



BENJAMIN
on law

In the last issue of the *Bulletin*, we discussed the duty to bargain, and strategies to compel hostile employers to recognise and negotiate with unions. This month we focus on the obligations on bargaining parties after the breakdown of talks and during the course of industrial action.

obligations *during* **industrial** **action**

by PAUL BENJAMIN of the Centre for Applied Legal Studies, University of the Witwatersrand

The ERGO case

The starting point for this discussion is the decision of the Appellate Division in the case of *NUM v East Rand Gold & Uranium Co Ltd* ("ERGO"). This was the first case in which the Appellate Division, the highest court in the land, heard an unfair labour practice case on appeal from the industrial court and

the Labour Appeal Court. It is therefore an important indicator of the way labour law is likely to develop in the next few years.

The case arose out of the 1987 strikes in the mining industry. The NUM was recognised by the company as representing all employees in a defined bargaining unit. Negotiations over wages and

conditions of employment for the year from 1 June that year ended in deadlock. Two conciliation board meetings failed to settle the dispute and in early August the union conducted a strike ballot in which a majority of members voted in favour of a strike.

The employer then issued a notice to all workers in the bargaining unit informing

them that if they individually agreed not to strike the company would pay them the final offer made to the union during negotiations with effect from 1 June. A small number of workers accepted this but the majority rejected it and went on strike.

The strike ended three weeks later without the workers winning any further benefits. The company refused to back-date the increase for strikers to 1 June, they only received the increased wage from the end of the strike (late August).

The unfair labour practice

The union said that this was an unfair labour practice because the company had "by-passed" the union and negotiated directly with employees. The court accepted this and said that so long as the union was recognised as the bargaining agent of the employees, the company could not negotiate with individual workers. Deadlock did not allow the company to do this.

On deadlock, the company could unilaterally implement its final offer. In other words, it could start paying its final wage offer to employees and give effect to any improved conditions of employment. However, it cannot implement changes that are better than what has been offered to the union during negotiations because this would undermine the union.

It is important to remember that the judgment does not

stop an employer communicating with employees by, for instance, issuing a brief describing developments during negotiations. What it cannot do is impose any condition (such as requiring employees to agree not to strike) as a requirement for implementation. Once it does this, it is bargaining with individuals and this is not allowed where a trade union is recognised.

If an employer wishes to deal directly with individual workers it must terminate its recognition agreement with the union. Unless there are very good grounds for doing this it will be an unfair labour practice which the union could challenge urgently in the industrial court.

Could an employer ever negotiate with individual workers without cancelling the recognition agreement? The court did not give a definite answer to this question but did indicate that there may be circumstances in which negotiation in bad faith by the union might serve as justification for the employer to negotiate directly with the employees. This could only be done where the union's bad faith bargaining caused the deadlock.

The importance of this is that unions will have to be careful to avoid accusations that they are conducting negotiations in bad faith. In brief the requirement of "bargaining in good faith" means that the parties must

have the intention to reach agreement. An example of bad faith bargaining is the refusal to justify a negotiating position because this makes it impossible for the other side to respond.

Consequences

What are the consequences of the ERGO judgment? In essence, what the court did was hold the employer to the terms of the recognition agreements. It said that it had recognised the union as the collective bargaining agent of workers and that it could not disregard this merely because the workers wished to strike.

The first lesson is that unions will have to pay very careful attention to the language used in recognition agreements, particularly central features such as the terms of the recognition of the union and the employer's obligation to negotiate.

This attitude of the court applies to both the wording of the agreement and the bargaining practices that develop. This will be most important where the recognition agreement states that the union represents its members, but the deal struck by the union has (as is usually the case) been extended to non-members. In such a case, the employer will also not be able to deal with non-members differently from members as a way of undermining the union.

The judgment may also offer a basis for trade unions to extend the range of issues

that are the subject of collective bargaining. An employer who has agreed to negotiate over wages and conditions of employment will not be able to change conditions of employment as and when it pleases. It will have to enter into negotiations and only on deadlock will it be able to make unilateral changes.

