

THE AGENCY PROBLEM IN TRADE UNIONS: A CASE FOR ENFORCING TRADE UNION LEADERSHIP ACCOUNTABILITY IN NAMIBIA'S LABOUR LAWS

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SUMMARY

Namibia's public and private sectors have encountered substantial industrial or strike action. This article highlights the agency problem that arises between trade union leaders or bargaining agents and the employees or the workers they represent during collective bargaining. The agency problem is a conflict of interest inherent in any relationship where one party is expected to act in another's best interests. How to ensure that the agent acts solely in the interest of the principal is a challenge. The agency problem can occur in companies, non-governmental organisations, professional institutions, governmental bodies or trade unions. Namibian labour laws provide for freedom of association, which includes the freedom to form and join trade unions, and also entrenches fundamental labour rights and protections, and regulates collective labour relations among others. However, the legal framework is silent as to what happens if union leaders or representatives act in bad faith and sign collective agreements that are not in the best interest of their members. This contribution argues that trade union representatives should be held accountable for failing to deliver on their mandates. Compromised trade union leadership or political intrigue in unionism needs to be addressed to minimise the agency problem in industrial action in future. Labour law practitioners should explore effective strategies to address this conundrum and ensure that the best interests of workers are upheld by trade union leaders. Trade unions must be transformative socio-economic movements to remain relevant and sustainable in Namibia or elsewhere. This can be achieved through law reform and by integrating the principles of the law of agency in labour laws to enforce trade union leadership accountability.

1 INTRODUCTION

A trade union is an expression of the common interest of the working class and should contribute to radical or revolutionary social change.¹ In great parts of the contemporary world, trade unions have consistently been on the defensive, suffering a decline in membership, public status and effectiveness in achieving their core objectives.² In Africa, trade unionism cannot be studied successfully in isolation from its association with national politics.³ Thus, the present discourse on the potential of trade unionism evokes efforts to reinvigorate and reformulate the defining agency relationship,⁴ especially between trade union leaders (representatives or shop stewards) and the workers (members or employees). The question of leadership in unions and broader worker movements is crucial to understanding how and why workers engage in collective action but is relatively poorly explored.⁵ Leadership entails the exercise of influence over others in order to complete a task or reach a goal. Leadership is a crucial factor in the process of worker mobilisation as “the whole process of collectivisation is heavily dependent on the actions of small numbers of leaders or activists”.⁶

Namibia’s public and private sectors have encountered substantial industrial or strike action. This article highlights the agency problem that arises between trade union leaders or bargaining agents and the union members or workers (the principals) they represent. The agency problem is a conflict of interest inherent in any relationship where one party is expected to act in another’s best interests. How to ensure that the agent acts solely in the interest of the principal is a challenge. The agency problem can occur in private companies, joint ventures, non-governmental organisations (NGOs), professional institutions and governmental bodies. This challenge is also present between trade union leaders and union members. Namibian law provides for freedom of association, which includes the freedom to form and join trade unions;⁷ it also entrenches fundamental labour rights and protections, and regulates collective labour relations, among other matters.⁸ The law, however, does not cater well for leaders’ accountability in cases where they sign collective agreements in bad faith or fail to deliver on their

¹ Budeli “Trade Unionism and Politics in Africa: The South African Experience” 2012 45(3) *Comparative and International Law Journal of Southern Africa* 454; McIlroy “Marxism and the Trade Unions: The Bureaucracy Versus the Rank and File Debate Revisited” 2014 42(4) *Critique Journal of Socialist Theory* 497.

² Hyman “How Can Trade Unions Act Strategically?” 2007 13(2) *Transfer* 2/07 193.

³ Budeli 2012 *CILSA* 454.

⁴ Fairbrother “Rethinking Trade Unionism: Union Renewal as Transition” 2015 26(4) *Economic and Labour Relations Review* 561.

⁵ Alexander “Leadership and Collective Action in the Egyptian Trade Unions” 2010 24(2) *Work, Employment and Society* 242–243; Kelly *Rethinking Industrial Relations* (1998); Barker, Johnson and Lavalette (eds) *Leadership and Social Movements* (2001).

⁶ Alexander 2010 *WES* 242.

⁷ Art 21 of the Namibian Constitution of 1990.

⁸ Labour Act 11 of 2007.

mandates. This article argues that trade union representatives or leaders should be held accountable for failing to deliver on their mandates through the rules of the law of agency and such obligations should be embedded in our labour laws.

2 THE ESSENCE AND MANDATES OF TRADE UNIONS

Workers, individually, are too weak and incapable to have their demands met at their workplaces, hence the need for a union to take advantage of the power that comes with unity and collectivism.⁹ Namibia, despite its small population of just over two million people, has almost 40 trade unions split into three federations.¹⁰ Jauch explains further:

“The largest trade union federation is the National Union of Namibian Workers (NUNW), which represents an estimated 60 000–70 000 workers. The NUNW played a key role during Namibia’s liberation struggle and continues to be affiliated to the South-West Africa People’s Organisation (SWAPO), which is the ruling party since independence.”¹¹

Namibia’s second trade union federation is the Trade Union Congress of Namibia (TUCNA), which represents an estimated 40 000 to 50 000 workers; it was formed in 2002 by unions that rejected the NUNW’s party-political link.¹² The third trade union federation, the Namibia National Labour Organisation (NANLO), is much smaller, with just a few thousand members. It emerged in 2014 following the dismissal of the former NUNW general secretary, who then established a new federation. Jauch further points out:

“These three union federations differ substantially in terms of their historical backgrounds, as the NUNW was always closely linked with SWAPO, while TUCNA represents most of those unions which want to operate independently from political parties. NANLO is essentially a break-away from the NUNW and is currently not linked to a political party. In ideological terms, the three federations are fairly similar beyond the question of the union-party linkage.

