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*Review*

# **A counterbalance between the unions' right to disclosure of information and the employers' right to the privacy or confidentiality of information**

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The issue of disclosure of information during negotiations has been a concern to both unions and employers. Unions have the right to have access to information that is in possession of the employer, while the employer has the right to refuse to disclose such information if the disclosure will affect their privacy or if the information requested is confidential and the disclosure will negatively impact on the competitive edge of the business. Despite the fact that access to information is protected in the law, the union can only request information that is relevant to the discussion before the parties. A refusal by the employer to provide a union with relevant information can negatively impede the prospects for a successful collective agreement or an amicable settlement of a labour dispute. The point of contention is that employers may be concerned that very important information like trade secrets may land in the hands of competitors if precautionary measures (like refusing to disclose such to the trade union and other parties) are not taken to guard against their disclosure. Then the question arises as to how to strike a balance between the refusal of the employer to disclose the information required by the union on the basis that the information is private and/or confidential, and the union's right to have access to such information. It is argued that the employer's right to privacy or confidentiality may be tempered with in terms of the limitation clause of the Constitution. This article further addresses the question of what can constitute acceptable reasons for the employer's refusal to provide the union with the requested information, and the effects of such refusal on the capacity of a union to negotiate effectively.

**Key words:** disclosure, confidentiality, privacy, access to information, negotiations.

## **INTRODUCTION**

There has been a concern among representatives of employees who are party to negotiations with employers that the latter tend to refuse to provide them with information when such information is necessary to advance the interests of workers – whether during

negotiations or when performing any other duties entrusted to them as representatives of workers in the workplace. In refusing to provide information, employers usually argue that providing the union with such information could amount to an unreasonable

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encroachment on their right to privacy, and can affect the confidentiality of the information if disclosed to the other party. Employers are mostly concerned that important information like trade secrets may land in the hands of competitors if precautionary measures are not taken to guard against their disclosure. The question that arises is how to strike a balance between the refusal of the employer to disclose the information required by the union on the basis that the information is private and/or confidential and the union's right to have access to such information.

A second question is whether the disclosure of such information would advance the cause of workers as well as that of employers. This article further attempt to address what can constitute acceptable reasons for the employer's refusal to provide the union with the requested information, and the effects of such refusal on the capacity of a union to negotiate effectively.

Sections 16 and 189(3) of the Labour Relations Act allow the majority union to request information from the employer during negotiations, if such information will be relevant to the issues before the parties. A problem will arise when the employer refuses, for reasons known to them, to provide the union with the requested information. Employers usually advance the confidentiality of information or the privacy of such information as the reasons for refusing to disclose the requested information. The question is whether such refusal would be justified in terms of section 36 of the Constitution of South Africa, 1996.

The article develops a clear understanding of the problem relating to the right to disclosure of information and the employer's right to privacy or confidentiality of information during negotiations. To arrive at a conclusion, the article uses both primary and secondary sources of law such as legislation and case law, textbooks, journal articles and international agreements.

## THE RATIONALE BEHIND THE DISCLOSURE OF INFORMATION

The previous LRA<sup>1</sup> made no provision for the disclosure of information. In a pioneering article written in 1980, Brand and Cassim argued that an unconditional refusal to disclose relevant information for the purpose of collective bargaining could amount to an unfair labour practice (Brand and Cassim, 1980). The introduction of the Constitution and the LRA of 1995 changed the position with regard to disclosure of information during negotiations or consultations leading to retrenchments. Section 32(1) of the Constitution of South Africa<sup>2</sup> (Constitution) provides that "everyone has the right of access to any information that is held by another person

and that is required for the exercise or protection of any rights".<sup>3</sup> Section 32(2) of the Constitution further provides that "legislation must be enacted to give effect to this right...". In response to this mandate from the Constitution, the Promotion of Access to Information Act<sup>4</sup> (PAIA) was promulgated. The PAIA gives effect to the right of access to information in general. However, in the labour relations' environment, the Labour Relations Act<sup>5</sup> (LRA) gives effect to section 32 of the Constitution through the provisions of two sections – Sections 16 and 189. These two sections entrench the right of access to information by trade unions or employee representatives where such information is in the possession of the employer. They are, therefore, an extension of the right to the disclosure of information entrenched in section 32 of the Constitution on matters affecting employees in the workplace.