The judgment will prevent employers from adopting tactics like offers to individuals that have been common in recent years and which undermine the solidarity of workers. A likely result is that employers will make increasing use of lock-outs to resolve collective bargaining disputes. A lock-out like a strike cannot be an unfair labour practice and like a strike hurts both management and workers through the loss of production and wages.

A central feature of the judgment is that it recognises the strike as a legitimate extension of the collective bargaining process during which the normal rules of collective bargaining apply. This is in sharp contrast with the approach of the labour appeal court in some recent cases which have stressed the right of employers to dismiss strikers. Hopefully, this will mean that the Appellate Division will adopt a more enlightened attitude to the dismissal of strikers when it hears a strike case later this year. ☆

Institute of Social Studies – Vacancy

The Institute of Social Studies (ISS) in The Hague, The Netherlands, is a post graduate centre specialising in international policy-orientated social science teaching, research and advisory work in the field of development studies and the Third World. Most students come from developing countries. The staff is also of international composition and all teaching is in English.

VACANCY FOR LECTURER/ SENIOR LECTURER

The ISS would like to appoint, as from 1 September 1993, a lecturer/senior lecturer for the multi-disciplinary MA-Programme LABOUR & DEVELOPMENT.

The Labour & Development Programme focuses on the economic, social, policy and managerial aspects of labour in the process of development. The programme includes an MA with various sub-specialisations and participation in an institute-wide research-oriented PhD programme. The Labour Studies programme concentrates on research and teaching of Labour studies with a specialisation on Third World experience and countries. Primary areas are: labour in the process of industrialisation, comparative labour relations, contemporary labour management practices, organised labour, and labour policy and theory.

The person is required to be competent in the labour studies field with interest in socio-economic analysis of the impact of economic policies. The work requires a familiarity with labour market analysis, social policy and institutional development in the Third World. The post entails, in particular, teaching and supervision of research at the post-graduate (MA) level. Active participation is also expected in research projects and staff are expected to publish their work in recognised academic journals. Some administrative work is also required.

The post is for two-years and is renewable, subject to satisfactory performance and the continued availability of funds.

Required:

- a PhD degree in one of the Social sciences
- teaching experience at post-graduate level
- a proven record of academic publications
- Third World experience

Employment conditions: similar to those of Dutch universities. Salary from 4858 Dfl to 7832 Dfl gross per month over 12 months per year plus 8% holiday allowance.

Research time is included in the work profile and staff appointed are expected to publish their work regularly in recognised academic journals and contribute actively to the various research activities and managerial tasks of their teaching group and of the ISS as a member of an interdisciplinary team.

Applications:

Accompanied by a curriculum vitae, copies of research output and the names of three referees should reach the ISS, not later than 31 January 1993, addressed to: The rector, Institute of Social Studies, PO Box 90733, 2509 LS The Hague, The Netherlands. Additional information can be obtained by telephone or by letter from Mr F B Schiphorst, Convenor Labour & Development Programme (tel +31 70 - 3510 329) or Dr H Thomas, Professor of Labour Studies (tel +31 70 - 3510 336).



Economic Notes is supplied by the Labour Research Service (LRS), Cape Town

Union representatives to the Community Growth Fund announced

The names of union representatives to the board of Unity have been announced. They will be screening all investments made by the Community Growth Fund (CGF), South Africa's first and only union-directed investment fund.

So far seven unions from both COSATU and NACTU are participating in Unity. Unions making large investments – more than R10 million per annum – in the CGF can nominate three representatives; smaller investments qualify for one or two representatives.

Unity is the union-owned organisation which owns a share of the Community Growth Management Company, which in turn controls the unit trust, the CGF. Unity has final decision-making on all

investments made by the CGF.

The NUM and PPWAWU can nominate three representatives each. The NUM nominees are Irene Barendilla, Martin Nicol and Senzeni Zokwana (a shaft steward at the President Steyn gold mine). Their alternates are Thabo Makgoba (shopsteward at Samancor's Tubatse Ferrochrome), Jesse Maluleke and Derrick Engelbrecht (an Eskom shopsteward).