⁹ Chidzambwa *An Exploratory Study of the Effectiveness of the Namibia Public Workers Union (NAPWU) as a Collective Bargaining Unit for Workers in the Civil Service: A Case Study of the Namibian Broadcasting Corporation (NBC)* (Masters thesis, University of Namibia) 2015. For a similar discussion on South Africa, see also Buhlungu, Brookes, and Wood “Trade Unions and Democracy in South Africa: Union Organizational Challenges and Solidarities in a Time of Transformation” 2008 46(3) *British Journal of Employment Relations* 439.

¹⁰ Jauch “Namibia’s Labour Movement: Prospects and Challenges for 2017 and Beyond” (January 2017) <https://www.pambazuka.org/democracy-governance/namibia%E2%80%99s-labour-movement-prospects-and-challenges-2017-and-beyond> (accessed 2021-04-25).

¹¹ *Ibid.*

¹² Jauch *Trade Unions in Namibia: Defining a New Role?* (2004); NemaKonde “South African Trade Unionism at a Crossroads: The Case of the Congress of South African Trade Unions” 2018 5(1–2) *African Journal of Democracy and Governance* 137.

They focus predominantly on 'bread and butter' issues and generally operate within a social-democratic framework. At present, none of them advocates for a more radical break with the existing socio-economic order."¹³

The issue of trade unions and politics has been central in the history of the Namibian labour movement.

Overall, Namibia's trade unions are characterised by a lack of ideological clarity, and statements by various union leaders point to ideological contradictions.¹⁴ Sentiments of radical nationalism and liberation have been combined with an acceptance of neoliberalism as the ideology of the "free market" multilateral business environment. As trade union leaders entered company boards as part of a poorly defined union investment strategy, their views and interests have increasingly converged with those of government and business.¹⁵ Also, some trade union leaders are now occupying management positions in the public and private sectors, which contradicts the principle of worker control within unions. These developments point to a lack of clarity regarding the working-class base of the labour movement, and confusion as to whose interests it is meant to serve.¹⁶

According to Parker, a trade union can be described as an organisation of employees whose principal object is the regulation of relations between its members, on the one hand, and their employers or employers' associations of which the employers are members, on the other hand.¹⁷ The treatment of trade unions in Namibian labour legislation is discussed later in the article. The essence of trade unions is the need for employees to present a united and collective front in their dealings with employers, which often have economic power. The purpose of a trade union is to secure suitable working conditions and remuneration for its individual members.¹⁸

Employers have always wielded enormous economic power over their employees, not to mention the tremendous economic and political power that modern governments have over their employees.¹⁹ As a result, employees have found it necessary, or imperative, to bind together into employees' organisations aimed at safeguarding and promoting their interests in the face of the vast economic power that private employers possess and exercise over employees, as well as the overwhelming economic and political power that governments bring to bear upon their own

¹³ Jauch <https://www.pambazuka.org/democracy-governance/namibia%E2%80%99s-labour-movement-prospects-and-challenges-2017-and-beyond>.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Parker *Labour Law in Namibia* (2012) 242; Munson "The Trade Union as an Organization" 1965 88(5) *Monthly Labor Review* 497.

¹⁸ *Ibid.*

¹⁹ Parker *Labour Law in Namibia* 141.

employees.²⁰ The provenance of free and lawful organisation of employees into trade unions lies in statute in Namibia, as is the case in most countries. The objectives of labour dispute resolution are speed, accessibility and legitimacy (which derive from representivity in the dispute resolution body, certainty and expertise).²¹ The *raison d'être* for trade unions is fairly obvious: to act on behalf of the employees of an organisation. Labour dispute resolution bodies, including trade unions, have an important role to play in maintaining an appropriate balance between the rights and interests of employees and employers while maintaining relatively healthy industrial relations with minimal resort to self-help.²²

Thus, if the trade union leadership is politically or otherwise affiliated, the trade union will hardly retain its independent existence, structure and organisation. The probability of this occurring is high where trade union leaders are members of the ruling party that is the government of the day. Union leaders or representatives may therefore be compromised as, based on their affiliation, they may not always be fully willing to disagree with employers during industrial action. In Namibia, the trend is that trade union leaders often end up in high positions in government after their trade union jobs, and in some instances, such leaders are well-known affiliates of the ruling party. As a consequence, the workers will often be at the periphery of the agency relationship in trade unionism, instead of at its heart. Importing the obligations and principles of the law of agency into the trade union context can assist to repair this relationship and place the workers at its heart. This would be in line with the principles of good faith, equity, and economic and social justice.

