to negotiate with workers regarding retrenchment, closure and transfer of undertakings. Consequently it argues that, for job security to ensue, industrial peace to prevail,business efficiency and productivity to abound, the employer should be compelled to bargain or negotiate with workers.This duty should be clearly stipulated in legislation. It further argues that consultation should be geared towards agreement. If agreement cannot be reached on the issues under consideration,it argues that the status quo should be maintained, that is no change to existing conditions should be implemented until a deadlock- breaking mechanism resolves the matter.

The aim of the work is threefold. First, it seeks to make a modest contribution to the understanding and importance of the duty to negotiate in labour law and industrial relations for post -Apartheid south Africa.Second, it disputes and ,in large measure,seeks to contradict earlier justifications for refusing to compel the employer to negotiate with workers in regard to retrenchment, closure and transfer of undertakings.Third,it attempts to provide insight into

how this duty can best be rendered more meaningful and equally beneficial to workers and employers.

Turning to the assessment,it finds that the insistence on duty to consult as opposed to duty to negotiate is pro -management and that it dangerously puts our labour relations into the horns of a dilemma.Furthermore,such an approach is out of touch with democratic developments in the country as well as the expectations of the industrial relations community.Lastly, it finds that the duty to consult is not as useful as the one to negotiate.It accordingly proposes that the employer be under a legislative obligation to negotiate and reach consensus with workers on issues affecting job security.

CHAPTER I

1.1 INTRODUCTION

This study examines whether or not the employer is under a duty to negotiate with workers in regard to issues affecting their job security. The focus is on retrenchment, closure and transfer of undertakings. Precisely why the employer is under no duty to negotiate with workers pertaining to these important respects, is the factor that has encouraged the undertaking of this study. The principal aim of the Labour Relations Act and the obstacles to its realisation form a major base of this examination. It has been recognised that certain labour practices or changes have the effect that the workers' employment opportunities get jeopardised.[1]

It has also been ruled that unilateral managerial decisions carry with them the seed of industrial turmoil or unrest.[2] Furthermore, lack of proper consultation, whatever that means, ferments resentment, anger, bitterness and ultimately strife. According to Feinberg, even though negotiation is commonplace, most people find it a difficult process and are often left feeling dissatisfied, worn out or angry with their negotiating partners.[3] If that is the feeling of a party in the process, the question is how much more angry and dissatisfied is a party

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[1] See sect.1 (1) of the LRA 28 of 1956 as amended. Examples are unilateral decisions on technological change,transfer and closure of undertakings.See also Naawu v Borg-Warner (1994) (3) SA (A) 15 at 20 F- H, Poolman, T, Principles of Unfair Labour Practice , 1985 at 42, Blum,A,'Technological Changes and Unions',(1991) IPM Journal at 23. see also Kellog SA (pty) Ltd v Fawu (1994) 15 ILJ 83 at 87 B-C.Contrast Weiss,M, Labour Law and Industrial Relations in the Federal Republic of Germany,1987 at 121.

[2] Numsa v ADE (1993) 14 ILJ 642 at 649 C-D, Kellog SA (pty) ltd v Fawu (1994) 15 ILJ 83 (LAC) at 84 F.See also Naawu v Borg- Warner above at 23 D. This does not only lead to industrial unrest but threatens job security.Co-determination is, for the simple reason that it addresses job security, recommended.See Douwes Dekker,'In Place of Strife',(1992) Finance Week,June 18-24,at 22.

[3] see Feinburg, P,' Negotiating Without Giving Up' 1991 BML at 190. see also Numsa v ADE (pty) ltd (1993) 14 ILJ 642 (LAC) at 651 B-C, where the need to consult is emphasised. Contrast UWC v UWCUWU (1992) 13 ILJ 699 (ARB)at 705 D-E.

who is refused the very opportunity to negotiate.[4] Be that as it may, nothing has been done in our labour law to compel the employer to negotiate with the union or employees in these respects. All that prevails is that the employer unilaterally decides in regard to retrenchments, closure and transfer of undertakings. The same is true of investment decisions. This is so despite proof that these decisions harm the employment relationship between the parties. They harm them because retrenchment often results.[5] The reason for this lack of negotiation is that these decisions fall within the terrain of the employer's managerial prerogative.[6]

This position is embodied in the Appellate Division decision of ADE v Numsa.[7] This case was an appeal against a LAC decision. The facts can be stated briefly. The company (ADE) retrenched a number of its hourly paid employees. The union (Numsa) sought an order in the Industrial Court in terms of Section 46 (9) of the LRA that the retrenchment constituted an unfair labour practice. This was so, the union alleged, because the company failed to disclose the 'CAG' Report on the basis of which it resorted to retrenchment. The Industrial Court held there was no Unfair Labour Practice. The appeal to the Appellate Division was occasioned by a ruling of the LAC reversing the Industrial Court decision.

This case is important to the study in three respects: firstly, in regard to the duty to negotiate, secondly, in regard to the disclosure of information for the purpose of negotiation, thirdly, it raises questions regarding confidentiality of information. These questions are all relevant to the issue under examination. As regards the duty to negotiate, the court, per Smalberger J A, held that the employer is not required by the LRA to bargain or negotiate with its workers or their unions 'with regard to retrenchment'. It further makes it clear that the

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[4] It must be remembered that retrenchment, closure and transfer of undertakings are issues over which the employer has no duty to negotiate presently. Here the employers' likes and dislikes go free. see Tatu v Spoornet (1993) 14 ILJ 1056 IC at 1064 E-F. See also O'REGAN, K,'Possibilities for Worker Participation in Corporate Decision making',Labour Law at 114 ff.

[5] See Strydom,A.M.,in Hlongwane and another v Plastix (pty)Ltd (1990) 11 ILJ 171.See also Maree,J, Trade Unions,Redundances and New Technology Agreements,1989.

[6] See Sforza v Lekato (1994) 15 ILJ 408 (IC) at 415 A, Fawu and others V Kellog SA (pty) ltd (1993) 14 ILJ 406 (IC) at 410 E-F. Contrast Pennington et al,Cosatu Strategies 1994 and Beyond, para 3.4.3 at 105.

[7] Unreported Case No 424/93

employer only has a duty to consult with the Union. The end result is that 'the ultimate decision to retrench [and indeed transfer or close a business] is one which falls squarely within the competence and responsibility of management'.[8]

As far as disclosure of information is concerned, the court held, inter alia, that the employer is only expected to disclose information that is relevant to the issues in question.[9] In other words, the employer has to unilaterally decide which information to furnish and what not. This is unfortunate for the court realised that the company never furnished all the necessary information in its possession. This was possibly because in the company's view such non-furnished information was irrelevant.

This is unfortunate because that was the very detailed information which the union needed in order to understand which employees, in terms of departments, were to be affected and so on.[10] It is an error to leave the employer a sole and unchecked determinant of the relevance or otherwise of information. This leaves employees with perceptions rather than fact[11]. The court itself acknowledged this. It further acknowledged that it is unlikely that the unions would be satisfied with anything less than the full report or information.[12] While that is so, only the employer has to determine the information. In other words, the court has not

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[8] op cit at 11.This displays how far behind our labour law is in this respect. For example, although English decisions,it is alleged,lean heavily in favour of upholding managements' right to re-organise a business such right has limitations like employees' interests. See Trollip,A,T, and Gon,S,C, Power,Law and Procedure,1992 at 33. For more discussion see chapter 3,below.

[9] At 14 and decisions cited there. Contrast Copeling, A.M, in Amalgamated Clothing and Textile Workers Union SA v SBH Cotton Mills (pty) ltd (1988) 9 ILJ 1026 (IC)

[10] Employers have a culture of non-disclosure. They believe that disclosure of information weakens their bargaining strength.See Brand,J,and Cassim,N,'The Duty to Disclose- A Pivotal Aspect of Collective Bargaining' (1980) ILJ 249. However it is argued that there is no substitute to detailed knowledge and information available to and shared by all parties in a particular negotiation. See Trollip,A,T, and Gon ,S,N, op cit at 45.

[11] The dangers of perception cannot be over emphasised. See Benjamin, P, 'Condoning The Unprocedural Retrenchment: The Rise of The 'No Difference Principle'(1992) 13 ILJ 299 at 285. See also Idem. 'When Negotiations Are Stifled' (1990) EL,6,5, at 117,where he argues that unions may rather resort to war(strike)than to law if the courts continue to view issues from an employers'point of view only. See also Trollip and Gon op cit at 61. They argue that where interaction [between employee and employer] is blocked [even by courts] and does not mature,hostility and violence will inevitably become ends in themselves.

[12] See ADE v Numsa (A) at 20.

solved this problem. The end result is that the employer, as it stands, is left both a player and a referee in this regard. This exacerbates the problem. What is workable in my opinion is that the employees, being the affected people, should be the determinants of the sufficiency and relevancy of information. Furthermore the employer should be obliged to furnish all information pertaining to the future of the company to the negotiation table. More of this in Chapter 5, below.

As regards the issue of confidential information, the court held that the employer cannot be expected to disclose information which 'could harm its business interest'. The example, the court held, is where such information is confidential. This approach is partly correct and supportable but not entirely. In accordance with the view that the business interest should not be harmed it is supported.

Furthermore it is supported in that the court upheld the Labour Appeal Court's approach where it was held that the employer and the union should jointly work out ways of safeguarding the confidentiality of the information. For the indication that if harm to the employer's interest is possible, such information should not be disclosed, it is not supported. The reason is simple. It does not balance the harm in regard to both parties. It also does not, by allowing workers to be involved in determining safety measures, secure the company's interest against disclosure. This is so despite the fact that the company needs this guarantee before disclosing confidential information.[13] This is discussed in detail in Chapter 5, below.

1.1.2 General Criticism of the Current Approach.

The approach that the employer is under no duty to negotiate with employees in these important respects is detrimental to good labour relations. Firstly, it entrenches unilateralism.[14] This is against the aim of the LRA. Secondly, it promotes inequality

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[13] See Numsa v ADE (LAC) at 652G. See also chapter 5,below.

[14] This is despite numerous decisions against unilateralism ,see note 2 above. See also Brassey, et al, The New Labour Law, 1987 at 242.

between the parties. This is so because the employer alone, unassisted by the union, is seen to be competent to make decisions for the welfare of the company.[15] In this regard it loses sight of the fact that 'more and more occasions [retrenchment, closure and transfer of business being no exception] call for negotiation, for conflict is a growth industry'.

Furthermore it loses sight of the reality that 'Today, all over the world, everyone wishes to participate in decisions affecting them, fewer and fewer people will accept decisions dictated to them by someone else'.[16] The approach is also based on wrong assumptions: that the employer and employee cannot bargain well if they bargain in a position of equal strength.[17] For this reason, it allows one party (the employer) to have dominance over the affairs of the company as against the other party (the workers).[18] In so doing, it fails to serve the main object of labour law - 'to be a countervailing force to counteract the inequality of bargaining power ... inherent in the employment relationship'.[19] It also does not protect workers against the arbitrary exercise of power by the employer. It leaves their employment security at the mercy of the employer's unilateral decisions-making power. More importantly, it erroneously divides the interests into employer, and therefore company's, and employees.[20]

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[15] In this respect the decision does not differ from the very decisions it purports to correct.The fact that the South African labour law has not yet addressed the question of managements' right to re-organise its business cannot be overstated. See Trollip and Gon op cit at 33.More of this in chapter 3,below.

[16] Feinberg P, op cit at 190,

[17] See Jordaan,B, 'Managerial Prerogative and Industrial Democracy' (1991) 11,3,IRJSA at 6. It is also a false assumption, argues the author, to believe that the right to manage would be rendered nugatory if employees were to be vested with rights to match those of the employer.Contrast Trollip and Gon op cit at 45. See also Nupen,c, Collective Bargaining Realities in South Africa:Problems and Potentials, In Anstey,M ,1990 at 41.

[18] This is wrong.Thompson and Benjamin blame collective bargaining for this. Their reason is that in this respect it allows'vested [employer] interests to become entrenched to the detriment of weaker parties and the common good'. see South African Labour Law ,1, [service No 30 1994] at A1-1.Contrast Clegg, s, 'Organisational Democracy,Power and Participation' 1983 at 23.
See also proposal in chapter 5,below.

[19] See Davies and Friedland, Kahn Freund's Labour and Law, 1983 at 18

[20] This is despite the opinion that it is notoriously difficult to draw a line between what interests the Company on the one hand and Labour on the other.See Stone, K, 'The Post -War Paradigm in American Labour Law',YLJ at 1554. See also Jordaan, B, 'Transfer, Closure and Insolvency of Undertakings' (1991) IlJ 12 at 958 and Piron,J, Collective Bargaining in South African Labour Law (LLD thesis UPE,1976) at 145.

The current approach is for these reasons, inter alia, no good base for labour law in a post-apartheid South Africa. This is so also because workers have made it unequivocally clear that they cannot, at least in a democratic South Africa, tolerate inequalities in the bargaining relationship.[21]

Lastly, this decision is an embodiment of the general confusion as regards the duty to bargain in our labour law. For example, the court held that the LRA requires the employer only to consult with the workers and not bargain with regard to retrenchment. This is arguable. Firstly it is based on a single section of the Act.[22] This is erroneous because it does not honour the general purpose of the Act. Secondly it upholds the common law position according to which the employee has no right to negotiate.[23] Furthermore, there is strong opinion that an argument can certainly be made out that an employer is under a duty to negotiate with its workforce before resorting to temporary closure - dare I say retrenchment and transfer of undertakings as well.[24] In fact the very origin of the duty to consult as opposed to the one to negotiate is suspect.[25]

The courts further contribute to the confusion. Faced with an argument from the respondent in the ADE v Numsa case, the court agreed that consultation should be geared to achieve consensus. This is unbelievable. The duty to consult, as interpreted by the courts so far, does not at any stage involve consensus.[26] It is only the duty to negotiate that involves agreement. As said, this duty does not exist in our law or the employer is not under such

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[21] Sactwu Congress ,'A Social Market Economy Offers the Best Hope' (1993) 17, 4, 25 at 27.See also Trollip and Gon op cit at 45 where they argue that the present approach bears no relation to reality.See also Kochen, E,Thomas,'Labour Law and Employment Policies for Global Economy' (1994) 15 at 699.

[22] For a detailed discussion see chapter 2,below.

[23] See Grant, B,'Majoritarianism and Collective Bargaining',(1993) 14 ILJ at 308. Contrast Davis,D, 'Ex Marks the Spot..'in note 22 chapter 2,below.

[24] See Davis, 'Uneven Justice'(1988) Finance Week,September 22-28. See also Grant, op cit, note 20 chapter 3,below.

[25] Jordaan, op cit at 963. See also chapter 3,below.

[26] See Judge Goldstone,in Num V Ergo (9191) 12 ILJ 1221 at 1237 I- ff. Contrast Cohen,M,'Retrenchment' (1991) IPM Journal at 1, CWIU v Sopelog CC (1994) 15 ILJ 90 (LAC) at 100 A, especially the remark 'no consensus was reached at meeting'. See also Feinberg, op cit at 190.

a duty.

The question is, if the employer is only expected to consult but not negotiate, and if consultation should be geared to consensus, what is the difference? Why should the court insist that the duty is not to bargain but consult? This implies one thing, there is confusion around the two concepts. More of this in Chapter 2, below. The only thing clear from this confusion is that the structures and institutions engendered by the Wiehahn commission have failed to cure the ambiguities of the LRA in regard to these issues. This applies equally to the general courts. These institutions,if anything, have compounded these ambiguities resulting in a serious drift from the spirit and general purpose of the LRA - to end unilateralism - and usher in fair labour practices.[27]

Currently, there is no clear statutory support or encouragement for employee participation in decision-making at the workplace. To this end it is proposed that the pending 'New Labour Relations Act' should in clear, precise and specific terms provide that the employer is obliged to negotiate with workers before altering or introducing a change to working conditions. In other words for any change in terms and conditions of employment, the parties should agree. If such agreement is not reached, the pre-impasse position should remain until a deadlock breaking mechanism resolves the matter.