Unions appoint representatives

PPWAWU's first representative is Apolis Solomons, a shopsteward at Kohler and a trustee of PPWAWU's national provident fund. The other two nominations will be made by worker trustees of the two largest provident funds linked to the union.

CAWU is represented by Dumisane Ntuli. The Transport & General Workers' Union representative is currently Jane Barrett. Further representation will depend on the outcome of seminars to be held within the union later this year.

The MEWUSA

representative is general secretary, Tommy Olifant, who has also been elected chairman of Unity for 1992. His alternate is Johnny Mokoena. The TAWU representative is president, Alex Mahlatjie, a Putco worker, and his alternate is Moses Makaleng, vice president of the union. The NUFWSAW have nominated William Makhunga, education officer, with Fatima Mandy, general secretary of NUFWSAW, as alternate.

Decisions made by the board

The board has now met three times to consider the selection of investments. Before making their decisions, board members consider a detailed report prepared by the Labour Research Service. LRS investigate each proposed investment according to 17 criteria laid down by Unity. A number of companies have been rejected as a result of unfavourable reports. Others have been approved for investment, while others still have been referred back for further intensive investigation.

Says Mark Anderson, leader of the LRS investigation team, "We are

getting active involvement in the research by shopstewards and officials. After we have completed our desk research, we interview the responsible union official and shopstewards at the company. The shopstewards in particular have been incredibly helpful in pointing us in the right direction". The LRS then interviews management in the presence of a shopsteward. For example, at Lenco's clothing company, the SACTWU shopstewards elected a senior shopsteward to accompany the LRS at the meeting with management.

Three key issues

Three key issues are emerging at many of the companies under investigation. The first is racial discrimination. The companies generally claim that they have eliminated this, but information from shopstewards shows that this is far from the case. Often overt racial discrimination has been replaced by other criteria, such as seniority. But shopstewards see this as simply a ploy to keep the status quo.

The second key issue is Bophuthatswana. Companies are hiding behind homeland legislation to keep union membership down. At least two companies have been rejected mainly because of their industrial relations practices in Bophuthatswana.

Finally, failure to agree to centralised bargaining is

damaging companies' reputations. While centralised bargaining as such is not a "make or break" issue, highly decentralised companies tend to have bad industrial relations at some of their branches. This is because local managements then have autonomy. Unions find it difficult to correct bad practices at such local branches, as head offices refuse to intervene. This "hands off" policy of the controlling company means their industrial relations profile is very mixed, and inevitably there are some very bad managements spoiling the overall picture.

Decentralised companies are therefore less likely, on balance, to gain acceptance by the Community Growth Fund.

Giving unions a say

The CGF aims to give unions a say in how their members' money is invested. Certainly, there has never been such intensive involvement of unions in the investment of their members' money, both during the company investigations and at the final decision-making. ♦

Secret salary survey tells all

The chief executive of a company is the most senior manager. And, as usual, chief executives in South Africa have continued to award themselves big increases.

That is what a recent *secret* survey of executive pay reports.

Basic pay for South Africa's most senior managers rose by 14,7% in the first half of 1992 – about on line with inflation.

Basic pay now represents just over half of a chief executive's total salary. Bonuses, perks and share options make up the rest. It was this part of their pay that has grown the most in 1992. The secret survey says chief executives' bonuses and perks increased by a whopping 28,8% (or R578 per week) to R2 605 per week.

This large increase is most surprising as bonuses are normally linked to profit performance. And nearly everyday chief executives report on the *poor* profit results of their companies!

The recession is bad, but not for everyone. The secret survey says a chief executive now gets R6 650 in total per week. This is the average, so some get even more than this.

What a chief executive gets

Basic pay:	
R4 045	14.7% increase
Bonuses, etc:	
R2 605	28.8% increase
Total:	
R6 650	20.0% increase

So when management next wants you to link pay with performance ask them how the chief executive's bonus pay is calculated! ♦

Company profile: Malbak

Malbak is South Africa's fourth largest industrial company. In 1991 it employed 56 000 people. The company is owned by Gencor.

expects them to be similar to 1991 figures. Malbak's sales were a massive R8,4 billion. Out of these sales it made profits of R720 million before paying interest and tax. Profit per worker in 1991 amounted to R12 857. Shareholders got dividends of R68 million in 1991.