3 AGENCY IN GENERAL AND AGENCY LAW

The agency problem is a conflict of interest inherent in any relationship where one party is expected to act in another's best interests. In corporate governance, finance, company or contract law, the agency problem usually refers to a conflict of interest between a company's management or directors and the company's stockholders or shareholders. Adam Smith, in his 1776 treatise *The Wealth of Nations*, pointed out the fundamental challenge underlying all corporate governance affairs, which is that "the directors of companies, being managers of other people's money, cannot be expected to watch over it with the same vigilance with which they watch over their own".²³ This is the agency problem. Simply put, whenever the owner of wealth (the principal) contracts with someone else (the agent) to manage his

²⁰ *Ibid.*

²¹ Roux and Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 120.

²² *Ibid.*

²³ Tricker *Corporate Governance: Principles, Policies and Practices* 3ed (2015).

or her affairs, the agency dilemma arises. How to ensure that the agent acts solely in the interest of the principal is a challenge.

The demands for transparency, accountability, reporting, audit, independent directors, and other requirements of company law, labour legislation or even the Constitution, and the demands of the corporate governance codes are, *inter alia*, all responses to the agency dilemma. The agency problem is not limited to relations between investors in listed companies and their agents. The agency problem can occur in private companies, joint ventures, NGOs, professional institutions, trade unions and governmental bodies. Wherever there is a separation between the members and the governing body appointed to protect their interests and deliver the required outcomes, the agency problem will arise, and corporate governance issues occur. The members could be the shareholders in a company, a professional institution or a trade union. Essentially, in agency situations, the parties have asymmetrical access to information, the directors know far more about the corporate situation than do the shareholders who must trust them. This situation is also present between trade union leaders and their members.

The term “agency” is used in a variety of contexts.²⁴ In legal contexts, the word “agent” is commonly used with respect to a person whose activities are concerned with the formation, variation or termination of contractual obligations, and “agency” has a corresponding meaning.²⁵ According to Havenga *et al*, one way the expression is used is to refer to an agreement in terms of which one party undertakes to perform a task or commission on behalf of another.²⁶ Havenga *et al* further pointed out that

“in this context agency indicates that the parties conclude a contract from which reciprocal rights and obligations flow. This contract is known as a contract of mandate and is governed by the law of contracts in general and by the rules applicable to contracts of mandate in particular.”²⁷

“Agency” also occurs where one person (the agent) concludes a juristic act on behalf of another (the principal). The juristic act is an act that creates, alters, or extinguishes legal relationships through the expression of the will of one or more persons.²⁸ Used in this sense, “agency” combines the principles of mandate and representation.

The concept of agency or representation therefore arises whenever one person, the agent or representative, concludes a juristic act for or on behalf of another, who is called the principal, with the result that a legal tie arises

²⁴ Havenga, Hurter, Schulze, Havenga, Kelbrick, Manamela, Manamela, and Stoop *General Principles of Commercial Law* 7ed (2013) 295.

²⁵ Kerr *The Law of Agency* 3ed (1991) 3; *Gowan v Bower* 1924 AD 550 569.

²⁶ Kerr *The Law of Agency* 3.

²⁷ *Ibid.*

²⁸ *Ibid.*

between the principal and a third party or third parties.²⁹ Any rights acquired, and duties assumed by the agent are for the principal and not for the agent. Agency therefore comprises the totality of juristic relationships that arise between these three parties.

Agency serves various needs in every society. First, the interests of those who have no capacity to act can be protected. Secondly, agency makes it possible for juristic acts to be performed on behalf of persons who are absent, and thirdly, it also allows for the use of specialised services of specific agents.³⁰ However, for a person to perform an act of representation, authority is a requirement and must be given. The duties or obligations of the agent include: the duty to follow instructions; the duty to exercise care and diligence; the duty of good faith; and the duty to account properly. These obligations are briefly discussed below, under the lens of trade unionism or collective labour law as branches of labour law.

3 1 The duty to follow instructions

The duty to follow instructions entails that the conduct of the agent should fall within the parameters of the agency agreement. The agent is bound to act in accordance with the principal's instructions.³¹ Should the agent not follow these instructions to the best of her or his ability, the principal has a right of recourse against the agent. This obligation and right of recourse is not visible in the labour legislation nor between trade union leaders and the represented workers.

Since agency is a form of service, it is clear that agents are bound to do what they have been instructed to do.³² This obligation should be well defined in the agency of trade unions, as should the consequences that follow from failure to do as instructed. Striking employees are often unhappy with the outcome of their industrial action because the trade union leadership did not deliver as instructed.

3 2 The duty to exercise care and diligence

The agent must use such care, skill and diligence as reasonably required for the due performance of his or her mandate. In the course of time, the law has implied into every contract of agency an undertaking by the agent that he will act with the care and diligence of the ordinary prudent man when he engages upon his principal's business.³³

²⁹ Havenga *et al* *General Principles of Commercial Law* 299.

³⁰ *Ibid.*

³¹ Havenga *et al* *General Principles of Commercial Law* 304.

³² *Bloom's Woollens (Pty) Ltd v Taylor* 1962 (2) SA 532 (A) par 538.

³³ *Sakala v Wamambo* 1991 (4) SA 144 (ZHC) 147C/D–148B/C.