1.1.3 **Justification for the above proposal**

This proposal is justifiable in many respects. Firstly, the Republic of South Africa Constitution Act 200 of 1993 provides that there shall be a right to bargain collectively. It further provides that workers shall be entitled to fair labour practices. Moreover, the constitution provides that every person shall have a right to freely engage in economic activity and to pursue a livelihood.[28] The fact that the right is bargaining in my opinion addresses the shortcomings of the duty to consult as seen above.

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[27] However the courts understand that the powers conferred to them in terms of section 17(21 A) (c) of the LRA are wide enough and that they may as a result thereof contribute to the development of this field of law. See Sopelong (LAC) decision at 90 J. Contrast with 102 F-J and 103 D. See Grant op cit at 307.

[28] See Section 26(1) and 27 of The Republic of South Africa Constitution Act 200 of 1993.

Similarly, retrenchment, closure and transfer of undertakings, in the manner in which they occur, do not, I submit, promote fair labour practices. The fact that the employer alone is competent to pronounce on the fate of the undertaking is inconsistent with the constitutional requirement that all people shall be equal before the law. It is also inconsistent with aim of the constitution to protect the interests of the company and therefore the employer at the expense of the employees' job security. This is so because the constitution provides that all people shall be entitled to equal protection of the law.[29] The proposal therefore contributes to the realisation of these objectives. The other ground for the justification of the above proposal is that the labour laws of any country should reflect that country's political and social life.[30]

Democracy being the order of the day in many respects in our country, it is undesirable that the labour section of our community should be governed under the old undemocratic and oppressive ways. In fact workers have expressly stated that they want changes in the workplace to match the changes in the political sphere in our country.[31] Against this resolution, a SACTWU congress has resolved 'through our struggles we can create a system of co-determination, where capital and government is unable to act in a unilateral manner'. The reason is simple workers believe that through co-determination they can have a joint say over economic policy at national, sectional and company level. In short 'the ability of the owners of capital to exercise their power would be limited through a requirement in law that they should negotiate with trade unions.'[32]

This is welcome. The reason is that it serves to safeguard what is called an institution through

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[29] See Section 8 (1) of Act 200 of 1993.Read with Section 4 (1 and 2)

[30] See Blanpain, R, Comparativism in Labour Law and Industrial Relations, 1987 at 1, Bendix,D,W;F,'Trade Unions ,Collective Bargaining and Political Democracy' (1980) 4 SAJLR at 37. See also Poolman, op cit at41 and 67, Wedderburn et al,Labour Law and Industrial Relations 1983 at 69.

[31] See Kochen op cit at 962.See also Von Holdt, Unions Seek ... Change, Sunday Times, August, 18 1994. Contrast Douwes Dekker,op cit, Finance Week,Who captures the need by saying that management-driven norms need to be matched with concerns of workers and the role of opinion in decision-making.

[32] See Nthangase and Solomons, 'Adversarial Participation,Union Response to Participatory Management.'(1993) SALB , 17,4,28. See also Pennington et al,Cosatu strategies 1994 and Beyond, at 105,(Para 3.4.3)

which people secure much of their self-respect and esteem - jobs.[33] In so doing it serves the economic function of collective bargaining.[34]

The question is whether we prefer to be compelled to real and meaningful negotiations in the workplace by words or war. The costs of the latter are too great. I conjecture no one longs for them, thus the old English adage 'Prevention is better than cure' stands. Over and above that, the employers themselves need the fruits of this proposal.

In the first place, by negotiating and agreeing with workers these issues, decisions that follow such negotiations will be legitimate and immune from challenge.[35] The result is a satisfied workforce and a productive industry.

Research shows that as soon as the workforce is satisfied and feels really a part of the undertaking and its processes, its commitment to the company's welfare and efficiency increases.[36]

Furthermore, the unacceptably high incidence of strikes, with its concomitant effects on the economy, will subside. This is because workers will feel their jobs are secured. It should be borne in mind that strikes are often characterised by violence.
Most importantly, they are perhaps occasioned by the uncertainty surrounding job security.[37] The proposal therefore has three-pronged benefits in this regard. It benefits the employers, the employees and, most importantly the economy. This is the economic efficiency of

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[33] See Poolman op cit at 84. See also Grant op cit at 311, Rycroft and Jordaan op cit at 116.

[34] See Grant, op cit at 331, Rycoft and Jordaan, A Guide To South African Labour Law: An Introduction, 1992,2 edition, at 117.See also Poolman, op cit at 84,ff.

[35] Dekker, Workers'Participation in South Africa :Some Suggestions,1990 at 244.

[36] Streeck,W, 'Co-Determination : A Fourth Decade',in Inter. Per.Org. Demo.,1984 at 411, Maree,J,'The Economic Case For Worker Participation: West-German Co-Determination', 1991 at 7 and 8,Blumberg,P,Industrial Democracy :A Sociology of Participation,1970 at 123. See also Dekker,note 31, above.For more discussion see chapter 5, below.

[37] See Backstrom, A, New Technology,Economic Progress and Employment in Sweden,1989 at 225, Benjamin,note 11 above, McDonald,F,'Resisting Retrenchment,Codes to Cut Labour Losses',(9187) 4,4,ISA at 91. See also Mohammedy's v CCAWU (1992) 13 ILJ 1174 (LAC) at 1181 C-D

co-determination. This being an introduction, more of this in Chapter 3 and 5, below.

Finally, such a legislative provision will help restrain the parties and regulate the employment relationship between them. After all, this is the principal aim of labour law.[38] This is one of the best ways through which the problems facing our labour relations have to be tackled. Keeping to the current approach will only serve to put our workplace and indeed the economy in a dilemma.[39]

[38] See Davies and Friedland, op cit 1983 at 15, Jordaan,(1991) IRJSA, at 8. See also Brassey et al,The New Labour Law, 1987 at 244

[39] See Von Holdt note 31, above. See also Trollip note 11, above.

1.2 RESEARCH METHODOLOGY AND STUDY OUTLINE

1.2.1 Research Methodology

The research methodology used in this study is that of literature review. The study mostly relies on secondary sources in the form of text books, journal articles and newspaper reports. However, reference has been made to statutes like the LRA 28 of 1956 as amended, the Public Servants Labour Relations Act 102 of 1993, the Republic of South Africa Constitution Act 200 of 1993 and case law. These have a direct bearing on the issues examined in this study.

A comparative approach has also been used. For example, the Australian experience of trade union involvement in investment and organisation decision-making has been looked at. The Swedish experience in co-determination has also been extensively relied upon. These countries' experiences have been looked at critically, not entirely as possible models but as countries from whose experiences we can cut a pattern.[40] However a full realisation of South Africa's unique situation is kept in mind throughout the process. International Labour Organisation Conventions and Recommendations where relevant have also been used. Due to limited time and scope of the study, no empirical work or questionnaires have been used.

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[40] The dangers of legal transplants are as great as their benefits. See Freund, K,'On Uses and Misuses of Comparative Law'(1974) MLR at 27,Watson 'Legal Transplants and Law Reform' LQR (1976) 79. For Benefits see Blanpain op cit at 2 and 5, Wedderburn,Lord,'Labour Law,Corporate Law and The Worker' (1993) 14 ILJ at 517. See also Du Tiot,Darcy,'Democratising The Employment Relationship'(1993) Stel.LR,at 349, who argues 'No Country in the world provides an exact precedent for the complex situation which [in South Africa] we face'.

1.2.2 **Study Outline**

I proceed in Chapter 2 to analyse the subject matter with a review of collective bargaining in South African labour law. On account of the fact that much has been written on the subject, I shall confine myself to brief comments.[41] Collective bargaining, by and large, places South Africa's labour law in its proper context. Its review is therefore important. The difference between consultation and negotiation is also examined in this chapter. Courts continue to use these terms both interchangeably and differently. It is therefore important to clarify them, particularly in order to discover the possible intention of the legislature.

In chapter 3, I examine the courts' approach to retrenchment, closure and transfer of undertakings. In the course of such an examination particular attention will be paid to the importance of involving workers meaningfully in the decision-making processes of the undertaking.

The argument of this dissertation is that in order to understand the confusion, uncertainties and contradictions that have characterised our labour law and indeed the courts' approach to the duty to bargain, regard should be made to the foundations upon which it is erected. To this end, concepts like managerial prerogative, its origin and scope being the basis for the courts' approach, is examined in Chapter 4. Chapter 5 on the other hand considers co-determination as a means to overcome the shortcomings of collective bargaining. I also look at the issue of possible legislative intervention to oblige employers to negotiate with employees over the planning of company affairs, particularly the issues under study. The uncertainty surrounding the issue of disclosure of information and confidentiality is also looked at. All this is done in full view of the need for economic efficiency of undertakings.

In conclusion, Chapter 6 summaries the discussion and looks at the prospective changes that

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[41] See among others,Piron, J, Collective Bargaining in South African Labour Law (LLD thesis,UPE,1976),Copelyn,J,'Collective Bargaining :a Base for Transforming Industry' (1991) 15 SALB, 26, Cameron et al,The New Labour Relations Act 1989, Cordova,E, Collective Bargaining, in Comparative Labour Law and Industrial Relations in Industrialised Market Economies,1990 4th ed,Rycroft and Jordaan op cit ,Le Roux,Pak and Van Niekerk,A, The South African Law of Unfair Dismissal,1994.

the forthcoming amendment to the LRA may bring about.

CHAPTER 2

THE CONTEXT

2.1 Collective Bargaining

According to some authors, industrial relations is about the limits on management's rights to command and on worker's duty to obey.[1] It is also said to be management's prerogative to dictate terms and conditions of employment and a worker's right to try to secure the most favourable terms and conditions. Indeed in the traditional theory of collective bargaining law, industrial conflict has been recast as the struggle of countervailing pressure groups solely over issues of economic distribution.[2]

From the foregoing, it is reasonable to deduce that collective bargaining is seen as some kind of workplace mini democracy wherein management and labour exercise sovereignty through joint regulation of work rules. However,it can be said that there is a difference between what collective bargaining is and what it should be – the ideal and real dichotomy.

This section briefly examines whether and how collective bargaining can facilitate, if at all, the process of real negotiations between labour and capital. Focus is particularly on the issues under discussion in this study. At this stage the intention is merely to examine its function, for detailed discussion later in the study.

From the definition of collective bargaining and the purpose of modern labour law it can be

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[1] Jowell, K,' The Bargaining Triangle - Beyond The Wiehahn Decade,' (1989) Indicator South Africa 6, 3, 75,quoting Hyman, 1975:24-26.

[2] See Lewis, R, in Labour Law and Industrial Relations, 1983 at 119.

said that some kind of give and take exists in labour relations[3]. The extent of such give and take is such that no party ends up being the final victor over the other's interests[4]. Davies and Friedland fittingly portray the interdependence in collective bargaining, of one party's success on the other's conduct[5]. For example, labour is interested in security and stability of employment while management is interested in, inter alia, stability through non-interruption of work and economic planning. Accordingly there is logic in the argument that collective bargaining fulfils, whether ideally or in practice, manifold functions - economic, social and even political in the work place.[6]

The social function in particular is served in that a system of industrial justice which protects employees from arbitrary action by management and which recognises their [employees'] rights to human dignity is established.[7]

However, from readings in collective bargaining, one gets statements which raise questions. These are statements like collective bargaining 'when properly conducted, or functioning well.'[8],[9] The question is whether as it is used now, collective bargaining is so properly conducted or functioning well. It is argued that it does not.
The reason for such non-functioning is attributed to the fact that in our labour relations, collective bargaining and indeed labour law itself is based on the pluralist tradition.[10]

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[3] Rycroft and Jordaan. Guide to South African Labour Law an Introduction, 1992, 2nd ed at 116. See also Trollip and Gon,op cit at 45.

[4] Brassey et al, The New Labour Law, 1987 at 242-43.

[5] Labour Law: Texts and Materials at 69.

[6] Rycroft and Jordaan, Note 3,op cit, at 117.

[7] Ibid at 117.

[8] Klare K, Workplace Democracy Perspective (1988). Harv. C.R C L L R 23 at 71.

[9] Rycroft and Jordaan at 117.

Lewis, R, Note 2 above, at 114. talks of a mature system of collective bargaining.

[10] Cameron et al, The New Labour Relations Act 1988, Chapter 5.
Du Toit, Darcy, Note 8, Chapter 1 at 336.
Thompson, C,' Section 43 of the LRA: An end to unilateralism' (1983) IRJ SA 3, 3, 18.
Rycroft and Jordaan at 119 and 129.

2.1.1 The Pluralist Perspective

Under the pluralist perspective a supposition that there exists an interdependence of interests between labour and capital prevails. Unlike other theories, it recognises the need for trade unions and does not only support their existence but seeks to co-work with them as representatives of workers' interests.[11] It further postulates that those parties – union or labour and capital - operate as equal partners in the relationship.

However, evidence, as will be seen below, disproves the existence of an equilibrium between the parties in the real work situation. This is so because under pluralism, the employer is regarded as being vested with certain prerogatives which entitle him to have the sole right of decision-making over certain issues in the running of the enterprise. In other words, under pluralism, a boundary or demarcation between issues that call for joint regulation or negotiation and unilateral decision-making between the parties exists.

Any challenge by the union representatives over issues within
authority of management is regarded as illegitimate.[12] The other interesting feature with pluralism is that historically, it was developed as a philosophy to counter the failure of the unitary approach to provide a convincing explanation for the existence and operation of employer prerogatives.[13]

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[11] On other theories like Unilateralism etc. see, Du Toit, D, at 328, Fox, A, in Davies and Friedland, 1979 at 16. See also Chapter 6, Note 4, below.
However according to Du Toit, D, at 329-330, management tends to see unions as human resources to be managed.

[12] As well as unhealthy or disruptive of the established order. See Fox, A, 1973 at 190 Note 2, Chapter 6. However contrast with the opinion that the duty to negotiate or bargain is introduced in the interests of order and stability. See Thompson, C,'On Bargaining and Legal Intervention'. (1987) 8 ILJ at 2.

Furthermore,it is suggested that the rights of private capital should not be viewed, if we are to reach the said order and stability at work, as sacrosanct. See Clegg, ' Organisational Democracy, Power and Participation' at 23. In fact Davies and Friedland, 1979:17, argue that this calls for management to realise that there are other leaders in the industry with whom they have to share decision-making power or right.

[13] Fox, A, in Child,J, Man and Organisation , 39 at 192.

From this it can be said that pluralism was developed to succeed the failed unitarism. Unfortunately, instead of substituting unitarism or explaining why under unitary perspective management enjoys certain prerogatives which are not subjected to negotiations or bargaining between the parties, pluralism incorporated the management prerogative perspective and left it intact. This is the failure of collective bargaining to be precise. This is so because collective bargaining was mainly conceived in order to replace unilateral decision-making. Instead of replacing such unilateralism, it accepts that management is the decision maker.[14]

The basis for this failure is that under pluralism, the parties, particularly the trade unions, should operate in such a way that it does not destroy the concerns and interest of the other – in this case management's -'right to manage' as it deems fit. This is done through requiring the parties to keep their demands at reasonable level whatever that means. However, there is every reason to believe that it is mostly the union which has to meet this requirement of reasonableness. This is so because, from the language of demand, it is common cause that the 'have not' demanded from the 'have'. Thus capital being the owner and financier of the undertaking, the tendency is, at least in this context, that it is the union that has to meet the requirements of this circumscription.[15]

What can be seen from the courts' approach, to be discussed below, is that unions have to keep their demands at the minimum where decisions about investment and technology issues, closure and transfer of undertakings are concerned. There is no doubt that these issues do not only affect employment security but other interest as well.

This disproves the prevalent view under pluralism that each party should work towards non-destruction of the other's concerns – at least as far as workers' job security is concerned. Furthermore, it proves that it is wrong to claim that, under pluralism, the parties are bound

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[14] Du Toit op cit, at 351.
see also, O'Regan, op cit at 119 where it is argued that collective bargaining does not affect managerial authority but underwrites it. See also at 132.Co'rdova, E, op cit,at 152.