It is believed that, with these provisions, the LRA aims to leverage bargaining power and ensure that both parties have equal access to the information that is considered crucial on issues before them. In order to put parties on a par when it comes to bargaining, the LRA requires that a registered trade union representing the majority of employees in a workplace (either alone or together with another union) is entitled to disclosure by the employer of all relevant information that will allow it to perform its representative functions effectively.<sup>6</sup> Section 16 of the LRA is dedicated to this function. It provides that:

- (2) subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the function referred to in section 14(1).  
 (3) subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.

The objects and purport of section 16 can be understood within the context of the LRA and inquiry into the intention of the legislator, which is set out in section 1 of the LRA. Section 1 of the LRA provides that the purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace by

<sup>3</sup> Section 32(1)(b) of the Constitution.

<sup>4</sup> Act 2 of 2000.

<sup>5</sup> Act 66 of 1995.

<sup>6</sup> Section 16(1) of the LRA. Some of the representative functions of the union include the duty to assist and represent employees in their grievances with the employer; representing employees during disciplinary proceedings; monitoring the employer's compliance with labour laws; reporting alleged contravention of the law or any rule regulating terms and conditions of employment; and performing any other function agreed to between the representative union and the employer, section 14(4) of the LRA.

<sup>1</sup> Labour Relations Act 28 of 1956.

<sup>2</sup> Constitution of the Republic of South Africa, 1996.

fulfilling several objectives listed in the Act.<sup>7</sup>

The second section that deals with the disclosure of information in the workplace and as informed by section 32(2) of the Constitution, is section 189(4) of the LRA. It provides that:

(b) in any dispute in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

In employment relations, the disclosure of information may be required during negotiations with the employer<sup>8</sup> or the union may require such information to enable it discharge its duties as being a representative of the workers.<sup>9</sup> In this regard, section 189(4) of the LRA allows the union to request the disclosure of information during proposed retrenchments. In both instances (whether information is required in terms of section 16 or in terms of section 189(4)), the information would be required in order to engage fruitfully in discussions with the employer.

Access to information is important as it is perceived by both trade unions and the employer as being a potential tool for enhancing their power in an industrial relations' system. This means that, for parties to negotiate honestly and trustworthily, fairness and cooperation in the disclosure of information is necessary, as it enables them to have equal standing at the bargaining table. In this regard, information equality is important for the negotiating parties, because the rational exchange of facts and arguments will significantly increase the chances of reaching agreement on disputed issues if both parties have in their possession all the necessary information to engage fruitfully in negotiations (Cox, 1985).

In most cases, it is the union that requests information from the employer and there is little or no problem if the employer agrees to the union's request. However, a difficulty arises where the employer refuses to grant access to information, which has been requested. Trade

unions cannot bargain effectively unless they have the necessary information at their disposal. Financial information, for example, would be essential to gauge an employer's ability to meet a union's demand. On the other hand, employers may regard demands for the disclosure of information as an intrusion on managerial powers, which could undermine the competitiveness of the business. To define the extent of the duty of disclosure, it is necessary to balance the employer's rights and interests against those of trade unions and employees (Jordaan, 1996).<sup>10</sup> The question that arises is what would justify the employer's refusal to grant access to information, which has been requested by the union. It is argued that one of the reasons that is usually advanced by employers is that the requested information is private and confidential and cannot be disclosed because it relates to trade secrets and its disclosure will affect the business in the short and long run.<sup>11</sup>

### **The meaning and significance of disclosure of information**

The term "disclosure" refers to an act of making something known or the fact that is made known or something that was not previously known. The advantage of access to information is that it promotes the values of transparency, openness, and accountability that are important for a progressive constitutional democracy (Manamela, 2018). Disclosure of information is part and parcel of the consultation process where parties exchange ideas about the nature of the business or the way the operation of the business should be conducted. In this regard, disclosure of information can take various forms and there can be no hard and fast rules about the extent to which it has to be made, and much will depend on the particular facts of each case.<sup>12</sup>

As stated above, the disclosure of information in terms of section 189(4) of the LRA is required when the employer contemplates dismissal on the basis of operational requirements or retrenchments.<sup>13</sup> With section 16 of the LRA, the union may request information that will allow it to perform its duties effectively.<sup>14</sup> In the end, it must be seen that the request for the disclosure of information is aimed at achieving fairness to both parties. Sufficient information must be disclosed to make the process of consultation meaningful or to allow the union

<sup>7</sup> These include (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of South Africa, 1996;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employees participation in decision-making in the workplace; and

(iv) the effective resolution of a labour dispute.