This obligation is the very reason for agency, although it may vary from case to case. In *S v Heller*,³⁴ the court posited that the principal bargains for the exercise of the disinterested skill, diligence and zeal of the agent. So, within trade union agency, as in many agency contracts, the *naturalia* include that the agent must perform his or her functions faithfully, honestly, and with care and diligence, and to account to his or her principal for his actions.

3 3 The duty of good faith

It is settled in law that the agent occupies a position of trust and confidence in relation to the principal. This fiduciary relationship requires the agent to conduct those affairs of the principal to which the authority extends, and in the best interests of the principal, and not for his or her own benefit.³⁵

The fiduciary nature of an agent's relationship with the principal and of an employee with the employer came before the Supreme Court of Appeal in the cases of *Ganes v Telecom Namibia Ltd*³⁶ and *Phillips v Fieldstone Africa (Pty) Ltd*.³⁷ The court stressed that an agent was obliged not to work against the principal's interests, nor place himself in a position where his interests conflicted with that of the principal.

Owing to apparent political pressure or affiliation and weak bargaining position, trade union leaders' duty of good faith has been compromised. They may not necessarily derive secret profits, but trade union leaders are directly and indirectly in conflict of interest with workers' best interests. Therefore, Namibia's labour laws must firmly borrow this fundamental principle of agency if trade unions are to deliver on their mandates and retain public confidence. No agent (or trade union representative or leader) may place himself in any position where his or her interest and his or her duty conflict.³⁸ Whenever, a union leader fraudulently compromises these principles, a number of remedies should be available to affected employees.

3 4 The duty to account properly

An agent is also obliged to account for everything in good faith.³⁹ The relevant pillar of this duty is that the agent provides information when necessary. An agent must give the principal full and accurate information of what he or she has done in carrying out the mandate and full and accurate

³⁴ 1971 (2) SA 29 (A) par 44 C.

³⁵ Havenga *et al General Principles of Commercial Law* 304; Swiatkowski "The Concept of Interest Representation During Industrial Disputes" 1993 3 *Tilburg FLRev* 239.

³⁶ 2004 (3) SA 615 (SCA).

³⁷ 2004 (3) SA 465 (SCA).

³⁸ *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 par 33.

³⁹ Kerr *The Law of Agency* 153; *David Trust v Aegis Insurance Co Ltd* 2000 (3) SA 289 (SCA).

information of the contract concluded.⁴⁰ Failure to disclose critical information often results in surprising or confusing industrial action outcomes. Therefore, agents must at all times be able to account properly for all matters concerning the agency, including in labour relations and disputes.

4 NAMIBIAN LABOUR LAWS AND TRADE UNIONISM

4 1 The Namibian Constitution and Labour Act of 2007

The Namibian Constitution provides for freedom of association.⁴¹ The inalienable right of workers to withdraw their labour legitimately and the employers' right, in similar fashion, to lock out employees, is sacrosanct to the Constitution and is therefore given practical expression in the labour laws.⁴²

Article 21(1)(e) of the Namibian Constitution (which is in accord with Namibia's international obligations and commitments under the International Labour Organisation (ILO)'s Freedom of Association and Protection of the Right to Organise Convention (ILO Convention),⁴³ and the International Covenant on Civil and Political Rights (ICCPR)) guarantees an employee's right to form and join a trade union of her or his choice. The Namibian Constitution, in a way, also supports the right to strike. Article 21(1)(f) of the Constitution protects employees from being imposed with a penal sanction solely for partaking in a strike.

In addition, Namibia is the first country expressly to include a right to administrative justice in its Constitution.⁴⁴ Article 18 reads as follows:

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a Competent court or Tribunal."

⁴⁰ Kerr *The Law of Agency* 155.

⁴¹ Art 21 of the Constitution of Namibia; UN General Assembly *Universal Declaration of Human Rights* (10 December 1948) 217 A (III); and International Labour Organization (ILO) *Constitution of the International Labour Organisation (ILO)* (1 April 1919); Jenks "International Protection of Trade Union Protection" 1957 87(1) *Heinonline* 14–19; Albertyn "Freedom of Association" 1991 2 *South African Human Rights Yearbook* 305.

⁴² Gurirab "A Season Rich in Industrial Actions" (October 2012) <https://www.namibian.com.na/index.php?id=100930&page=archive-read> (accessed 2021-06-2).

⁴³ ILO *Freedom of Association and Protection of the Right to Organise Convention* C87 (1948) Adopted: 09/07/1948.

⁴⁴ Burns and Beukes *Administrative Law Under the 1996 Constitution* 3ed (2006) 201.

This article imposes a positive duty on the public administration to comply with the requirements of fairness, legality, and reasonableness in its actions.⁴⁵ Failure to do so grants an aggrieved person the right to seek redress before a court or tribunal.⁴⁶

4 2 The Labour Act 11 of 2007 and strikes

In labour relations, there are widely accepted acts that parties to industrial disputes of interest may resort to: employees may strike, and employers may resort to a lockout. A strike in labour or employment relations is a joint action of a group of employees, whereby they withdraw their labour partially or totally, with the aim of inducing the employer to accept their joint demands.⁴⁷ A “strike” is similarly also defined in the 2007 Labour Act.⁴⁸ For the purposes of the Act, a strike is industrial action taken by employees as parties to an industrial dispute of interest.