[15] See Apostoleris, A.M., FAWU v Kellog SA (Pty) Ltd (1993) 14 ILJ 406 (IC) at 413 A.
See also Fox, A, 'Industrial Sociology and Industrial Relations' in Davies and Friedland, 1979 at 17 who argues that this is the economic power by which the employer seeks to do with its hired labour the way it wants.

together through a continuous process of concession and compromise.[16]
What is true is that collective bargaining is a display of power that is to say what makes the parties yield to one another is the bringing of power to bear in the negotiations.[17]

If that was not the case, the whole notion of struggle and industrial action would not feature let alone be necessary.
Thus the popular statement that labour and management determine jointly the work place conditions by negotiating collective agreements and arrive at mutually agreeable terms for their relations is true, if at all, when it does not pertain to retrenchment, closure and transfer of undertakings. It is false to claim that under pluralism no party plays a dominant role.[18]

What is true is the opposite. Thus pluralism has been blamed for institutionalising conflict and advesarialism.[19] The question is whether this is all that pluralism can offer. The same question can be asked of collective bargaining. This is the question because some authors

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[16] Lewis, R, op cit, at 915.
Anstey, M, Worker Participation:Concepts and Issues, 1990 at 2. See also Du Toit, op cit at 330.
However, see Karl Klare, op cit , at 59 who argues that time has come for all sides to let go of the irrational adversary attitudes that block them from reaping mutually advantageous gains from co-operation.

[17] Cameron et al,op cit at 99.
Salomon, Industrial Relations at 272 quoted from Du Toit, at 333 who says practically speaking, in other words, the issue is on,e of 'Power-Play' or struggle. See also O'Regan op cit, at 118 who says the union's ultimate weapons is strike action.

[18] See Stone, K, Op cit, YLJ, at 1545.

Clegg, op cit at 16 who argues and correctly in my view, that employee participation schemes are widely regarded as the means whereby a more equal distribution of power in organisation may be achieved. This is so in my opinion provided such schemes are decision making schemes in all issues. because this power is made more important by the range of issues over which it may be exercised.

See also Davies and Friedland 1979:17 who argue that this is a socially acceptable fact (that participation should be extended to all issues) for which management should not experience guilt at 'surrendering' their proper functions. It will therefore be only when such unfettered managerial power has been curbed and balanced that talk of 'equality' between the parties can be accepted, not now. See also Jordaan, B, 'Industrial Pluralism and the approach of the industrial Court' (1989) 10 ILJ 791 at 798.

[19] Du Toit,op cit, at 357, it is hoped that the time has now come where these dangerous foundations of imbalance of power between labour and capital, will be removed and a culture of co-operation between the parties be developed because now practical solutions to South Africa's problems in the political sphere have been achieved. See at 354.

argue that a truly pluralist approach fosters joint decision making and economic cooperation between labour and capital on all issues of industrial life.[20] Thus accordingly, a principled reliance on managerial prerogative in the context of collective bargaining simply does not make sense.

The former is unitarist and power centred in its conception and execution while the values of collective bargaining, it has been said, are based on the dispensation of power, tolerance and consent.

These traces of unitarism in pluralism and invariably our collective bargaining deserve further comment. According to Rycroft and Jordaan, unitary philosophy is embedded in the philosophy of the common law contract of employment.[21] This is important because it shows how unlikely a collective bargaining system based on pluralism and which incorporates unitarism is unable to usher in any real participation of workers in decisions that affect them. As will be seen in the discussion in Chapter 4 below, these remnants of common law phenomena do not advance good labour relations. This is more so considering the fact that the Labour Relations Act was enacted to modify common law in innumerable ways.[22] It is hoped therefore that the invasion into these common law phenomena will be carried on successfully.This will be important in two respects:
Firstly, it will help put pluralism into its true meaning, as Jordaan argues, thereby allow parties to negotiate and bargain on anything, or secondly it will help get rid of the very pluralism with its incorporated unitary or common law inherited shortcomings.[23]

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[20] Jordaan, B, ' Managerial Prerogative and Industrial Democracy' (1991) IRJSA 11, 3, at 6.See also Thompson and Benjamin op cit at A1-1

[21] 1992 2nd ed at 119.
See also Fox, A,in Child, op cit, at 191.

[22] See NUMSA v Borg-Warner (1994) 15 ILJ 509 (A) at 510 C. See also Davis, 'Ex marks the spot - MAAWU v Borg-Warner' EL 10, 6, 132.

Jugde Goldstone in NUM v ERGO (1991) 12 ILJ 12 21 (A) at 1237 who argues that the court(s) should not primarily have regard to the contractual but have regard to the principles of fairness.

Brassey et al,op cit, at 354-5.

[23] see, Note 20 above.

For example the African National Congress proposes for the implementation of the Reconstruction and Development Programme, 'a system of collective bargaining at national, industrial and work place level, giving workers *a key say in industry decision making and ensuring that unions are fully involved in designing and overseeing changes at work place and industry levels.*[24] (my italics) Although the implications of such proposals are discussed more fully in Chapter 5 below, a brief comment can be made here. This presupposes a radical departure from our present limits of collective bargaining. What this proposal entails is some kind of co-determination approach to industrial relations in the sense that here, *workers will be involved not in curing defects in decisions already taken nor yet in addressing symptoms – the softening of hardship as the courts call it, but the causes.*[25]

It is common cause that retrenchment occurs in some instances as a result of investment decisions.[26] In other words, investment decision by management, say on technology, cause loss of jobs.This has at least been the case in South Africa.[27] This proposal therefore allows workers to be involved as a matter of legislative right to the designing [planning] and overseeing (which to me also implies the implementation) of the decisions. The fact that employers should negotiate with unions or workers concerning substantial changes concerning production matters and workplace [re] organisation means that there is no stage where workers are not involved. It also means that they are part and parcel of the company seeing to both its needs and welfare.

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[24] The Reconstruction and Development Programme - A Policy Framework, 1994 at 114. This implies a fundamental change to company law. See also O'Regan op cit ,at 132. See also Trollip and Gon op cit at 83

O. Kahn-Freund - 'Industrial Democracy' (1977) 6 ILJ (UK) at 75-7 in Davies and Friedland 1979:189.

[25] See ADE v NUMSA (A) at 10.

[26] Hlongwane v Plastic (1990) 11 ILJ 171 (IC) 174 B-C especially 17 B-C.
It is the researcher's argument that workers should be involved in these investment decisions principally because of the admissions that the employer is generally under no pressure in making decisions of this sort. Furthermore and more importantly, investment in ways which, while they are privately [and outside the reach of others - say workers] profitable, are [sometimes] ruinous. According to literature, investment in technology is the example of investments that lead to mass redundancies. See Clegg, S. 1983 at 23.

Maree, J, Trade Unions, Redundancies and New Technology Agreements, 1984 at 3.

[27] See McDonald, op cit at 91. See also, Blum,A, 'Technological Changes and Unions',(1991) IPM ,23.

This to me lifts the veil, cuts the curtain and redraws the boundaries of managerial prerogative. It does this by extending the border of collective bargaining in regard to the issues under focus in particular and labour relations in general. It is certainly welcome.

This extension of collective bargaining has long been expected.[28]
According to Sactwu Congress, salvation is in co-determination.[29] This is so because, as said above, management will be unable to act unilaterally in decisions like among others investment and work organisation, for through law, the ability of owners of capital to exercise their power in these respects would be limited by a requirement that they negotiate with trade unions. Thus through co-determination, unions see an opportunity to have a joint say over economic policy at national, sectoral and company level. Whether this co-determination means a substitution of collective bargaining or its extension through participatory means is beyond the scope of this work.

All that can be said is that in so far as it answers the issues in focus, it is welcome. This is so because as Stanton puts it, 'being a participative approach to management, it will improve decision making by ensuring full opportunities for the staff who will be affected by such decisions to make their views known and to have them properly considered.'[30]

Furthermore because the crisis of management is too severe, the union must therefore play an active role in planning the future of the industry and this inevitably propels it beyond past

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[28] Grant, B,' In Defence of Majoritarianism: Part 1 - Majoritarianism and Collective Bargaining' (1993) ILJ 14, 305, 307.

Jowell, K, op cit, at 75.
Rycroft and Jordaan 1992 2nd ed op cit at 125 ff who called for these demands to be legitimised.

[29] 1993, 17,4, SALB 25 at 28.
See also, Ntshangase and Solomons, op cit, (1993) 17, 4, SALB 35.
Daphine, J, (1994) 18, 2, SALB, 85 at 88. Note his caution at 89.

[30] Quoted from Davis, M, and Lansbury, D,. Worker participation and decisions on technological change in Australia, 1989 at 103.

strategies based on union reaction to management decisions.[31]

2.2 Consultation or Negotiation

The Labour Relations Act (28 of 1956, the Act) provides that a termination of an employment on grounds, other than disciplinary ones, will constitute an unfair labour practice if that termination is not preceded by a prior consultation with the employee(s) or his/her representative body or trade union.[32] An industrial court judgement has specifically said: '*it is after all only consultation that is called for in retrenchment and not negotiation*'.[33] Surely this depicts a notion of difference between these concepts.
This section examines this difference.

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[31] Ibid at 110.

It must however be kept in mind that in South Africa, union's reaction to management decisions was not at least in the later years, a strategy. See, Von Holdt, (1993) 17, 3, SALB at 49 and Sunday Times, 18 August, 1994.
Du Toit, op cit, at 329 ff. This is discussed in some detail in Chapter 3, below.

However the importance of such a role cannot be over emphasised. See Maree, J, 1991 'ASSA' at 19. Douwes- Dekker, 1990:260 who argues that worker participation is more value rather than profit- driven in that it gives legitimacy to management decisions. See also Streeck, W,' Co-determination: The Fourth Decade' 1984 at 413.

[32] Section 1 (b) (ii) (bb) LRA 28 of 1956 as amended. See also Smalberger, J.A, in ADE v NUMSA 1994 Case No. 424/93 (unreported) at 6.

[33] Tutu v Spoornet (1993) 14 ILJ 1056 (IC) at 1067 E-F.
See also ADE v NUMSA (A) above at 11, TGWU and Others v SA Stevedoers Ltd (1993) 14 ILJ 1068 (IC) at 1069 A.

2.2.1 Consultation

According to Bulbulia there is a difference between consultation and negotiation.[34] To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement. To bargain on the other side means to haggle or wrangle so as to arrive at some agreement in terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and/or agreement.

From this distinction, it would seem that the difference between the two concepts centres more clearly around the purpose or end result thereof. At the one end the purpose is counsel or advice on say how a desired end can be reached or achieved. On the other hand, it would seem the purpose is to reach an agreement or compromise. This in a way implies a process of give and take, a product of the haggling and wrangling. However, in practice the courts are not unanimous on purpose of consultation and negotiation.

According to Jordaan, in some cases the courts saw consultation as being aimed at merely influencing the decision, say, to close or transfer business as the case may be.[35] If it appeared that management was intent on implementing its decision, it followed that consultation would not have had any effect on the outcome. For example in Changula v Bell Equipment (1992) 13 ILJ 101 (LAC) management had decided to amend a disciplinary code. It informed the trade union. When the union wanted to raise some objections pending their

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[34] MAWU v Hart (1985) 6 ILC 478 B-C.

However it must be noted that even though these terms differ according to this decision and indeed in practice at least in other countries, in South Africa they mean one thing - and that is obviously not agreement. There is no convincing reason for this approach. The only possible justification is the desire to preserve managerial prerogative on the one hand and the upholding of the employer's desire to enhance and gain its bargaining leverage on the other. See Rycroft, A,' The Employer's level of tolerance: in a lawful strike' (1993). ILJ 14 285 at 287. Even though these terms 'mean' the same thing in our labour relations (depending of course from which side you are), the courts are conscious not to rule that the employer is under a duty to negotiate. It is my suspicion that the treatment of these terms as meaning the same thing is deliberate and purposeful. See also Chapter 3,below.

[35] Jordaan, B,(1991) ' Transfer, closure and insolvency of undertakings' ILJ 12 935 at 961.

meeting on the issue, management told them that they can object but management would continue implementing the amendment.

The question is whether these workers in this case were consulted. In the manner by which consultation is described (Mawu v Hart) it is my opinion that these workers were consulted. This is so because their comment was welcome even though it would have made no difference in that possibly by the time it would have been ready and given, management would have implemented the code. This case is different from Shezi and others v Consolidated Frame Cotton Corp (1984) 5 ILJ 12 at 13 G in that as the court observed in the latter, the workers had not been consulted but informed that they had been selected for retrenchment.

According to Jordaan the need to consult is limited to the implementation of the decision, its proper purpose, according to some decisions, being to guard against improper motive on the employer's part[36]. What is not clear from the foregoing is whether when the court says, after all, consultation is the only requirement in retrenchment cases, not negotiation, it means consultation with a view to affording best result to management's desire. Put the other way round, if management intends or desires to lay off people, is the purpose of consultation to help or advise that employer how best to achieve that intention?

It is my argument that according to Bulbulia's description the answer would be yes. The case of Hoegenoeg Andolusite v Num will help clarify this argument.[37] In this case workers were laid off after being given misleading information about their fate. The retrenchment was held as unfair by the LAC thus confirming the court a quo's judgement.

Before the agreement with the purchaser was concluded, said the judge, there might have been some basis for retaining confidentiality, but after that, once it became clear that the employment of some workers was in jeopardy, 'there was a clear duty upon the employer to

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[36] Ibid.
See also Seven Abel cc v HARWU (1990) 11 ILJ 504 (LAC) at 507 H-I. However the similarity of the two schools of thought in this regard are considered more appropriately in Chapter 3, below.

[37] (1992) 12 ILJ 87 (IC).
See also Fagan DJP, in Numsa v ADE 1993 (LAC) at 650 A-D.

have made a proper, comprehensive and complete disclosure of the current state of affairs and then to have invited the workforce to make suggestions for the purpose of ameliorating any difficulties which they might encounter'.[38] There was no invitation extended by the employer to the workers present at the meeting to negotiate the terms of the retrenchment. The employer, said the appeal court, failed to give proper attention to the legitimate needs of its workforce.

While this decision is good in that it emphasises consultation as a real corner stone of the principles applicable to retrenchment, it begs the question – what does the LRA say?

The Act does not require the employer to consult about the decision. All the Act requires is that the employment of a worker should not be terminated before a consultation if an unfair labour practice is not to be committed.[39] In other words, the first part of the employer's action – the sale of the business is 'all right' as held. The interesting part is the last one.The interest is whether it means that if the employees were invited (now that it was clear their jobs were in jeopardy) to make suggestions, that would not have been an unfair labour practice. This is so because their jobs would have been in danger due to the sale of business in which they were not involved. Taken strictly and in the sense of Section 1(b) (ii) (bb), no unfair labour practice will have been committed.

This is the submission because the Act requires, literally speaking, prior consultation before termination of employment. It does not require prior consultation before a decision, for

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[38] Whether this has been done with any degree of success is questionable. This is so because as will be seen in some instances both the need to retrench and close or transfer business has been done with sole aim of avoiding negotiations or dealings with trade unions " - if machines mean less trouble than labour". See Blum, A, Albert,' Technological changes and unions' (1991) IPM Journal at 23.
See also O' Sullivan, Justin, 'New Technology and Productivity' (1994) People Dynamics at 11 who argues that these measures have been resorted to as the panacea to management problems.

[39] The LRA has two positions. The first one is Section 1 (ii) (bb), the subject of this note. However, contrast this with Section 24 which talks about list (non limited) of things on which the industrial council has to reach agreement. It is for this reason that it is submitted in this work that it was wrong to consider the employer's duty in regard to these issues firstly and lastly on the basis of Section 1 (ii) bb. This is so because in my opinion this Section is the last Section in the process where after agreement has been reached say on unavoidability of retrenchment, as a procedural requirement, the employer has to terminate the employment thereby. This is agreed to by Strydom, A.M. in Hlongwane v Plastic (Pty) Ltd, above, at 71 D. See also Thompson et al, 1994, Current Labour Law at 38 who say the ULP was and is silent on the question of negotiations.

example, sale, closure or transfer of business. This is unfortunate because termination of an employment is a product of decisions like those.