With the exception of the paper and packaging operations, all Malbak

This is mainly as a result of rationalisation programmes and the economic slowdown. Rationalisation programmes at the newly acquired companies, SA Druggist and Fedfood, are also likely to reduce employment.

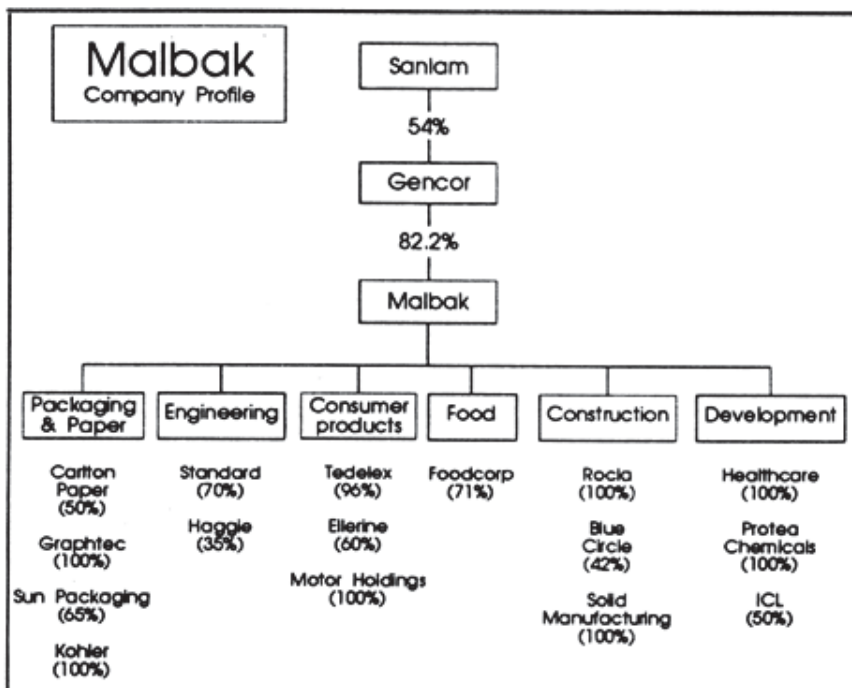
Management says it wants to be seen to be "just, equitable and fair" on wages. Most workers employed by Malbak have their wages set by industrial councils. Where there is no industrial council, wages are normally centralised at company level, such as at Carlton Paper.

Director's got paid R5 million in 1991. As there are 10 directors on the board, each director therefore earns R9 615 per week! So, Malbak's directors got 52 times more than a labourer at Tedelex, who earns R184 per week.

Derek Keys, the minister of finance, is still a non-executive director of Malbak.

Workers at some of Malbak's companies say that racial discrimination is still present, although not visible. In response, Malbak's management says that in its large subsidiaries there are programmes to eliminate racial discrimination.

Malbak has set a target of 1,5% of profits for spending on community projects at its subsidiaries. At the moment unions are not directly involved in any spending decisions, on what would amount to about R8 million each year. ♦



Malbak's subsidiaries

	Union	Employment
Holdains (Carlton Paper/Kohler)	PPWAWU	11 120
Haggie/Standard Eng.	NUMSA/MEWUSA	13 346
Tedelex	MEWUSA	} 12 235
Ellerine	SACCAWU	
Motor Holdings	NUMSA/MEWUSA	
Foodcorp (Fedfood/Kanhym)	FAWU	18 250
Darling & Hodgson	CAWU/BCAWU	6 679
Protea Chemicals	SACWU/CWIU	8 347
International interests		1 039

Given the poor economy, Malbak's profits increased by a healthy 14 % in 1991. 1992 results have not yet been released, but management

companies have reduced employment. Total employment decreased from 63 898 in 1990 to 56 595 in 1991, a decrease of 11,4%.