The Act grants employees the right to take industrial action in the form of a strike, and it puts down requirements to make such industrial action lawful.⁴⁹ The courts have also recognised striking as an essential ingredient of the negotiation process, and the strike weapon is an integral part of collective bargaining.⁵⁰ The ILO Convention does not clearly provide for the right of employees to strike.⁵¹ However, the right to strike is an essential element of collective bargaining.

The 2007 Labour Act seeks to regulate, *inter alia*, the registration of trade unions and employers’ organisations, collective labour relations, and the systematic prevention and resolution of labour disputes.⁵² Strikes in recent years, mostly in the public sector, have cast doubt on the effectiveness of the Labour Act, and trade unions, in this area.

⁴⁵ *Ibid.*

⁴⁶ *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC).

⁴⁷ Parker *Labour Law in Namibia* 223.

⁴⁸ According to s 1, “strike” means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, another employer or an employers’ organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute. See also s 213 of South Africa’s Labour Relations Act 66 of 1995; s 2 of Swaziland’s Industrial Relations Act 1 of 2000.

⁴⁹ Chapter 7 of the Labour Act 11 of 2007 or specifically s 74(1)(a) of the Labour Act provides that “every party to a dispute of interest has the right to strike”.

⁵⁰ *Smit v Standard Bank Namibia Limited* 1994 NR 366 (LC); *Barlows Manufacturing Co Ltd v Metals & Allied Workers Union* (1990) 11 ILJ 35 (T); *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A); *Crofter Harris Tweed Co v Veitch* [1942] AC 435 par 463.

⁵¹ Bellace “The ILO and the Right to Strike” 2014 153(1) *International Labour Review* 29–70.

⁵² Preamble to the Labour Act 11 of 2007.

Parker notes three fundamental points with regard to a strike.⁵³ First, an employee's right to take industrial action in the form of a strike is statutory. Secondly, the remedy of a strike is not open to a single employee acting alone and on his own behalf to back a demand for improved working conditions for himself. Thirdly, the strike action must be for a specific purpose, namely, as a tool for inducing an employer to accede to proposals of employees where such demands or proposals are the subject of an industrial dispute between the employer and the employees.⁵⁴ A strike is therefore an indispensable tool and economic instrument used as a last resort to propel parties to an industrial dispute to come to some agreement at the negotiation table. Given the significance of a strike, the relationship between employees and their trade union representatives should not be undermined. Trade union leaders should be held accountable in events where they compromise in the negotiation process, as this will often have a negative impact on the lives of workers.

4 3 Trade unions

In terms of the 2007 Labour Act, a "trade union" is defined as an association of employees whose principal purpose is to regulate relations between employees and employers.⁵⁵ Chapter 6 of the Labour Act establishes the legal framework for the formation and registration of trade unions, and other matters connected with, or incidental to, trade union rights and activities. According to the 2007 Labour Act, certain notable rights accrue to a trade union upon registration.⁵⁶

The right to join or form trade unions is a genus of the wider human right to freedom of association, which is recognised in international human rights laws. By virtue of article 144 of the Constitution, international law forms part of Namibian law. Article 22(1) of the ICCPR provides that everyone shall have the right to freedom of association with others, and the right to form and join trade unions for the protection of his interests.⁵⁷ State parties (including Namibia) are expected to domesticate and comply with these provisions. Article 21(1)(e) of the Namibian Constitution, which is in accord with Namibia's international obligations and commitments under the ILO Convention and the ICCPR, also guarantees an employee's right to form and join a trade union of her or his choice.⁵⁸ At international, regional and

⁵³ Parker *Labour Law in Namibia* 113.

⁵⁴ *Ibid.*

⁵⁵ S 1 of the Labour Act 11 of 2007.

⁵⁶ S 59 of the Labour Act 11 of 2007.

⁵⁷ Namibia ratified the ICCPR in 1996; see also ILO *Freedom of Association and Protection of the Right to Organise Convention C87* (1948) Adopted: 09/07/1948.

⁵⁸ If the Labour Commissioner refuses to register a trade union, he or she must give notice of such decision and the reasons for it. See *Frank v Chairperson of the Immigration Selection*

national levels, the right to form trade unions is recognised as a fundamental right. It can therefore be argued that trade unions are essential agents in society, and when they fail to uphold the core obligations of agency, they violate international, constitutional and labour laws.

In addition, the Labour Act of 2007 provides that a trade union must draft a constitution as its guiding document. The elements of the constitution of a trade union are set out in the Act.⁵⁹ The constitution of a trade union must declare the objects of the union and clearly prescribe the functions of its office-bearers and officials. A trade union whose sole object is to gain and maintain political power is not really a trade union for the purpose of the Act.⁶⁰ Although trade unions may vigorously and openly support a political party, the politicisation of trade unions perhaps makes it difficult to hold trade union leaders accountable. Of course, trade unions continue to play an important role in African politics and elsewhere. But there is a need to strengthen the agency component in trade unionism if trade unions are to remain relevant in Namibia and other parts of the world.