Furthermore, it is the decision which jeopardises or prejudices the worker's job. In other words, such consultation will mostly serve to convince the employee that his job has ended and not that perhaps the decision must not be taken so that jobs are secured. It is my argument that the taking of the decision without negotiating with the workers should in fact mean that an ULP has been committed not the other way round. In my opinion to hold otherwise is like 'shutting the stable door after the horse has bolted'.[40]

From the above approach it can be seen how empty and detrimental to industrial peace is approaching the matter in terms of Section 1(b) (ii) (bb) of the Act. It is my submission that it is the reference to this section as a basis for decisions on workers' rights in retrenchment, closure and transfer of undertakings that has contributed to enormous confusion as far as the rights of employees are concerned. Similarly the duty of the employers to negotiate, not consult, with employees or their trade unions is by the same approach also confused.

This is the confusion that has led to dissenting and 'assenting' judgements in the labour courts. These decisions have also led to uncertainty in important issues as job security. For example, in some decisions the court held that the employer should inform the employees well in advance of the intended transfer and that employers and the person taking over the business should involve employees in negotiations about the transfer of the undertaking.[41]

In others it has been emphasised that any discussion on the subject should be as exhaustive as possible and not be sporadic or superficial. These need further comment. In respect of the

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[40] See Van Niekerk, A, op cit, at , Chapter 1 above. See also Davis, 'Consulting over Retrenchment' (1993) 9, b, EL at 131-33.

[41] NUTWU v Broitex (1987) 8 ILJ 794 (IC).
However, an opposite occurred in Kellog SA (Pty) Ltd v FAWU and Others (1994) 15 ILJ 83 (LAC) at 87 B-D. What is interesting with this latter case is that the LAC refused to be drawn into ruling on the unfairness of the decision to enter into agreement with buyer or transferee without consulting with workers despite the terminative effect which such an agreement had.

first decision, two possibilities exist. A strong possibility is that the employer and the party taking over the business will have agreed in principle on the transfer.

Secondly, due to the involvement of the workers in the stage before the finalisation of the deal, a strong possibility that the negotiations may succeed in one of the following exists:

(a) The employees may successfully negotiate the transferee to take them on thus securing their jobs or that being uncertain especially since the transferee is under no obligation to take them on,

(b) The employees may succeed to persuade management to see that the transfer is unnecessary and thus perhaps secure their jobs or most unfortunately and there being no duty on employer to agree whether in negotiation or consultation ,

(c) Some employees, or all, if the transferee can not take any of them, losing their job through implementation of the already agreed upon transfer.

In respect of the second decision, one comment will fit. The question of exhaustive consultation – long consultation - does not make sense regard being had to the purpose of consultation as described (Mawu v Hart). Secondly, however early one may notify the other party of pending termination of work, that may be good psychologically, if at all, but does not change the unfairness of the resultant effect.[42]

These decisions therefore makes one suspect an existence of the possibility that such an exhaustive consultation should be tailored and geared towards agreement – thus be negotiation in the true sense of the word.

For example in NUMSA v Metkor Industries, the judge rejected the employer's stance that it was under no obligation to consult with the employees before transferring the

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[42] Contrast Directive 75/129, 77/187 E.E.C. Where there is inter alia a provision for 30 days period in which effort should be undertaken with a view to reach consensus, etc.

See also Blum, A, op cit at 23ff, Cohen, M,' Retrenchment' (1990),IPM Journal Supplement Sheet 200 at 1ff.

undertaking.[43] The judge said 'I take the view that it is a requirement that, if it is a consequence that the employees' interests shall be affected, the employees are entitled to be kept informed, from the earliest possible reasonable time, to the extent to which it is reasonably necessary *to enable them to consult with management in* regard to only such matters as reasonable affect them. . . .' (my italics). It seems to me that this judgement postulates consultation geared to agreement because:

(a) In this case there are two consultations, the first one takes the form of management informing the workers timeously of the pending decision that may ultimately affect the workers' interests,

(b) secondly,the workers have to consult with management to the extent that they may be affected say by the desired management result, now: if consultation is merely a device directed at helping management achieve its desired aim (it being management who had such a duty) what aim is the consultation that workers are to engage in with management.

Put the other way round, does it not mean that as management has consulted, workers should also be given time so that they too should consult management about their own intended goal – say avoiding retrenchment? This seems to be one of the logical ways of looking at it. In fact, the fact that the workers should be given the reasons for the intended retrenchment and also that they should engage with management in a process that will lead to agreement should retrenchment be unavoidable as regards time table and selection criteria testifies to this argument. The reality is that they were involved in negotiation under cloak of consultation.[44] This is my submission because, in many retrenchment cases, if not all, management tends to

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[43] (1990) 11 ILJ 1116 (IC).

[44] Changula v Bell Equipment (1992) 13 ILJ 101 (LAC) at 105 F-G.This confusion can only be solved by an'intelligible piece of legislation which clearly and unequivocally express its intentions.'See Justice Kriek in Natal Die Castings Company (pty) Limited v President, Industrial Court and others (1987) 8 ILJ at 253J-254A.

take decisions before resorting to consultation.[45]

This is not unthinkable because after all management understands itself as the sole custodians who, due to their right to manage and keep the company profitable, should react and take decisions as the business may require. This is further strengthened by the opinion that failure to consult ensures that the decision initially favoured by management is implemented. Thus if parties consult with a view to agreement, that is to say negotiate, the later position is likely to be different from the initial one.

According to Brassey, the underlying principle is that the employer should discuss every business adjustment that might adversely affect employees.[46] He continues to clarify the whole confusion by saying that 'this was the principle that gave birth to the duty that we have come to call rather loosely, the duty to consult over retrenchment. No doubt we shall continue to use this terminology, and there is no harm in that, provided we realise what is truly at stake'.

The question remains, is there really any difference between consultation and negotiation? One observes that although generally these two concepts are different in terms of definition, in practice and in terms of results, they are not so different. The reason is that as are used in court cases, although negotiation should be poised to agreement, ultimately in both there is no duty to agree. Thus, as it is now, if there is any difference it is a question or matter of extent and degree.

As a result these concepts are difficult or impossible to separate in practice. The impossibility being a matter of practice as has happened in our courts so far, the last question is what should be done. Should it be left as confusing as it is or should it be changed? I

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[45] For example the strike although may be an option, it is not safe. See Le Roux and Van Niekerk, A, op cit , at, 306.

Rycroft, A,op cit at, 285. It is proposed that the provisions of sect 65(1)of the Draft negotiating document(The New labour Relations Act) should have its way to the final Act. See also, Chapter 5 and 6, below.

[46] See page 25 below.

submit it should be changed to expressly say that consultation should be geared to consensus.

It is my submission that the confusion by the courts was due to a pro-management stance that is a refusal to allow unions through collective bargaining to 'intrude' on the managerial terrain. On account of the demarcation and in an attempt to give it a base, the courts approached issues of retrenchment on the basis of Section 1 (b) (ii) bb.

In my opinion that should not have been done. Section 1 (b) (ii) (bb), to me, although it is in the early pages of the statute, is a procedural step in the sense that, I submit, when the parties have negotiated say retrenchment on the basis of Section 24 (a) of LRA, *the negotiation section*, and it appears that retrenchment is unavoidable, it is then that the procedure should take the Section 1 (b) (ii) (bb) route.

In other words, what should have been done is to judge each party's duty and right on the basis of Section 24. In my humble opinion, Section 24 sets out a platform and subjects where unilateralism has got no place. The list is not exhaustive therefore it should not be limited in any way and by any excuse. This is what Clive Thompson, save for not calling it co-determination, interpreted the Act to require.[47] Thus if the courts have interpreted the parties' rights and duties under section 24, the difference in principle or dictionary between consultation and negotiation would not be impossible in practice.

That having not been done, it is submitted that the legislature should in clear and certain terms provide that the employer will have a duty to negotiate with employees or their unions. That provision is particularly necessary in regard to decisions, which as said, have the effect that jobs are lost. This is the better and functional method.[48]

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[47] Section 43 of the LRA: An end to unilateralism' (1983) IRJSA, 3, 3, at 23.

[48] Brassey, M, (1991) 7, 4, El 82, Captures the process well by saying that on the basis of Saccola/Cosatu/Nactu agreement the employer should consult with a view to reaching agreement. See for the position in Germany,Weiss,M,'Labour Dispute Settlement by Courts in Germany.'(1994) 15 ILJ 1 ff.

See Fagan DJP in Numsa V ADE 1993 (LAC) at 649 D on need for courts to refrain from being seen as pro-management.

This, it is submitted, is the logical way otherwise there is no need to talk of duty to bargain but to consult and the premise be collective consultation not bargaining. The duty to negotiate, it should be clarified due to the confusion of these terms, should mean a process of joint decision making geared to agreement.

It is my observation that a difference indubitably exists between these two concepts,despite attempts by the courts to use them interchangeably. This confusion of meanings, it is submitted, has been an unfortunate attempt to render negotiation as empty as consultation. [49]

[49] The requirement is for negotiation geared to agreement.

See Bamber, J, Greg, and Lansbury, D, Russell,(eds) Co-determination and technological change with the German automobile industry 1989:79.

See also, Douwes -Dekker 1990:244.

CHAPTER 3

THE COURTS' APPROACH

3.1 Bargaining Topics

The history of collective bargaining has been marked by a struggle between those seeking to maintain authoritarian management on the one hand and working people seeking to control their own working environment on the other. Some of the most bitter disputes in industry have been fought on the issue of management functions in which employers have sought to impose their absolute right to manage and to insist that unions could only raise issues following the act of management.[1]

This chapter examines the courts' approach to this issue.

3.1.1 Transfer

It is argued that ' at the heart of disputes over transfer and closures [and indeed retrenchment] lies a clash between the employer's interest in the efficiency or survival of the undertaking and the employee's interests in job security, between the employer's right to safeguard sensitive information and the employee's right to be informed at the earliest possible opportunity of change in the structure and organisation of the enterprise.'[2]

The requirement now is no longer on being informed at the earliest stage or opportunity but

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[1] Harry,Urwin, 1970:3. Quoted from Storey, J. Managerial Prerogative and the Question of Control, 1983:106.

[2] Jordaan, B,' Transfer, closure and insolvency of undertakings' (1991) ILJ 12, 935.

on being part of the decision and its implementation.[3] However, hitherto there appears to be no problem generally when it comes to transfer of undertaking. The employer is obliged to inform its employees well in advance of the intended transfer and the employer and the prospective transferee should involve the employees or their representatives in negotiations about the transfer of the undertaking.[4]

The purpose of such consultation and ultimately negotiation has been laid down in Kebeni and Others v Cementile Products (Ciskei) (Pty) Ltd and Another.[5] These are inter alia to discuss the measures which are to be taken to protect the interests of the employees and preservation of the employment relationship notwithstanding change of ownership of the business. Good as this may be, it has not always been the case.[6] The reality is that although the law seems to be uniform in these cases, the employers keep on approaching it differently.[7]

Lastly, while the decision that as a matter of public policy the industrial court should insist on consultation being held prior to retrenchment is relatively closer to the approach proposed

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[3] See Chapter 5, below. According to Trollip and Gon, it is clearly both the responsibility of capital and in the interest of capital to start involving labour in major policy decisions. See op cit at 83.
See also Klare, K, ' Workplace democracy and market reconstruction', CULR, 1988, 38 at 241.

[4] PPWAWU v Raycraft (1989) 10 ILJ 272 (IC). However as will be seen below, this consultation is useless.

[5] (1987) 8 ILJ 421 (IC) at 449 F-G.

See also NUMSA v Metkor above. This approach is hailed by Jordaan, see note, 2, above at 944.

[6] Ntuli v Hazelmore Group. (1988) 9 ILJ (IC).

The other complicating problem here is that the courts have a tendency to regard conclusion of an employment contract as something where the likes and dislikes of the employer have a free rein.

See Ngobeni v Voetsak (1984) 5 ILJ 205 (IC) cited in Brassey, M. 'Dismissal of strikers' (1990) 11 ILJ 213. However, the rulings on effect of LRA on common law is welcome. See Borg Warner's decision above.

[7] For example, the employer in Bales v Reckitt and Colman (1988) 14 ILJ 438 (IC), contested and appealed against a decision of the (IC) where it was held that he was under an obligation to consult with employees. However, the (LAC) has confirmed the IC approach in this regard. See the 1994 LAC at 792 and decisions cited therein.

See also Manganese Metal Co. (Pty) Ltd and NUMSA (1993) 14 ILJ 500 (ARB) where transfer was effected against employee's will or consent.

in this study, it is not complete. The problem as said in the above chapter, is that consultation, like negotiation under the present industrial relations regime, does not entail a duty to agree. The only fortunate thing is that the common law requirement to obtain employees' consent to transfer of ownership has a strong influence in this regard.

The concern is whether in view of the Numsa v Borg-Warner decision, where the divorce between common law and industrial relations is widened if not settled, arguments may not rise whereby employers will argue that under labour legislation, a statutory regime, he is not bound by common law. This divorce is contained in the judgement.

The case involved a selective non-employment of some of the employer's retrenched workers. The union sought relief in the industrial court to the effect that the employer in not re-hiring the said workers breached an agreement and also committed an unfair labour practice. The employer argued that the court had no jurisdiction because ' an act of employment or re-employment is not a labour practice and falls outside the domain of the industrial court'. It was held that 'the unmistaken intent of the labour legislation generally is to intrude or permit the intrusion of third parties in this relationship in innumerable ways'. It was further stated that 'it [the LRA] envisages intrusion...regardless of common - law notions of consensus between the individual employer and employee on that score'.[8]

While this judgement is sound as regards the effect of labour legislation on common law, it raises concerns. The fact that 'under the LRA' there is no duty to negotiate on the employer and thereby agree with workers on employment changes as was the case in common - law leaves the workers' jobs even more insecure. My argument is that the employer may legitimately effect changes under the labour legislation arena without the need for consent as required under common law.

It is therefore my submission that the labour relations arena should, in order to uphold employment security, require the employer to get employees' consensus in this and related issues. As things stand, employees' jobs are insecure. The fact that the ADE v Numsa AD

[8] (1994) (3) SA 15 (A) at 23 C-E per Van Den Heever JA.

decision makes it the law that the only duty is the very consultation which does not imply agreement raises concerns about the direction our labour law should take in this regard. It is for this reason that this 'trite law' needs to be upgraded to capture the spirit of involvement in decisions or designing and overseeing the future of company. The state of being a doer than receiver, instructor than instructed.[9]

3.1.1 Closure and Retrenchment

The position as regards closure and retrenchment is best captured by Graham Giles and June Wilson.[10] They argue that the extent of an employer's obligation to consult over proposed retrenchment has for several years been a subject of confused and conflicting decisions by members of the Industrial Court and the Labour Appeal Court. There are two schools of thought: One maintains that the primary decision to retrench is purely a matter of managerial prerogative while the other maintains consultation is required before any primary decision can fairly be taken. The two views, continue the authors, reflect conflicting philosophies regarding the role of management and the 'free market system'. Both of these approaches are resistant.

For easy reference, the view that the primary decision is purely a matter of managerial prerogative, will be referred to in this work as school 1 then the other school, that is, where the decision must not be taken before consultation, school 2. The first school of thought would be said to be closed or dead because of the Appellate Division judgement of Smalberger, J.A. in ADE v Numsa.[11] In this case, in an issue on consultation, the AD held that the approach which requires consultation once the possible need for retrenchment is identified and before a final decision to retrench is reached is the right approach.

However, for reasons to be advanced later in this work, it is submitted that the law is not yet

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[9] This should not be read as implying that everybody will be the Director/Governor. See Davies and Friedland, 1983 at 18.

[10] 'The Lockhorn's: Operational requirements and prior consultation', Labour Law Briefs and Court Reports, 2, 9.

[11] 1994 (AD) unreported.

settled or certain even in regard to the question of when the duty, in order to be meaningful, should arise, what is the proper procedure to be followed by employers and the concomitant rights of employees in relation to the issue of retrenchment.