5 COLLECTIVE BARGAINING

According to Grogan, collective bargaining takes place when one or more employers engage with one or more employee collectives in an attempt to reach agreement on issues of mutual concern.⁶¹ There is a substantial difference between consultation and bargaining.⁶² Grogan points out:

“By collective bargaining we mean those social structures whereby employers bargain with the representatives of their employees about the terms and conditions of employment, about rules governing the working environment and about procedure that should govern the relations between the union and employer. Such bargaining is called collective bargaining because on the workers’ side the representative acts on behalf of a group of workers.”⁶³

Collective bargaining is a fundamental philosophy, and is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes.⁶⁴ The recognition and inclusion of trade unions for the purpose of collective bargaining is a statutory innovation.⁶⁵

Board 1999 NR 257 (HC) and *Katofa v Administrator-General for South-West Africa* 1985 (4) SA 211 (SWA).

⁵⁹ S 53 of the Labour Act 11 of 2007.

⁶⁰ Parker *Labour Law in Namibia* 248.

⁶¹ Grogan *Workplace Law* 10ed (2009) 312.

⁶² *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) par 493H–I.

⁶³ *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) par 1237A–B.

⁶⁴ *NUM v East Rand Gold & Uranium Co Ltd supra* par 1236J–1237A.

⁶⁵ Parker *Labour Law in Namibia* 261.

However, it needs to entrench the fundamental principles of the law of agency, as trade unions are also often exclusive bargaining agents.

The question that often crops up during collective bargaining is whether it is practicable or fair to an employer that some of its own employees (who by virtue of their managerial position in the enterprise represent the employer during collective bargaining with a trade union) should be members of that trade union.⁶⁶ Managers, in most cases, belong to the management component of the organisation.⁶⁷ Nothing prevents an employee who is a manager of an organisation from forming or joining a trade union.⁶⁸ However, it may be unconscionable for an employee to be placed under undue pressure to disclose the employer's confidential information or to be made a member of the negotiating team representing the trade union in negotiations with the employer where it is part of the employee's duties to negotiate on behalf of, or assist, the employer in negotiations with the same trade union.⁶⁹ The Industrial Court in the case of *Keshwar v SANCA* observed that an employee may not participate in those union activities that could make it impossible or extremely difficult to perform the tasks entrusted to him by his master.⁷⁰ This discussion also shows the agency dilemma in trade unions from the employer's perspective. Trade unionism or strike law, as it is currently, is prone to conflicts of interest. Therefore, it is recommended that labour legislation be revised to close these gaps and prevent potential conflicts of interest in the bargaining units from both the employee and employer perspectives.

Upon registration, trade unions acquire certain statutory rights. Those rights, and rights attaching to a trade union as the exclusive bargaining agent, are inherently collective rights and cannot attach to individual members of the trade union.⁷¹ The basis of collective bargaining is the desire that employers and employees should bargain freely with minimum state interference to promote industrial peace and tranquillity. Although state intervention is in the form of legislation, it is conducive to sound employment or labour relations. Therefore, the machinery of collective bargaining has the effect of replacing the arrangement whereby remuneration and other terms and conditions of service of employees are negotiated between the employer and its employees individually.⁷²

⁶⁶ Parker *Labour Law in Namibia* 244.

⁶⁷ Blunt *Organisational Theory and Behaviour: An African Perspective* (1983).

⁶⁸ *Keshwar v SANCA* 1991 12 ILJ 816 (IC).

⁶⁹ *Keshwar v SANCA supra* at 818H.

⁷⁰ *Ibid.*

⁷¹ *Mutual & Federal Insurance Co v Bank, Insurance, Finance & Assurance Workers Union* (1996) 17 ILJ 241 (A).

⁷² Parker *Labour Law in Namibia* 259.

The desired result of collective bargaining is the making of a collective agreement. A collective agreement is defined in the Labour Act as a written agreement concerning the terms and conditions of employment, or any other matter of mutual interest, concluded by (a) registered trade union(s) and an employer(s) or registered employers' organisation.⁷³

Having access to adequate, correct and relevant information is one of the hallmarks of genuine collective bargaining as it leads to both the employer and trade union in question understanding each other's position and circumstances.⁷⁴ It is an unfair labour practice for an employer to fail to disclose to a registered trade union any relevant information that is reasonably required to enable the trade union to consult and bargain collectively in respect of any labour matter.⁷⁵ Wording in legislation implies that the important duty to disclose information only lies between the employer and the trade union. However, it is equally, or even more, important that this duty extends and is emphasised in the relationship between trade union leaders and the workers they represent.

It is also an unfair labour practice for the parties to bargain in bad faith. The element of good faith is essential not only in the law of agency but also in the labour legislation or laws of most countries. The element of good faith is a vital one and has been discussed above in the context of the obligations of agents in agency law. Goldstone JA (as he then was) stated in the case of *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd*⁷⁶ that "the very stuff of collective bargaining is the duty to bargain in good faith". Good faith "does not compel a party to agree to each and every proposal, neither does it require a party to make a concession anyhow".⁷⁷ Therefore, if an impasse is reached owing to bad faith on the part of the trade union representatives, direct negotiation with individual employees would be fair, just and equitable.

6 NAMIBIA'S INDUSTRIAL ACTION IN CONTEXT

According to the Olsonian theory of collective action, unions are encompassing organisations whose members are subsumed into a general mass, which leads to problems of representivity and ultimately of maintaining

⁷³ S 1 of the Labour Act 11 of 2007.