Also uncertain in this whole duty to consult is its usefulness as far as employees' interest', particularly job security is concerned. This is a serious concern because research shows that people place much value on security of employment. Thus uncertainty around an important aspect as this is highly inappropriate.

(a) **Precedent**

Although this is not a place to examine issues of precedent the first problem with this judgement relates to the problem of precedent in our labour relations system. The fact is that the need to consult before a final decision is taken has long been ruled by the appellate division. While that is so, subsequent decisions and actions went the other way. This makes one doubt if the law will be as easily settled by this judgement.[12] According to Smalberger, J.A., (at 11), citing SARB v Johannesburg City Council, the approach that consultation must precede final decision is rooted in pragmatism. The question is, how far pragmatic it has been and with what results. In my opinion, if there was respect for precedent in our labour system, and in view of the fact that the appellate division decision referred to by Smalberger, J.A. in a 1991 judgement, the inconsistencies that occurred in the years thereafter would not have occurred.

For example, the whole issue of the 'no difference principle', which has been held as ascribing no intrinsic value to the process of consultation, would not have been the issue until

[12] The only thing certain from this judgement is my hypothesis that in our present labour relations dispensation, the employer is under no obligation to negotiate or bargain with employees or their representatives in regard to retrenchment, closure and transfer of undertakings. All that there is, is a duty to consult – the effect of which,it is contested,is not satisfactory.

say 1993/4.[13] If indeed there was respect for precedent and if consultation is held as so important,it is doubtful that in 1994, there could still be decisions involving complaints of non - consultation.[14]

Furthermore, in view of the date when the retrenchment guidelines were adopted by the courts, one would not have thought that there would still be decisions where these guidelines are said to be no rules of law, or that they should not be seen to be binding or applied strictu sensu and so forth.[15] The fact that the cases just referred to are industrial court cases is immaterial. For that matter, in Lathe and Others v Impala Holiday Flats and Another the fact that it was ruled at LAC level when the duty to consult should have been imposed further portrays the problem.[16] What is this to say? This means, although an argument that the law in this regard is settled by this AD decision, it remains to be seen if that will be the case in practice.

It is my submission that, in view of the history of our labour relations, it may take yet a considerable period before a common approach is attained.[17] Moreover, the decision itself begs questions. The question surrounds the effect of such 'settlement.'It is my argument that this decision is equally empty as the other decisions before it. This is so at least as far as job security is concerned.If it settles any thing -that is the employers' dominance in the employment relationship.

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[13] The marathon the no difference principle had to run is reflected in CWIU and Others v Sopelog cc (1994) 15 ILJ 90 (LAC) at 104 (H), NUMSA v ADE (1993) 14 ILJ 642 (LAC) and decisions cited there, see also, Ferodo (Pty) Ltd v De Ruiter (1993) 14 ILJ 974 (LAC) among others.

Manqindi and others v Continental Bottle Planting (Pty) Ltd (1993) 15 ILJ 400 (IC) at 405.

[14] Reckitt and Colman (1994) (LAC) 792.

[15] However, from the argument that the (IC) is at liberty not to follow precedents of LAC, it is obvious why. See Tatu v Spoornet (1993) 14 ILJ 1056 (IC) at 1062 C-D.

[16] (1993) 14 ILJ 1074 (IC).

[17] See Note 13, Supra.

See also how the two schools of thought in regard to when or at what stage the duty to consult arises. See Sopelag cc op cit at 103 G to 103 A and decisions cited there. Van Niekerk and Le Roux, The South African Law of Unfair Dismissal 1994 at 249 ff.

(b) Stages

Firstly, it is my contention that although the decision is slightly different from the school 1 approach, it is similar to it in that it too still recognises and preserves managerial prerogative. For example according to school 1, the retrenchment process is based on stages with the first one being the sole prerogative of management. Similarly this (ADE v Numsa (AD)) decision recognises stages.

The only difference between the two schools is that the first makes the first decision a sole prerogative of management while the second school makes the final or ultimate decision the sole prerogative of management.[18] The AD judgement depicts the process like this:
. . . both in logic and in law, when an employer, having foreseen the need for it, [retrenchment] contemplates retrenchment. This stage would normally be preceded by a perception or recognition by management that its business enterprise is ailing or failing; a consideration of the causes and possible remedies, an appreciation of the need to take remedial steps; and the identification of retrenchment as a possible remedial measure.

Accordingly, consultation will be entered into once that stage has been reached and not before. Thus, although the process before the reaching of the stage is not dubbed a stage, it does not seem to me that the court is realising how much is involved in the absence of the employees or their representatives, in this contemplative stage. For that matter in that process a decision is taken after discussion, however long or exhaustive

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[18] This is what is called partial participation because here workers only 'influence' decisions because they are in the 'unequal position of permanent subordinates'. The final decision – making rests with the superiors, the management. The difference between this and what is called 'Pseudo Participation' is that with the latter, the employees are expected to accept decisions already made. The similarity between them is articulated by Davies,M,Edward and Russel, D. Lansbury, Worker participation in decisions on technological change in Australia, 1989 at 107. They say: ". . . the rights granted to workers do not extend to decision making, but simply require management to engage in consultation about change.This will worsen the relationship between the parties.See Trollip and Gon op cit at 83.

See also Pateman Carole, Participation and Democratic Theory, 1970:70,
Poole, M, Worker's Participation in Industry, 1978 at 57.
D. Dekker, 1990 at 250.

Both of these are not functional and out of step with present industrial relations expectations, as it is an unbalanced pro-business approach, See Thompson et al,op cit 1994 at 41.

they may be, at managerial level but only in 'principle.'[19] In fact the court does not worry itself about the content of that decision as long as it is not a final decision.This is worth a further comment. The allowing of management this critical right borders so much on the old ways of doing things. For example, in this approach, like before, the competence of workers to identify that the enterprise is ailing or failing is doubted and disregarded.

Secondly, as though to say even if they do have it, it seems doubtful that it is sophisticated and expert enough to enable them to identify possible remedies. The end result is that only management, possibly because of its knowledge, expertise, skill and peculiar interest, has to decide or work on this identification and only then should workers be consulted.[20] Whatever the reason for such demarcation it is clear that, as Jordaan has correctly argued, the courts put a greater amount of trust on management's business acumen.[21]

However, one wonders what is the point of verifying if indeed retrenchment is unavoidable if it is not doubtful that the identified remedy is ' the ' remedy. Why expect it to be accepted?

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[19] See Numsa v ADE 1993 (LAC) at 650 E and decisions cited therein. Note that this is what the (AD) in ADE v Numsa was upholding in the final analysis.

[20] See Myburgh, J. in Mohamedy's v CCAWU (1992) 13 ILJ 1174 (LAC) at 1179 J. However, the AD decision (ADE v NUMSA (A)) is careful not to call this process even its results as a decision, not even in principle but merely a need. It is only hoped that, that being demarcation in essence, it is not decided on because managerial prerogative, which is doubtful, is not being preserved. Furthermore, the court's (AD) per Smalberger, J.A. differentiation and identifying the workforce apart from problem solving is unfortunate and not in keeping with the held view. See Davies and Friedland, 1979 at 17 who argue that unions contribute immensely to the solution of problems which must be dealt with in one way or another.

Grant, B, 'Majoritarianism and Collective Bargaining' (1993) 14 ILJ at 309 citing FAWU v Spekenham at 637 G, NUM v ERGO (A) at 1236 J-I 237 A.

See also Copeling, A.M, in Amalgamated Clothing and Textile Workers Union of SA v SBH Cottons (1989) 9 ILJ 1026 (IC) at 1031 D-H. This serves two things. It taps workers skill and abilities and being preservative of managerial desires, it upholds one party's needs against those of the other.

See Poole, M, 1978:53, Davis and Lansbury 1989: 113. The perception being created here is dangerous. For example, unions do not doubt their abilities and expertise. See Copelyn, J. (1991) 15, 6, SALB at 32. Maree, J, The Economic Case for Worker Participation: West-German co-determination, 1991 at 9.

Dous Dekker, 1990:242, summarises the approach by saying: "the process and implementation of decision-making is still not driven by the ethic of 'doing the right things' in terms of democratic norms". This is non-functional and flammatory. See Jordaan Note 2, Supra at 958.

[21] See (1991) ILJ 12 at 961, especially where he cautions on the naivety of such an approach.

Be that as it may, some authors argue that there is every wisdom in involving workers even at this contemplative stage.[22] The other plausible opinion in this regard is based on the fact that in doing so, the prospects for meaningful and satisfying work are increased. Also the fuller realisation of human potential is likewise given a chance.[23] Consequently, employees are not just logs in the wheel of industrial life but competent and important persons in the planning not only of the change but in realisation of the welfare of the industry through involvement even at the contemplative stage as well as decision making.

(c) **The Decision**

The other problem with this approach pertains to the decision maker. According to the judgement, the ultimate decision to retrench is one which falls squarely within management responsibility and competence. This is not different from school 1. For example, if this approach is marked in terms of effect, the same results are likely.

(a) The desire that management has stands an even a better in this latter approach than with school 1. This is so because here the employer can easily get to the consultation process as though he does not have any fixed plan and then immediately after the consultation, have and decide on it. There is no way, in my opinion, that he can be questioned because the whole consultation process has no obligation to agree on

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[22] Bamber, Greg, in Hyman and Streeck,(eds) 1989 at 206. what is interesting with this Bamber approach is that these workers who it seems will have missed something if not consulted at contemplation stage, are involved in the decision making finally as well. The question then is if while they stand another sure and most important chance – decision making, yet it seems non-consultation at contemplation stage is great, how much more the ones who will not only miss the contemplation but also the final decision making as well.

[23] Ludeke, J.T. (The Hon Mr Justice),' Whatever happened to the prerogatives of management', Aust. L.J. (1992) 66 at 23-24.

See also Poole, M, 1978 at 56 who says worker participation [in decision making] increases the level of workers satisfaction and thereby makes a contented workforce. This will be so because the decision will have been negotiated or agreed upon rather than an unnegotiated or unilateral one. See Thompson et al 1994, Current labour law at 38.

Jordaan (1991) ILJ 12 935 at 961.
Cokile and Others v Windhoek Mines Ltd (1994) 15 ILJ 824 IC where a balance between the interests of the parties is upheld as should be strived for.
Maree, J. 1991 op cit at 17.

anything that the workforce suggests. All that will happen is that the workforce will be left uncertain hoping that the employer may in his decision possibly honour their views as expressed in the consultation. The only way it differs from school 1 is that the employer's attitude and plan cannot be detected here. This is so because it will not possibly have shown during consultation thus rendering the whole process a mere formality.

Thus with school 1 the radicality of the approach, that is management's hard reliance on managerial prerogative, works to the disadvantage of the desired management result, while the moderate spirit of the school 2 makes it undetectable and free for implementation.

(b) This school structures the consultation process like this:

(i) The identification and consideration of need for retrenchment and/or consideration of retrenchment as possible remedy.

(ii) The consultation process.

(iii) The final or ultimate decision.24

This is unhelpful to the union as said. The reason is that the employer in this approach enters the consultation process with opinion – the need for retrenchment - and comes out with the same. In the absence of a testing method, that is, how effectively the employees' views will have been honoured in the process especially that he is not obliged to agree, management is then left free to decide and implement the same. Thus his likes and dislikes will go unchecked.

This happens this way, under this approach, the employee boards the retrenchment train halfway – on the road to the final decision. He then drops off, as he has to, halfway again – somewhere before the final or ultimate decision (or the decision at all because there is no stage where his agreeing or non-agreeing is in issue). Thus the employer, because of his power and position, is left all by himself to decide as best fits his business needs. I cannot imagine how a complaint can be lodged and succeed that he did not consult because what he decides on is above the employees' questioning ability, it being a matter solely for his managerial discretion.

At best this approach proves and settles one thing - that is how useless and empty the whole duty to consult is to the employees as opposed to the duty to negotiate.[24] In the same breath it proves how much more useful to the employer the duty to consult is than that to negotiate. This is so because under the duty to consult as is evident from this judgement, the employer gives (up) nothing while taking something from the employees. This is both optional and discretional. Similarly, the employee, it being uncertain if what he may contribute will be fitted into the decision, only takes what the employer gives finally. Out of all this there remains a wonder.

The wonder is why do the courts insist that the duty is that of consultation and not negotiation. This is particularly so because if,as the courts interpret these concepts, there is no difference in result between them, why should they be so conscious to consistently say the duty is not negotiation? It is my argument that this is the position because the employers would like.

This is capitulation in the extreme. This is my submission because a lot of effort had to made to convince employers that, unlike what they understood it to be, the duty does not include agreement. This enthusiasm to please employers is best reflected by inter alia a reaction of same court members. For example Van Niekerk,S.M and Copeling A.M, in reaction to Numsa v ADE (LAC) Said 'we... are deeply concerned about this development. The aforesaid view [that retrenchment should be a last resort] will undoubtedly cause much consternation and anxiety in business circles'. A closer examination of the courts' judgements, as argued in chapter 1 above, reflect to a large extent that the courts go out of the way to uphold the employers' interests. This is all done at the expense of workers' jobs

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24 [24](a) For the school structure, see ADE V Numsa,at 10.

24 (b) The courts went out of their way to afford them a comfort zone – the declaration of negotiation as the same as consultation – at least as far as the result is concerned. See Brassey, M,' Revels with levels' (1991) EL 7, 6, 117.

Thus Jordaan's view that the origin of duty to consult rather than negotiate is suspect is confirmed here. (see note 2,at 963).See also Rycroft,A,chapter 2, note 33.

It is for this and related reasons that a new system or beginning with a clear and precise provision in this regard is mooted in this work. See also Baskin, J, (993) SALB 17, 4, 62.

It has to be discontinued as it upholds one party's interest.

In all, the decision is just a better way of going through the motions, a soft and gentle way of doing so, but similar in many respects to the other approach.

As will be seen in Chapter 6, it is part of the proposal that the duty should be to negotiate because this one carries with it an obligation to agree not just going through motions which may or may not be considered at the decision making stage.[25]

Even if the present approach meant that there should be negotiation, it would make no difference as just said. This raises questions to which there are many answers. Firstly, according to Grant, negotiation is a method of joint decision -making with the goal of establishing mutually acceptable terms and conditions.[26] The question is whether it depends which side of the spectrum one stands.

Furthermore Douwes-Dekker says that industrial relations reflect the ethos of society[27]. The question is what ethos does this court approach reflect? It is my argument that it certainly does not reflect the present industrial relations demand.Our present approach is in many respects far behind from the approach in other jurisdictions. It has to be changed so as to reflect the entire industrial society's interest and indeed the democratic practice in the country.

It is proposed that, if in such a negotiation process agreement cannot be reached, the status quo stands until resolved through other means, say mediation, arbitration or any better.

Otherwise the approach has also succeeded in showing how resilient and unprepared the

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[25] A clear and specific legislative provision to this effect will save our labour law in many ways. See Thompson, C. (1991) 12 ILJ 12, 1209, who argues that it is doubtful if a coherent set of principles may emerge from an awkward piece of legislation.

[26] op cit at 311

[27] op cit at 244

courts are in promoting issues of consultation to those of negotiation. The dangers of this approach are considered in Chapter 6, below.

(c) Confidentiality and Disclosure of Information

Although this aspect of the court's approach is considered in detail in Chapter 5, some preliminary remarks may be made here. From the facts of Numsa v ADE (LAC) something raises suspicion - the confidentiality of the report. The fact that at first the company was not prepared to release the report because it, or at least some parts, were confidential is not reconcilable with the fact that later on the full report was released. The suspicion emerges in that there is no corresponding complaint that the business has been prejudiced thereafter. The question therefore is whether indeed the report was confidential or the whole claim was a bargaining strategy.

Furthermore the Appellate Division's apparent preparedness to have the report furnished without any qualification somehow leaves the matter not finally settled[28]. This is due to the fact that this information relates only to retrenchment. It should be borne in mind that as argued in chapter 2, retrenchment results from an investment decision in regard to which the employees were not even consulted. The ADE decision, like many others, does not address this important fact. The result is that managerial prerogative is left intact in this respect.

The concomitant effects of this on job security cannot be overemphasised. The idea of worker involvement at designing, planning and overseeing of the business, I submit, will address this shortcoming.

The other problem with confidentiality is whether the people (management), who have or who declare the reports as confidential, really know whether or not such are confidential. For example, in the Sopelog LAC case, the person responsible seemingly did not know whether the report was confidential or not but she felt obliged not to release it.[29] This borders on

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[28] See at 20.More of this in chapter 5,below.

[29] See at 12.

mistrust because even though she promised to release the report after consulting an attorney, she never came back. The questions are many : was the report confidential or not, was she sincere in saying she was consulting an attorney, did she consult the attorney and with what result?

This reinforces perceptions and cannot be taken lightly. When the duty is that of negotiation, where agreement will reign, a (joint) monitoring scheme will have to be devised with the function, among others, to work on joint plans where issues as the ones in question will, on an equal footing between the parties, be looked at. Generally the approach of Fagan, D.J.P. in Numsa v ADE where a joint solution of the problem was held is welcome but needs consolidation and base.[30]

[30] Davies,'Consulting over decision to retrench'(1993) EL 9, 6, 131-33.

CHAPTER 4

THE BASIS

It has been argued that the problem with managements' rights [prerogative] is usually concerned with the scope of the collective bargaining process and the effect of the concept of unfair labour practice in 'eroding and undermining managements' authority.[1]

From the discussion on the courts' approach, there seems to be a deep seated belief in the preservation of managerial prerogative. On the other hand, research shows that unions' concern with having a key voice in corporate or industrial affairs has developed. It is based on interest in job security and corporate managerial decisions affecting plant closures, relocations or transfers, lay-offs or retrenchment and other matters covering the whole of the working environment.[2] In essence, unions want to be part of the decisions on planning the future,expenditure and investment policies of the enterprise.

Similarly,it has been opined that 'it was [is] an error to regard such prerogatives and industrial democracy as mutually exclusive areas'.[3] While that is so, labour law scholars have identified that the courts have construed collective bargaining in such a way as to leave the bed rock of managerial prerogative intact. Accordingly, this has locked the labour process to its existing adversarial mode. In view of these shortcomings, they have proposed, as a guide to legal reform, a reconsideration of the labour laws relating to inter alia

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[1] Poolman op cit at 91

[2] Zaskon, S, 'Worker participation: Industrial democracy and managerial prerogative in the FRG ,Sweden and the USA',(1984), HICLR, 8, 1.

[3] Steward, Andrew, ' Managerial Prerogative On The Retreat' (1985), Aust. L.J. 59, 724-5.

managerial prerogative.[4]

The question is, what is this managerial prerogative, where does it originate from and what is its scope and content, and lastly, how functional is it to labour law ?

4.1 Meaning

According to John Storey managerial prerogative is an emotive and generic term.[5] Consequently, authors have for a long time avoided defining or probing its meaning. The result is that the concept means different things to different people. For example, when used in trade union circles, it can raise suspicions that the user is implying support for unilateral and arbitrary managerial action. When used in management circles on the other hand, it can raise contrary fears that an attack is being prepared on managements' right to manage.

According to the new standard dictionary, managerial prerogative refers to an indefensible and unquestionable right belonging to a person or body of persons by virtue of position or relation and exercised without control or accountability.[6] The employer therefore draws his authority from his power to manage property and to trade. It has been opined also that this right to manage allows the employer to manage and control workers as well.[7] The essence of such a right is that the employer can unilaterally decide which issues to surrender to collective bargaining and which not. In this process issues are divided into mandatory and permissive issues.

The mandatory issues refer to issues that directly affect the employment

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[4] O'Regan, op cit at 132.
Du Toit,op cit at 351.
Jordaan, 'Managerial Prerogative And Industrial Democracy' (1991), IRJSA 11, 3, 8.

[5] Storey, J, Managerial Prerogative and the Question of Control at 102.
See also Ludeke, J.R, Whatever happened to the Prerogatives of Management? (1992) Aust L.J at 16.

[6] Storey Note 5 above, at 717,

[7] See Poolman op cit at 100. Cf Jordaan op cit (IRJSA) at 1.

relationship.Permissive issues on the other hand include 'all matters of entrepreneurial or strategic nature, financial arrangements, business location, organising and planning policies and so on. The permissive issues are seen to be having an indirect impact on the employment relationship.[8]

The argument of this study is that there should be a duty to negotiate on all issues that affect employment security . This should be the position whether such effect is direct or otherwise. This is my argument because such decisions often have retrenchments as one of their inevitable results.[9] However as things are presently,'the choice whether or not to submit a permissive issue to collective bargaining remains solely with the employer'. He cannot be compelled to negotiate about such a decision even by the courts.[10]

The other point worth commenting on in this dictionary definition is whether it implies an agreed upon right or a 'creational' right. Zaskon's definition of this concept helps clear the concern. According to him, this concept referring as it does to a sphere of decisions which are the sole or exclusive province of the owners of the enterprise or management, it rests on the notion that the employer is the source of all managerial power and that all these powers not ceded in the collective bargaining agreement are retained by the employer.[11]

The question that remains is whether management, if it were to be called upon to explain its source of managerial prerogative to make the ultimate decision and responsibility, cite any agreement between itself and labour. This is doubtful. What is true therefore is that at least in our system, management and indeed the courts have continued unilaterally to elevate certain issues above the reach of collective bargaining. This is despite the view that collective bargain is a system that creates new centres of power.[12]

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[8] See Poolman op cit at 91.

[9] See Davies and Friedland op cit (1979) at 187.

[10] See Poolman op cit at 103, 104,105.

[11] Note 1,above at 101.

[12] Thompson and Benjamin op cit at A1-1.

What is certain, as will be seen below, is that this doctrine has no fixed scope, it is inconsistent and often compromised in practice. Therefore there is no logical reason why courts should sanction or help the employer maintain boundaries. In fact, as will be seen when I examine 'functionality' below, courts would best be advised to leave the issue of managerial prerogative to negotiation and agreement. After all managerial prerogative is the name for the remaining portion of managements' original authority and is therefore the name for the residue of discretionary powers left at any moment in the hands of management. According to Wood, every act which a manager or his subordinate can lawfully [and fairly] do and without the [further] consent of the worker organisation, is done by virtue of this prerogative.[13]

4.2 Origin and Development

The origin of managerial power or distribution thereof is not easy to trace.[14] These are by and large, perceived as 'given' in the taken for granted world order.[15] According to Sorcell, social power or even economic power, is not a simple phenomenon exercised through the market only.[16] Social groups create for themselves and in the minds of others presumptions of what society is about or, more specifically, of the limits of action. In other words, they create a social reality, conditioning others to regard certain actions as legitimate. In the end some groups will have some authority or retain some. In the employment sphere, the 'haves' will bear a power of command over the 'have nots'. In the end they will both control them and the employment processes. However,as history unfolds,few and few people will accept

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[13] Jordaan, note 3 above at 5.
See also Wood, 1956:25 in Storey, above. It is worth noting that the PSLRA (Section 4 (14)) subjects the exercise of the prerogative to law.

[14] Davies and Friedland, op cit 1983 at 17.

[15] Storey op cit at 59.
See also Perline and Poynter, 'Union And Management Perceptions of Managerial Prerogative:...' (1990) BJIR at 181.

[16] Quoted from Stewart op cit at 718. This is not unthinkable regard being had to history of slavery, master and servant and so on.

this paternalism.

It is for this reason that one wonders whether as the courts are doing there is still logic in that approach. The reason being simply that it is held that enlightened employers now see the need to handle their labour and human relations with skill and knowledge on how to prevent hostility and insecurity.
Against this background and on the basis that what has characterised collective bargaining is bitter struggles around the issues of absolute or ultimate rights it is submitted that the preservation of this prerogative is not in the interest of any of the parties.[17]

The courts and even management, will be quick to realise, as they recognised that workers would not be satisfied with blocked information (for that would still instill the ultimate control phenomenon), that workers will not at all accept their fate to be in the hands of unchecked management right, worse if it does not take cognisance of their interests as well. Thus as paternalism failed in struggles for trade union recognition (for black employees then), it will not succeed even in this area of managerial prerogative.[18] History teaches us that when unions and indeed people have realised the legitimacy of a need, they spare no effort to cause it to come to fruition.

This is my submission because organised labour on their side, are aware of their responsibilities to employers – to help them meet new industrial challenge and economic problems.[19] They need something in return. More precisely the concept, having originated as an incident of private ownership, has developed out of an understanding that the employer and nobody else, must prevail in issues not covered by express agreement even though they

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17 See note 1, Chapter 3, above.

18 Sutton, R,V,' The Employer and Trade Unions in The Eighties' (1980) SAJLR 4 at 38 and 58.

19 Ntshangase and Solomons, (1993) SALB 17, 4, 35.

affect the successful conduct of business.[20] It is based on the fact that the decision of what to do with his own property and therefore the conduct of it belongs to the employer, who takes the risks of the enterprise.[21] It is for these excuses that the employer have been allowed not to negotiate on decisions about the future direction of the company and so on. The least he could do would be to consult on the effects of the decisions but not on the decision itself. The reason, the courts concurred, is business logic.[22] For the reasons advanced, this view is short lived.

Furthermore, the fact that the powers formerly attendant on property have now largely passed to those who, without necessarily being owners, can control and direct, makes the argument for the prevailing of the owner of property, on which this prerogative bears source, unnecessary.[23] The right or responsibility to manage should not be viewed as implying that the management should have an unfettered right thereto. In fact there is authority to the effect that any right, be it property or so, was never unrestrictable. That was so, say if its continued unfettered use would be a danger to other people's lives.[24]

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[20] Zaskon op cit at 97.
See also Douwes Dekker, op cit at 246 referring to Karl Marx, Lewis, R, Labour Law and Industrial Relations, 1983 at 119.

[21] Stewart op cit at 717, Poolman op cit at 105.
This is based on opinion like the owner is the financier of the enterprise and therefore should not only prevail but see to it (done) that his business does not fail or ail. It presupposes an unlimited property right and is false in that regard.

See Visser, D,P,'The Absoluteness Of Ownership:...', Birks P. 'The Roman Law Concept Of Dominium And The Idea Of Absolute Ownership', in Acta Juridica (1985) 39 and 24 respectively, Le Roux and Van Niekerk, 1994 at 13,22 ff.

[22] See Le Roux and Van Niekerk op cit at 248 and decisions cited there.

[23] Rycroft and Jordaan, op cit at 10 ff. Note the argument that power to manage should rather be given to those directly and actively involved with the enterprise at 17. The fact that there are instances where ownership and control are separated make this argument sound. See also Ellerman P. David, 1983:273 19.

[24] See Lewis, C, 'The Modern Concept Of Ownership Of Land' (1985) Acta Juridica, 241 of 243, 249, 251.See also Poolman op cit at 92.

The right to manage or the prerogative thereof poses a real danger not only of unemployment to the employed but also turmoil to the country.[25] Therefore it must be restricted statutorily by requiring management to negotiate with workers on these issues.[26] In other words, managerial prerogative should now be developed and have its origins not from here and there, as is the case from the above discussion, but from the negotiation table.

4.3 Scope and Content

The other interesting issue with managerial prerogative surrounds the whole question of its scope and content. According to Brassey, managerial prerogative relates to the employer's 'right' to lay down the norms and standards of the enterprise – the right to manage the enterprise.[27] However, Brassey is quick to add that such a right must be exercised within the limits of the contract, the collective agreement and the legal rules that govern them.

Accordingly, managerial prerogative relates to issues like tea breaks, leave, direction and/or place where workers should work e.g. production lines. From this declaration of scope, it is reasonable to say that decisions relating to retrenchment, closure and transfer of undertaking are not included within the scope of sole and ultimate managerial prerogative.

This is true from the author's restriction – 'this - at least as far as the law is concerned - is what managerial prerogative entails, *no more no less'* (my italics).

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25 Von Holdt, op cit, Sunday Times, 18 August 1994.See also Friedman Workers Voice (1992), June No.3.
See also Chapter 5, below.

26 This is no new thing in this sphere.
See Rycroft and Jordaan op cit at 16, Poolman op cit at 91.

27 The New Labour Law, 1987 at 74. Rycroft, A,' The Employer's Level Of Tolerance' (1993) ILJ 14 at 287.
Maree, J,The Economic Case For Worker Participation: West-German Co-Determination (1991) at 9.
From these it can be observed that this prerogative is progressive than stagnant. It also disproves the view that the employer decides what to talk about and what not.
See also Perline and Poynter op cit at 180 ff.

According to Jordaan on the other hand, the concept of managerial prerogative is an ill-defined concept with an uncertain content as it is undetermined by legal doctrine.[28] Therefore 'the real content and extent [scope] of the right to manage is determined by economic and other factors situated largely outside the legal framework'. It is a factor of the employer's relative bargaining strength.

From this statement it can be seen how progressive and adjustable this concept should be. It means it is flexible and not rigid – thus it can from time to time be determined by the parties to the relationship and even the legislature (when it comes to a push) so as to meet the requirements of the time. As indicated in Chapter 5, and indeed Chapter 2, the need to adjust labour law to suit present needs cannot be over - emphasised. We cannot succeed in that drive unless we realise the role that managerial prerogative has played in delaying the development of the law in this regard.

Such a realisation will best inform us on deciding where to locate this concept – in the negotiation table as argued above. This is so because it will only be then that they will be exercised justly and in keeping with'managements'primary responsibility - to attend to the well - being of its employees'. Presently management and indeed the courts have focused os much attention to the well being of the business at the expense of job security.

Furthermore one wonders by what measure do the courts, let alone that it is not advisable that they should have in the first place, draw the boundary and scope of the prerogative.[29] This is more so that the assumption that employers cannot bargain collectively if labour is equipped with rights and sanctions which equal those of the employees in either legal and economic terms is false.[30] This is not only false but unfortunate. The sooner whoever believes and changes his mind, the better. For example, in Australia it has been held that . . . preservation of an unfettered 'right to manage' has ceased to be a relevant aim. What the

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28 (1991) IRJSA 11, 3 at 4 and 6.See also Le Roux and Van Niekerk op cit at 243, Poolman op cit at 91.

29 Cameron et al, 1988 at 100, Cf, Grant, (1993) ILJ 14 at 307.

30 This is probably the basis the courts use to preserve this prerogative.

Australian companies have understood and applied is employee involvement at the process through which employees are encouraged to share in the problem solving and decision making within their area of competence.[31]

What is interesting with this Australian approach is that, by contrast, our courts differentiate between problem solving and bargaining. They further leave the decision - especially that the employer is under no duty to bargain or negotiate - thus agree with employees, in the sole competence of management. Consequently and because problem solving is something different from consultation it is also a sole responsibility of management.[32]

Accordingly, by whatever measure, these decisions and problem solving in our labour system fall squarely within managerial prerogative.[33] They have to be reviewed. This is so because as things are workers are assumed to be having no rights. This is evident from the fact that the employer should, as he feels like, submit issues to collective bargaining. Furthermore, in this process, intelligent human resources have been artificially trapped in artificial limits. It is time to release such energy and potential into our economy.[34] Managerial prerogative must be subject to negotiation between the parties.

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31 See Ludeke, op cit for the position in Australia at 24-26.

However there is opinion that although Australia has gone so far (as said by Ludeke), they want the whole arrangement to be extended as far as worker participation.This, unlike industrial democracy, leaves managerial prerogative untouched. See Davis M. Edward and Lansbury D. Russel, op cit, 1989 at 113.

32 See Sactwu Congress (1993) SALB 17, 4 at 25 where it is resolved 'yet at the same time we cannot tolerate the major inequalities in power and resources in a democratic South Africa'.

33 See ADE v NUMSA (AD) at 11-13.Cf Davies and Friedland op cit 1979 at 197

In Australia what is important, so they have realised, is not only the need for change [retrenchment, closure and so forth.] but also the process by which they [identify the need and remedy] achieve that change. Consequently they involve workers in the planning and realisation of the industry's welfare. This is Albertyn's recommendation for our country too. See Chapter 5, below.