⁷⁴ Parker *Labour Law in Namibia* 264.

⁷⁵ S 50(1)(d) subject to s 50(2)–(7) of the Labour Act 11 of 2007; s 16(3) of South Africa's Labour Relations Act 66 of 1995; and s 181 of United Kingdom's Trade Unions and Labour Relations (Consolidation) Act of 1992.

⁷⁶ (1991) 12 ILJ 1221 (A) par 123.

⁷⁷ *Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia NLLP* 2002 (2) 188 NLC par 198.

mobilisation.⁷⁸ In a study conducted by Chidzambwa,⁷⁹ the findings revealed that the majority of NAPWU members believe that their union has little or no influence at all when it comes to the working conditions of its members. The respondents feel insecure, as management can act as it deems fit and encounters no resistance from the union; the widely held opinion of NAPWU members at NBC was that there is poor accountability of the union to its members – to the extent that some members felt that their union was conniving with management against them.⁸⁰ Despite the above-mentioned problems, NAPWU (through its shop stewards) has assisted its members in the area of legal aid by supporting them in cases of conflicts among employees, or other individual problems faced with their immediate supervisors.⁸¹ The outcome of the research indicated that NAPWU should consider adopting “servicing”⁸² and “organising”⁸³ models of union representation and to let these two complement each other. This would prevent the “us-and-them” relationship currently prevailing between the union and its members and affecting the collectivism approach.

Namibia has seen a quite-marked increase in strikes and industrial action in the country generally.⁸⁴ At times, it appeared that the successive strikes were copycats or that the success of one group fed into the actions of others. What was also remarkable was that most of the strikes have been in the public sector.⁸⁵ The strikes have often revealed the huge gap between the remuneration of executive management, particularly at state-owned enterprises, and those at the bottom of the pile.

The print media in Namibia has consistently reported that the leaders of the workers, in the run-up to the congress of the ruling party (South West Africa People’s Organisation [SWAPO]), locked themselves up in smoked-filled rooms plotting and horse trading on who should or should not be their ruler rather than being concerned with the welfare of their members.⁸⁶ It appears that trade union leaders have long sold their souls for silver coins to politicians and an assortment of dubious moneymen. In other words, being a trade union leader or representative is now an opportunity for career

⁷⁸ Wood “Solidarity, Representativity and Accountability: The Origins, State and Implications of Shopfloor Democracy Within the Congress of South African Trade Unions” 2003 45(3) *The Journal of Industrial Relations* 326.

⁷⁹ Chidzambwa *An Exploratory Study of the Effectiveness of the Namibia Public Workers Union (NAPWU) as a Collective Bargaining Unit for Workers in the Civil Service* 2015 A thesis submitted in partial fulfilment of the requirements for the Master of Public Administration at the University of Namibia 33.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² The ability to deliver services for employees in improving work and working conditions.

⁸³ The term used to encapsulate those factors that give a union the capacity to represent its members by virtue of its healthy state as an organisation.

⁸⁴ Gurirab “A Season Rich in Industrial Actions” *The Namibian* 09 October 2012.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

development or self-enrichment. The bosses of the unions sit on boards as shareholders of companies and toast with their newfound friends while the constituents of the unionists eke out a living in squalor.⁸⁷

What then are the contributing factors that lead to strikes? According to Jauch who is a labour researcher and educator based in Windhoek, there are several factors that lead to strikes, though they may differ from case to case.⁸⁸ In some instances, they seem to be caused by hard-line attitudes during negotiations or a breakdown of trust in management. The NAMDEB strike also points to deep-rooted tensions between the company management and its workforce; thus, a relatively small dispute escalated into a drawn-out strike for almost a month causing financial losses to workers and the company alike.⁸⁹ The poor state of labour relations was also shown by the fact that political intervention had to be used to settle the strike.

In other cases, companies have refused to provide trade unions with essential information required for collective bargaining, thus setting the stage for confrontational negotiations. Perhaps the most important factor leading to strikes is the enormous level of inequality experienced at the workplace and in society in general.⁹⁰ Such inequalities have to be seen as socially unjust and seem to have been a key factor in the recent strike at Rossing Uranium.⁹¹ In addition, various role players from labour movements, employers' organisations and government have expressed concerns and offered explanations that "trade unions are becoming unreasonable". Some observe that the challenges faced by NAPWU and National Union of Namibian Workers are the same though, and although both unions believe that unity is the way forward, they fail to unite because of political differences.⁹²

In 2018, there were also many major strikes in Namibia. Among them were one organised by teachers, one by the national broadcaster (Namibia Broadcasting Corporation) and another by the University of Namibia; like any other prior to them, they displayed that in Namibia's trade unionism, there was an agency problem between the representatives (the bargaining agents) and the workers or employees (the principal). In terms of the Act, a trade union is a juristic person, and a member, office-bearer or official of a registered trade union is not personally liable for any liability or obligation

⁸⁷ *Ibid.*

⁸⁸ Jauch "Namibia's Strike Wave" (October 2011) <https://www.thevillager.com.na/articles/414/namibias-strike-wave/> (accessed 2021-06-02).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Smith "Namibia's Peace and Stability Are Under Threat, Unless Striking Socio-Economic Inequalities in the Country Are Addressed" (2019) <https://www.namibian.com.na/index.php?id=63312&page=archive-read> (accessed 2019-04-30).

incurred in good faith by the union only because of being a member, office-bearer or official. What about the aspect of bad faith? What if union leaders and authorised representatives sign collective agreements that are not in the best interest of their members? Legislation is silent on these issues. The rising number of labour disputes in Namibia is a wake-up call for government to revise labour laws governing the role and powers accorded to trade unions and employers, and dispute resolution policies in line with the latest economic developments in the country and international standards to ensure fairness and equity.