34 See Trollip and Gon op cit at 86.See also note 20 chapter 3,above.

CHAPTER 5

PROPOSAL

5.1 Co-determination

5.1.1 Negotiation before Decision

While our collective bargaining, as indicated above, failed to challenge managerial prerogative and thus left the traditional way of governing the industry intact, Sweden has developed a system that changes the way things are done. In Sweden, collective bargaining, based on an adversarial relationship between employers and employees, has developed legal mechanisms to channel conflict into co-operation. This has done by means of the Co-determination Act of 1977, otherwise referred to as the 'MBL'. According to Canova this Act in effect opened up the area of management prerogative to collective bargaining and expanded union rights to receive regular information from the employer.[1] The result is that there is a continued dialogue between the adversaries with a goal of achieving mutual understanding.

This subjecting of management prerogative to negotiation is welcome. This is so because, as we have seen above, it is insistence on preservation of this phenomenon in its classic form that has caused and strengthened confusion in all attempts to regulate negotiations between management and labour.

It is additionally important because it will in my opinion give confidence to both management and labour. To management it will, now that its scope, content and procedure in execution

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[1] Canova, T.A, 'Monologue or dialogue in management decisions: A comparison of mandatory bargaining duties in the USA and Sweden'. CLLJ (1991) 12 at 269.

will have been negotiated between the parties, restore confidence. This will be so because management will now be sure that it is not only perceived to be accountable to the members of the industrial community but that their exercise of the right is not only 'uncontested' but blessed.[2] This will be particularly so given the fact that in negotiations, an agreement will have been reached as far as the issues on which management will have a go ahead are concerned. Alternatively, in case agreement is not reached, a method will have been agreed upon on how management should go about many issues.

To the workers on the other side, this will be important because it will give them a meaningful sense of belonging to the corporation. More importantly,it will give them a right of voice in decisions that affect their relations with the company. Furthermore, it will provide labour with security for change and the awareness of the need for such a change.[3] Thus labour will under this regime no longer be seen as only there to foster the business interests of the employer but also their own and company's through input in the decisions affecting the welfare and future of the enterprise.[4]

Lastly, it will help to give a definite basis for the realisation of the constitutional rights to, for instance, equality before the law and right to the pursuit of economic activity and hopefully industrial peace. This is what not only the employees need for the security of their jobs but, it is submitted, our industrial relations system as well. This is what the legislature

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[2] Gouwer, Modern company law. 4 ed. 1979 at 10-11.

See also Rycroft and Jordaan op cit at 16. Jordaan specifically likes this concept.

[3] Canova above.
See also Bamber Greg and Lansbury Russel,op cit at 103.

[4] Rycroft and Jordaan op cit at 60.
See also Albertyn Chris,' Elements of interest based bargaining' (1994) EL 11, at 6.

has to capture.[5]

According to the MBL the employer is required to negotiate over any matter relating to the employment relationship and to initiate negotiations before deciding on important alterations to its activities. This is vitally important and valuable to South African labour for many reasons.[6] Firstly, it helps clear the uncertainty of when the duty to negotiate should arise.[7] Thus although section 24 (aa) of the LRA encourages negotiation on all matters of interest between the parties, the courts have not interpreted it to mean negotiation on for instance retrenchments; closure and transfer of undertakings. Even if they had, in view of their approach to consultation, that is the stage when the duty arises, it is doubtful in my opinion that they could have held the duty to arise before the decision is taken.[8], [9]

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[5] Von Holdt, op cit , The Sunday Times, 14/8/94 puts the need by saying: '. . . co-determination in the workplace would help end the monopoly of white [and all] managers over decision making . . .' He further says: ". . . and this means a corresponding limitation on employer prerogatives."
See also SACTWU Congress (1993) SALB 17, 4 at 25.
Ntshangase and Solomons (1993) SALB 17, 4 at 35.

[6] Our equivalent would be Section 24 (aa) of the LRA but for reasons unknown, the courts have preferred to interpret Section 1 (ii) (bb) or ULP definition as meaning negotiations. See Thompson et al Current Labour Law, 1994 at 28.
See also Section 1, PSLRA on issues of mutual interest.

[7] Jordaan, ' Transfer, Closure and Insolvency of Undertakings' (1991) ILJ 12 935 at 958 who criticises, correctly so, the courts leaning to one party's interests while it is difficult to draw the line.

See also Stone, op cit YLJ at 1554.

Brassey, M, 'Consulting Over Decisions To Retrench' (1991) EL 7, 4, at 82 says there can be no objection to making consultation [negotiation] over the matter mandatory when workers jobs are at stake.

[8] Even if they could any way, such negotiation would mean nothing more than consultation in that no objection to reach agreement.

[9] NUMSA v ADE (1993) 14 ILJ 642 (LAC). Cf Sforza v Lekato Vet AG Ltd (1994) is ILJ 408 (IC) at 415A - where the court objects by saying that would make a charade of the whole thing.

Secondly, this requirement and indeed legislative provision will help, it is hoped and submitted, to ensure that justice and fairness is not only done in retrenchment and closure of undertaking cases but seen to be done. This is a long overdue expectation for in Gonya v Besterecta (1986) 7 ILJ 39 (IC), it was pointed out that ' . . . without proper consultative [negotiation] procedures with a representative body of workers . . . the fairness of the retrenchment [closure and transfer of undertakings] cannot be demonstrated or conveyed'.

The other important aspect of the Swedish model is that while the employer is obliged to negotiate over his decisions, he retains the right to carry out these decisions.[10] This is important because, as argued in the next chapter, it implies that unions are not necessarily interested in management function but only to have their voice heard and also that decisions made take workers' welfare into account.

This approach puts managerial prerogative in its proper place – the place where decisions are ultimately taken and carried out. In other words, it takes away the unfounded belief that management prerogative is also concerned with the process leading up to decision.[11] Put succinctly, to argue that demanding management to negotiate before a decision is taking away management prerogative is fallacious. This can also be understood through the fact that management and ownership of enterprise are sometimes separated. The fact that the owner gives the manager a mandate to manage does not take away his ownership rights. In the same vein, the fact that workers negotiate with management – that being a process - does not mean management does not have the right to carry out the decisions.

All this does is to ensure that the decision is jointly agreed upon. In that way, the confessed collective bargaining tradition will be rendered more real. In other words,the fact that management is the decision maker does not mean that workers have no right to be heard before the decision is taken. On the contrary, it is precisely in such circumstances, where one party has the power to decide on the fate of another, that the right to be heard is [and should]

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10 Brassey note 7 above at 83.

11 This approach is praise worthy as it disproves the objection raised in the Sforza and similar decisions.

normally [be] conferred.[12]

According to Streeck, this co-determination (as in Sweden) requirement to negotiate before a decision is taken will help management in the following ways:[13]

- to learn to communicate more freely with the organisation in general and with the workforce in particular.

- to take more factors into account and consider them more thoroughly, and

- to make underlying assumptions more explicit. Thus, it being a move away from the present form of management prerogative, it will help inject a good sense of accountability to management and not least to the workers as well.

The other aspect attached to this negotiation before decision is taken is the granting of the right to strike to the union should agreement not be reached in the negotiation process. This is particularly important because in some co-determination schemes, workers do not retain this right.[14] It is submitted however that our legal system will have to increase the protection that accompanies this right in the final analysis. So far as it has occurred in our labour relations, workers' jobs have not been secured.[15] In summary, according to Canova,

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12 Note 10 above at 83. See also Friedman and Lee (1986) ILJ (UK) 15 at 29.

13 Streeck, W, 'Co-determination: The fourth decade', 1984 at 413 ff.It should be noted that Streeck wrote in the context of Germany. However the facts apply here equally.

See also Gordell, B,' Worker participation and autonomy . . .' 1983 at 412.

14 Daphine, J, (1994) SALB 18, 2 at 88 argues that workers need the right and ability to engage in industrial action.

15 Although this is beyond the scope of this work, the right to strike in South African law has not developed to be a meaningful and effective weapon. See Rycroft, A,' Employer's Level of Tolerance in A Lawful Strike' (1993) ILJ 14 285. See also the review in Le Roux and Van Niekerk, op cit at 306 ff. See also Section 27 (4) Act 200, 1993.

plant shuttings, relocations, transfers,and lay offs are all subject to the section 11 [of the MBL] negotiation duty.[16]

The other level of employee participation in Sweden relates to the workers' entitlement to negotiations before an employer decides to appoint executives, managing directors, office supervisors and so forth. In South Africa the extension of workers' interests to this extent should be contemplated.[17] Although this is not a place to focus on the importance of this issue it will suffice to note that this will set the necessary ground work for co-operation between the parties. This is so because the type of management hierarchy that will result in this process will not only enjoy the support of the industrial community but will, it is hoped, be seen to be in line with the envisaged and desired joint decision-making process. This has been predicted by Davies and Friedland who refer to it as an expression of employees' industrial relations citizenship rights comparable to ordinary citizens'election of those who should govern them in a political sphere.[18] It further will ensure that collective bargaining or co-determination proceeds smoothly in the sense that parties will possibly move away from positional bargaining to bargaining in the interests of all.[19]

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16 Canova above at 276, 278 for exceptions, contrast with ADE v NUMSA (A) (1994) (unreported) at 14 where the issues of urgency have not been qualified.

For worker's view in South Africa, see Pennington et al. Cosatu Strategies 1994 and beyond 1994 at 102.

SACTWU Congress (1993) SALB 17 No.4 25.

From these it is clear that workers want issues on retrenchment, restructuring and investments to be matters of compulsory negotiation (by law).

17 See note 16 above.

18 1983 at 23.
Sutton, R.V, (1980) SAILR 57.
Klare Karl: 'Workplace democracy perspective' 1988 at 39 (HCRCLL.R.)

19 Davis (1993) EL 9, 6, 132-33.

5.1.2 Disclosure of Information

As said above, in South Africa the issue of disclosure of information has yet to be fully explored. In Sweden, section 18 of the MBL requires a party to produce documents to which it has referred during negotiations. Section 19 goes even much further than this initial disclosure right by requiring an employer to keep a union (to which he or she is bound by a collective agreement) continually informed of trends in production and the company's financial position. Unions are also given the right to examine books, accounts and other documents.[20]

South Africa on the contrary, judging from the few cases that have been examined in this connection, still lags behind. In Numsa v ADE (1944) (LAC) 642 at 653 A-B the union requested a 'C.A.G.' report which contained vital information and which the employer relied on in deciding to retrench some of its members. They were ultimately given the report though late. The LAC in trying to put certainty on this issue held that the employer should be open and helpful in meeting requests for information. Thus sufficient information must be disclosed to make the process of consultation meaningful. Accordingly the LAC held that this includes information concerning the need for retrenchment as well as information that will assist the employees or their union in making contributions about ways of avoiding retrenchment.

However, the employer under this regime cannot be expected to disclose information which (a) is not available to it, (b) is not relevant to the issues under discussion and (c) could harm the employer's business interests for reasons other than its relevance to the consultation process, for example, trade secrets and other confidential information. The Appellate Division per Smallberger J.A., has agreed to the LAC approach to this question.

Although these are important decisions, they are subject to criticism. In the first instance, the employer, not even the court, determines what

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[20] Canova at 289.
See also Davies and Friedland, 1979:153.
Maree, J.(1991), ASSA Conference Paper at 4.

information on the basis of relevance is necessary.[21] He alone also determines that such information is sufficient – a typical example of a party who plays the dual position of player and referee. This is an unfortunate position because research shows that these very employers, in many cases, consider disclosure of information to be an unwarranted invasion of their privacy and prerogative.[22] Their further ground for refusing to disclose information is that such information will weaken their bargaining position because the true facts may justify the union's claim and result in a worse financial bargain for the employer.

Finally management argues that each party strikes a bargain on the basis of its own knowledge and disclosure would undermine the essence of the bargain. These are the destructive effects typical of positional bargaining. It is in view of such effects among others that it has been blamed for the failure of collective bargaining. It is unfortunate that at a time when our labour relations requires co-operation, the courts should sanction the opposite.

The need to change this approach cannot be over emphasised. It has been opined that because the courts are prone to upholding the decision of the employer instead of substituting it even when the situation demands, the workers may resort to strike [war] rather than law.[23] This is no crazy statement: workers have resolved that they cannot at least in a democratic South Africa tolerate the inequalities in labour relations. Chris Albertyn succinctly draws the picture well by saying 'obedience [to the industrial system and command structure] emerges from effective systems of control, commitment arises from participation in decisions.'[24] This court's approach being an entrenchment of the old unilateralism (non-participation of workers in decisions) is detrimental to the envisaged attainment of industrial peace.

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21 This does not mean to suggest that it is the court that draws the lines here. It only means that the court does not see itself as could determine this relevance. What is worse is that it leaves the employer the sole determinant. In other countries, information rights are agreed upon. See Douwes Dekker, 1990:258.

22 Brand and Cassim,' The Duty To Disclose - A Pivotal Aspect Of Collective Bargaining' (1980) ILJ 1, 249 at 251.

23 Benjamin, P,' When Dismissal Disputes Are Stifled . . .' (1990) EL 6, 5, 117 at 118.

24 Albertyn,' Interest Bargaining Over Wages' (1994) EL 11, 2, at 27.

Furthermore it is not good that the courts should put their trust on the very employer (neither assisted nor supervised) who sees non-disclosure as not only a good bargaining method, but a legitimate and perhaps even fair for one party to negotiate from an uninformed and unintelligible position. It is unthinkable that such a party (employer) can volunteer the same information to the other party. This is compounded by the fact that the requirement that information should be disclosed cannot be held to be a hard and fast rule.[25] Lastly in our system, the employer may only furnish the information on request as against the continuous basis true of the Swedish model.[26]

In Sweden on the other hand, the determinant, that is to say, the party who determines that the information is not sufficient is the workers or their union. This is so in that, there the question is whether the issue is one to which the court would typically expect a trade union to wish to have an opportunity to negotiate about.

It should be immediately mentioned that the composition of the court in Sweden is different from ours at present. In Sweden the court is representative of party interests in that one half of the bench represents the employees and the other half represents the employers. It therefore becomes logical that as representatives, they will bring to the fore whatever may interest the workers and vice versa. The implications of and complications that may be attendant to such a structure are beyond the scope of this work. Suffice it to say that the courts there do not, in contrast to our case, leave it to the whim of the employer. Seeing that we have gone 'beyond' the dictates of common law it is my hope that we will find no problem with regulating things in similar or related fashion.

The importance of this right of determination of sufficiency or relevance, cannot be over - emphasised given the fragile industrial relations situation we have in South Africa. The choice therefore, as Brand and Cassim argue, appears to be one between disclosure (that is to say, rational conciliation which may have short-term disadvantages for employers) and non-

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25 See NUMSA v ADE (LAC) at 651 J. I only hope that the stated extent is not the limit. The fact that this has been adopted by the AD unqualified is a cause for concern.

26 Canova at 272.

disclosure (conciliation based on power-play with long-term adverse consequences for both the employer and society as a whole).[27]

I suppose the latter choice is not what everyone will opt for. Furthermore it is hoped that management, and indeed the society at large, will begin and continue to ask itself whether the greater latitude being allowed the employers has to be left as it is. For that matter section 23 of the Republic of South Africa Act 200 of 1993 provides that every person [even unions they being persons in a juridical sense] shall have a right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

I am aware of the horizontal and vertical application of the constitution. However, practical realities warrant practical considerations. For example there is no doubt that unions in the Public Service and their members will have the protection of this clause in the form of having access to the information they may require from government or its organs. The question is whether it can be expected that those unions will be comfortable with a situation where, in the private sector, they will face claims that the 'constitution'or the clause does not apply. This is particularly so where the unions do not operate in the public sector only.