7 CONCLUSIONS AND RECOMMENDATIONS

This article has explored the relationship between trade union leaders or representatives and employees or workers from the perspective of the law of agency. The article has argued for integration of the general principles of agency law into labour laws to ensure trade union leaders' accountability, which will in turn minimise the agency dilemma in trade unions. Trade unions should be genuine representatives (the agents) of workers (the principals) and must in the performance of their duties be guided by the best interests of the workers and the essential element of good faith. Factors such as compromised leadership, patronage, lack of good governance principles and political intrigue in unionism need to be addressed. Otherwise, the agency problem will persist and compromise industrial action in future. Therefore, labour law practitioners should solemnly scrutinise this conundrum with a view to ensuring that the best interests of workers or union members are upheld by trade union leaders, above anything else. Trade unions must be transformative and progressive movements if they are to remain relevant and sustainable in Namibia. This can be achieved by introducing and integrating the principles of the law of agency in labour laws to enforce union accountability.

In addition, the successful struggle of the working class for decent wages, good working conditions and working hours, and for the right to organise and strike is a monumental and towering achievement of the last century. In order to retain the success and significance of trade unions in Namibia and elsewhere, the legislature, civil society and legal practitioners need critically to assess the agency problem in trade unions and make appropriate recommendations for reform. Reforms should deal specifically with the agency relationship between trade union leaders or representatives and the workers or employees they represent. This reinforcement is likely to restore public confidence in trade union functions and help them remain relevant to their mandates. Further research is recommended on this subject matter. Below are some useful suggestions on how to address these issues:

- Introduce stricter controls in collective bargaining and re-examine the system of collective labour law with a view to eliminating dysfunctional barriers.
- Enact a Trade Unions Act or similar legislation aimed at ensuring that trade unions continue to play a role in promoting and safeguarding workers' economic and social interests rather than abdicating that duty in exchange for bribes and related favours from employers.⁹³
- Autonomous public sector bargaining councils could be introduced.⁹⁴
- Avoid trade union pluralism⁹⁵ and try conglomerate unions in order to recompose the modalities of participation in decision-making in trade unions.⁹⁶
- Form a new type of social movement unionism in which workers' interests are at the heart of negotiations, dispute settlement or during collective bargaining.
- In Namibia, as in South Africa,⁹⁷ extreme social inequality and political affiliation (especially of the union leaders) plays the biggest part in fueling the tensions that are manifested in disorderly labour disputes.⁹⁸ Ironically, it is argued that if trade unions were to disengage from political parties and concentrate on the advancement of their members, rather than a political agenda, the trustworthiness of the Namibian labour movement would improve while it simultaneously lobbied government to pursue healthier policies on labour matters, especially collective bargaining.
- Despite their relationships with political parties, trade unions must remain autonomous.⁹⁹ Legislative reforms could also reflect a worker-led collective bargaining approach or model.
- Moving beyond a traditional trade-union-centred approach, some suggest that for trade unionism to sustain its relevance within the

⁹³ Du Toit and Ronnie "The Necessary Evolution of Strike Law" in Roux and Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 195–218.

⁹⁴ Godfrey and Bamu "The State of Centralised Bargaining and Possible Future Trends" in Roux and Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 242.

⁹⁵ Lamptey and Parku "An Exploratory Study of Trade Union Pluralism in Ghana" 2018 42(1) *African Journal of Employee Relations* 4312.

⁹⁶ Thomas "Conglomerate Unions and Transformations of Union Democracy" 2017 55(3) *British Journal of Industrial Relations* 648.

⁹⁷ Roux and Rycroft *Reinventing Labour Law* (2012) 120.

⁹⁸ Uys and Holtzhausen "Factors That Have an Impact on the Future of Trade Unions in South Africa" 2016 13 *Journal of Contemporary Management* 1164.

⁹⁹ Budeli 2012 *CILSA* 454; Yihong "Labour in Defiance: The Emergence of Autonomous Collective Bargaining in Southern China" 2016 11(2) *Journal of Comparative Law* 331.

present globalised liberal political culture, its revolutionary outlook must give way to a new business orientation.¹⁰⁰

- Members of trade unions must be careful in the nomination of candidates who wish to be elected as office-bearers.
- Further research must explore and identify strategies that can be implemented by trade unions to enhance healthier and stronger solidarity with the workers.

There can be no single, pragmatic and final answer to the dilemmas posed by the relationship between union leadership (representatives or shop stewards) and employees or workers for they are shaped in different countries by different historical and national circumstances.

¹⁰⁰ Ajayi and Tongo "Liberal Democracy, Trade Unionism and Sustainable Development in Nigeria" 2007 2(2-3) *African Journal of Business and Economic Research* 90.