It shall be noted that the constitution is the supreme law of the country and any law inconsistent thereof shall be null and void to the extent of
such inconsistency.[28] Be that as it may, it has been claimed that workers want [real] change in the workplace – change to match the political changes in the country. Jordaan, on the other hand has long suggested that as in political life, so in industrial life. Industrial democracy like its political counterpart, requires that individual [and collective] rights should

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27 Note 22 above at 252.See also Numsa v Borg - Warner (1994) 15 ILJ 509 (A) at 510 B - E. See also Davis, 'Ex Marks The Spot...'(9194) EL 10,6,at 132.

28 Section 4 (1) Constitution Act 200 of 1993 (RSA).
See also ANC, The Reconstruction and Development Programme - A Policy Framework 1994 at 113 and 114. Of importance is the fact that the constitution already provides for right to information (Section 23). It would be appreciable to have it extended in cover the private sector as well.

be safeguarded against arbitrary deprivation.[29] There is nothing sinister with this, after all industrial relations should be a reflection of the country's political, social and economic life.[30]

Unions cannot play a key role in achieving a transformation of a country into a democratic society and still be thought that they will expect management to enjoy the flexibility of deciding relevance and sufficiency without them participating in the process given that these are the days of 'transparency.'[31] These may appear too bold, but it is my submission that they are the better means of both preventing and solving the labour relations crisis and start a long trek to economic justice otherwise *we will see a wave of militant strikes worthy of media hysteria* (my emphasis).[32]

5.1.3 **Confidentiality**

In Sweden, if the employer requires that the information that he or she provides be kept confidential by the union, the parties should negotiate over the issue. This is according to section 21 of the MBL. If agreement is not reached on the issue, the employer may impose such a duty of confidentiality until the labour court has decided the matter.

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29 Jordaan, (1991) ILJ 12 at 961.

30 Kahn Freund.' On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.
Blanpain, Comparativism in Labour Law and Industrial Relations in R. Blanpain (ed) CLL and Industrial Rel. 3 ed. (1987) 3.
Watson,'Legal Transplants and Law Reform',(1976) 92,L Q R at 79.
McDonough, M. Loraine,' The Transferability of Labour Law: Can an American Transplant Take Root in British Soil',(1992) CLLJ 13, 504 especially conclusion. However, see Du Toit at 349 who argues, 'No country in the world provides an exact precedent for the complex situation which we face.'

31 See Kochen, A. Thomas, 'Labour and Employment Policies For Global Economy', (1994) ILJ 15 at 699 ff.
Pennington et al, op cit para. 2.1.5 at 101.

32 Von Holdt Karl, op cit Sunday Times .

In South Africa, the LAC in Numsa v ADE held that the employer and union should determine ways and means by which the information can be made available.[33] Such an investigation should be such that it excludes or minimises the risk of harm. This is a vital step and a praiseworthy approach because here the court emphasises a joint determination of the confidentiality of the information as well as the investigation process. What is also good with this approach is that it emphasises that a balance needs to be struck between the conflicting interests of the parties. This is also important because cooperation, both in the determination and investigation, not only imply that both parties have an interest in the welfare of the company but also avoids the impression, whether true or false, that the employer is trying to hide something. It is accordingly hoped that the information, on which the determination of the confidentiality or otherwise of the information will be based, will itself be an uncensored true information.[34]

On the whole management was, at least as reflected in ADE v Numsa (AD),even prepared to offer the full report to Numsa in return for a guarantee of confidentiality.[35] If this can be generalised as to what should be done by management in general, one would argue that the legislature should provide that the parties shall have a duty to preserve confidentiality of such information. It should also provide that liabilities may attach should such a duty be breached by the employees or unions.

In Sweden, for example, although only as far as subcontracting is concerned,, unions enjoy a veto power against management's acts in this regard.[36] However, if some damages occur

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[33] At 652 G-H.
See also Clegg, S, Organisational Democracy, Power and Participation, 1983 at 23.
See Fagan, D.J.P.'s advice, NUMSA v ADE at 652 E-F.

[34] This is important because empirical evidence suggests that in some co-determination set ups, worker representatives are provided with information which is systematically biased in the direction of management interests.
See Clark 1977:362,quoted from Clegg, 1983:23.
See also Gardell, op cit at 359.

[35] At 19.

[36] Although sub-contracting is not directly focused at in this study, has adverse effects on job insecurity.

to the enterprise, through say a business opportunity that has been missed through improper use of this veto power, the union is sued for liability.[37] This example is important in a number of ways.

Firstly it would guarantee as we have seen in the ADE v Numsa Appellate Division decision, the confidential interests of the company. Secondly, the union can veto an employer who unscrupulously refuses to disclose information on a guise of confidentiality. Equally, both parties will be responsible to the other in the sense that management will neither have a hiding place nor reason to want to withhold disclosure. At the same time and more importantly, the union will not unjustly put the employer's business at risk say by exercising the veto power or disclosing or breaching their duty of confidentiality. This is the best way of securing the parties' interest.This is so given the fact that the matter is put to the union on a take it or leave it basis. This therefore tends to enhance management's preparedness to disclose, secure in the knowledge that the company's interest will not be put at risk.

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[37] Maree (1991) at 13.
Ellermen, P. David, 1983 at 265.
According to Canova at 286, this is provided for in Section 57 of the MBL.
See also Smith, B. 1990:236 ff.

CHAPTER 6

CONCLUSION

In conclusion an evaluative question needs be asked, where does this duty to consult, as opposed to negotiate, leave our labour law? The answer is not hard to find: the issue is left at 'demarcation and removal' stages where only management has free rein. This approach tends to accept an organisational structure which does not share decision-making authority and legitimises unbridled managerial prerogative. Typically, therefore, unions are best seen as threats to the established order where some issues are demarcated and removed from negotiations.[1]

On the other hand this insistence on managerial prerogative in its current form leaves us with a clear message that unions are compelled to change their desire for involvement in the running of the enterprise, at least as regards these issues.[2] Consequently, management goals and policies are seen as rational. It follows that only in so far as workers' behaviour is congruent with these goals and policies [by committing themselves to help management achieve them] it is likewise rational. This is not far fetched because after all, one thing has

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[1] The term negotiate is used cautiously and generally here. See Fox, A, Industrial Relations: A social critique of Pluralist Ideology, 1973 at 190, and also at 206.
See also Lansbury Russel and Bamber Greg, Technological Change and Human Resources, 1989 at 7 where management is portrayed as opposed to co-determination because it threatens managerial prerogative in this regard.

[2] The danger with this is that as it entrenches positional bargaining, it precipitates anger and frustration as the employees find themselves bound to the employer's desires while their own are left unaddressed.

See Feinberg. op cit at 191.
Naidoo Jayendra, BR (1993) 2, 1, 23.
Karl Klare, op cit C U L R at 241.
Negrelli, S, Management Strategy: Towards New Form of Regulation 1989 at 91 who argues in favour of continuous negotiation on substantive issues like restructuring as well as problem solving.
Fox, op cit 1973 at 186. See also Nupen, C, 1990:41.

to be got clear, it is management which has 'its hands on the controls'. It has been argued that according to business norms,management has to react, unrestricted and by himself, to what the instrument shows.[3]

The other evaluative question is whether this approach is functional or contributing to both the realisation of industrial harmony and to the demands of current industrial realities. In attempting to answer this question one important factor has to be kept in mind.

From our discussion above, it can be noted that our collective bargaining system has had shortcomings because at one level it is based on pluralist tendencies. On the other hand it still bears strong features, under pluralist notions, of unitarism.[4] The end result and indeed the main reason was the preservation of managerial prerogative. The inadequacies of the unitary perspective as well as pluralism having been generally exposed, the consideration of the question of functionality will be focused on the concept of managerial prerogative as a component of such theories.

Managerial prerogative, as can be observed, only serves to foment grudge and indignation. Accordingly the duty to consult being poised to preserving the same helps in nothing but precipitation of the same grudge and bitterness. In view of such effects and regard being had to the current trend of industrial or labour law 'politics', it is submitted that the maintenance of this prerogative in the sense in which it has been preserved hitherto is dysfunctional. The danger of the system cannot be over emphasised. It is my argument that it does not sound nor convince how there can be a duty to bargain and yet when it comes to important issues

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[3] See Thring, J, in CWIU v Sopelog (LAC) at 103I. The AD in ADE v NUMSA, even though it referred to this decision,it left untouched this qualification.

[4] The approach that generally can be said to be recognising one source of authority (management) and one focus of loyalty.
See Poole, M, Worker's participation in industry, 1978 at 55.

as retrenchment, closure and transfer of undertakings that duty does not feature.[5] There is no way that this approach is not oppressive. That no oppressor can be forever needs to be seen to be true. If that is realised, there is every wisdom in adopting other attitudes and move to systems that do not empower one party at the expense of the other.[6]

While that is so, it is disheartening that managerial prerogative is characterised as it is in terms of over-arching exploitation of one class by another, of the propertyless by the propertied, of the weak by the strong. As said before, something has to be done with this because it is just not good.[7] The reality is that management may not be able to enforce, so Fox argues, without serious loss to itself, a total assertation of prerogative in areas of policy where it is challenged by a determined union or work group. The situation of industrial turmoil is what I think nobody would like. Unfortunately unless something is done we may find ourselves in such danger. As it happened elsewhere, it may happen to us. The choice

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[5] Brand, J, et al,' Bargaining and bad faith' (1991) EL 7, 6 at 107.
Brassey, et al,op cit at 151.
O'Regan op cit at 115. Thus the view that the duty to bargain or negotiate is introduced in the interests of public order and security or welfare, is as true now as it was then and cannot, if we are serious, be left confined to some issues and not to others.
See Thompson, (1987) ILJ 8 at 2. It must further be stated that unions have always demanded of employers the duty to negotiate, hence it is possible that when they allege non-consultation they may sometimes be meaning negotiation in the sense of agreement or consensus. See for example ADE v NUMSA (AD).
See also Davis, 'Uneven Justice', op cit at 21. Thompson, et al, op cit at 38.

[6] Mboweni, T, (1994) ILJ 15 73 who argues that the world [even the industrial world] is changing and we must [labour relations or management attitudes and style included] always adapt to the changing world.
See also Kochan, E, Thomas, op cit at 692.
Karl Klare op cit, CULR at 241. O' Regan op cit at 119.
Thompson, et al,op cit at 36, who call for more flexible arrangements and a greater autonomy for standards at the workplace.

[7] Fox, 1973 at 213.
Storey, op cit at 56.

is either to have it by war or words. The latter is better while the former is destructive.[8] The situation is such that unless something more appropriate is done, management's power and superiority is no longer sufficient to permit the luxury of imposed solutions. In the current circumstances, the best chance of being able to 'control' events and obtain workers' obedience lies in their being ready to share that control with the groups they are seeking to govern.[9], [10]

This is particularly so because today, unlike before, workers can no longer legitimise, by refraining from interfering in certain 'preserved areas,' the notion of unfettered managerial prerogative. Furthermore, workers are aware that the purpose of organisations might more properly be regarded as to advance the sectional interests of the controllers and those on whose behalf they engage in controlling. On that basis managers are expected to remain alert to situational demands.[11]

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[8] See Stephen, E, The politics of worker participation, 1980 at 48. Cf Grobbelaar, J,A, (1979) SAJLR at 39, who advised that the withholding of rewards cannot be maintained for any significant period of time.
Sutton, R.V. op cit at 58 who advised then, as it stands now, that employers would best be advised (even the country) to be ready for these developments even before pressure is exerted in this direction and adjust accordingly.

[9] Fox, op cit at 194-5.

[10] Albertyn, (1994) EL 11, 2 at 26 ff.
_____ (1994) EL 11, 1, at 6 ff.

[11] Storey, op cit at 77.
Boskoert, B. 'Management in the 21st Century,'(1987), who advises that innovation is another basic ingredient of doing business. Zac de Beer in (Management in the 21st Century) argues that after all it is with people that business has to deal. He therefore advises that future management excellence will be determined by breaking up old traditions and creating [with workers] new ones. Cf British Institute of Management, cited in Storey op cit at 78. With same tone Kochen op cit, captures the point by saying that the present foundations are an unsafe basis for moving into the future. He therefore proposes inter alia that management should redefine roles and allow employees to participate in decisions that affect their work and economic future, eliminate the barriers to employer participation or negotiation.

Grobbelaar, op cit at 37 says this is what is necessary for a healthy, expanding and sound commerce and industry. I concur,otherwise, any other would be like shutting the stable door after the horse has bolted.

From the above it can therefore be seen that what is appropriate is to afford workers a voice in the direction and vital decisions of the enterprise for which they work. This is importantly so that the employees' as well as employers' interests are tied to the companies.[12] Thus a recommended approach is to have employment matters, that is to say investment, plans for future, retrenchments and so on negotiated at company so that the end result can certainly bear and be a product of rational debate between the parties.[13]

It is on these grounds therefore that it is submitted that as the present system is not a good foundation for the future, that a 'completely' new system has to be put in place. Such a system, it is submitted, will have to make it a duty that the parties be obliged to negotiate on any issues of interest between them. It will have to, by providing for employee involvement in planning, running and overseeing of company or industry's future, also provide that where agreement is not reached, the status quo will remain until a breaking mechanism has been resorted to.[14] It is against this background the prospects for the realisation of these issues needs to be commented on. While this may not be an exhaustive examination of this question, it does not seem, as discussed above, that these ideas are far from realisation.

The draft negotiating document covers some of these issues in an appreciable way. For instance, the purpose and indeed the meaning of consultation is brought to certainty in the bill. It does this by providing that there shall be no change in the employment practice unless there has been consensus between the parties in that regard.

This renders negotiations more meaningful. Furthermore, the list of issues on which the parties may negotiate, non - exhaustive as it is, is wide enough to cover the basic concerns

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12 Stone, op cit at 1558.
Jordaan, op cit (1991) 12 ILJ at 958.
Negrelli op cit at 92 advises that for this realisation to be practicable, the parties need to change their attitudes, modify their norms of behaviour from the exclusive defence of their own interests and reconstruct the existing power relationships.

13 Godongwane, E, (1992) SALB 16, 4, 23.
Maree, J,(1991) 'ASSA' at 4.

14 This is not unheard of. The example is the strike procedure in our labour law - at least the spirit behind,not to mention the merits and demerits.

addressed in this study. For example the issue of confidentiality and disclosure of information is provided for. It is my submission that this does away with unilateralism.

In the same vein it does not only restrain the rights of the parties but also protect their basic interests like job security as well as the welfare of the undertaking. The bill provides for joint decision making between the parties.[15] This effectively redresses managerial prerogative while it, at the same time, enhances greater worker participation and democracy at the workplace. It is my recommendation that these clauses should become the provisions of the final draft or Act.

This is importantly so that, whatever the shortcomings as well as intentions, this being no focus of this work, the idea of co-operation has been tried with some success in labour relations.[16] This is the is time to try and make it work in South Africa. Therefore their prospects are not far fetched.[17]

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[15] See sections 63 to 68 of The Draft Negotiating Document,January 1995.

[16] Bird, A, (1988) SALB 13, 6, at 48.
Anstey, 1990 at 245.
Evans, (1993) SALB 16, 2.
Maree, J, Conflict and Co-operation, 1992.
Dekker, 1990:249.

[17] For hazards of legal transplants, see note 32, in Chapter 5, above.

Lastly it is essential to state that evidence abounds to the effect that participation of workers in the running of the undertaking has not compromised business efficiency. On the contrary business ideals and efficiency are said to have been remarkably enhanced due to worker involvement.[18]

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[18] Maree, op cit ,'ASSA' at 7 and 8.
Blumberg, P, Industrial Democracy. The Sociology of Participation. 1970:123.
Giliome,' Sharing the Co-Determination in the 1980s,' (1989) ISA 6.4.67.
Streeck, op cit at 411.
Backstrom, A, New Technology, Economic Progress and Employment in Sweden, 1989 at 225 who argues that if unions lack the opportunity to influence developments they will inevitably oppose all changes in order to preserve jobs thus hamper progress.

However, for side effects see:-Brassey, 'Singing for their Supper. A Life in a Union Factory,' EL 6, 2, 40.
Maree, op cit,'ASSA' at 17.Blumberg, op cit at 123.

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