<sup>8</sup>Section 189(3) of the LRA.

<sup>9</sup> These duties are listed in section 14(4) of the LRA.

<sup>10</sup> For a discussion, see Jordaan "Disclosure of Information in terms of the LRA" *Labour News & Court Reports* (September 1996) Vol 6(2); Lanman "Labour Right to Employer Information" *CLL* (October 1996)vol 6(3). See, also, *NUMSA v Nissan Manufacturers (Pty) Ltd* [1994] 4 BALR 494.

<sup>11</sup> *TNRT Express Worldwide (SA) (Pty) Ltd v SATAWU & Others* case number J2270/14 para [20].

<sup>12</sup> *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILIJ 642 (LAC) 643.

<sup>13</sup> Operational requirements are defined in section 213 of the LRA to mean economical, technological, structural, or similar needs of the employer.

<sup>14</sup>Section 16(2) of the LRA.

to perform its duties properly. In this regard, the employer should be open and helpful in trying to meet requests for information. The kind of information that must be disclosed in terms of section 189(4) of the LRA includes the need for retrenchments, as well as information that will assist the employees or the trade union in making contributions about alternatives to retrenchments or ways of avoiding retrenchments. It is believed that during retrenchments, employees or their representatives cannot make sensible suggestions about matters over which the LRA enjoins consultation, unless they have sufficient information to appraise or challenge the employer's proposals, or to formulate alternatives to dismissals.<sup>15</sup>

The right to disclosure of information is also confirmed by the International Labour Organisation (ILO). Article 13 para 1 of the ILO Convention 158 of 1982 provides that:

When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

The ILO Collective Standards Recommendation 163 further provides that "measures adapted to national conditions should be taken, if necessary so that parties have access to the information required by meaningful negotiation".

### Only relevant information can be disclosed

The question of what constitutes relevant information is not defined or explained in the LRA, except in section 16(2) where it is stated that the employer must disclose to a representative trade union all "relevant information" which will "enable the trade union representatives effectively perform their functions".<sup>16</sup> In this regard, section 16(2) gives an indication as to why a representative union would need information from the employer. In order for the trade unions to negotiate for the benefit of everyone, they need to be able to access employer's plans and decisions or at least those ones that affect the negotiations. Examples of information that

may be considered relevant include managerial salaries; production and marketing plans; information on wages and benefits; information on the financial status of the organisation; employee absenteeism; industrial relations and productivity; and annual reports of companies.<sup>17</sup> If the information is required during retrenchments, an audited financial statement of the company may be relevant.<sup>18</sup> Without access to this kind of information and without any knowledge of the employer's priorities and reasoning, it is argued that trade unions cannot table good offers and counter-offers during negotiations.

However, an employer may fear that providing information to a trade union can have a negative impact on him/her and their business. For example, the argument could be that giving the union information would weaken their position in relation to competitors as such information may find its way into the hands of competitors and consequently cause serious damage to the business (Bellace and Gospel, 1983, pp. 58; Brand and Cassim, 1980, pp 251). On the other hand, unions need information that is in the employer's possession. As stated above, the information requested will enable the union engage fruitfully in negotiations with the employer. In this regard, balance needs to be struck between the right of trade unions to have access to information that is in the hands of the employer, and the employer's right to privacy or confidentiality of information (Jordaan, 1996; Landman, 1996).

The history of South Africa has shown that employers are reluctant to provide unions with information that they request. For example, during the drafting of the LRA in 1995, Business Unity South Africa (BUSA) raised concerns regarding the right to disclosure of information in its submissions to the National Economic Development and Labour Council (NEDLAC). It regarded the obligation to disclose information to trade unions as a threat to and an encroachment on managerial prerogatives. This argument was largely based on commercial secrecy, confidentiality and that the disclosure of information would impede effective decision-making (Bellace and Gospel, 1983; Brand and Cassim, 1980).

It is not a given exercise that the employer will always make available information that is requested by unions. For a trade union to have discharged its obligations, it has to prove that the information it seeks from the employer is indeed relevant.<sup>19</sup> In this regard, the employer is not compelled to respond to a general demand of relevant information from the union. The union needs to specify or establish that the information would be relevant for the purposes of collective bargaining.

For a union to be eligible for access to information it must meet certain requirements, that is, the requesting

<sup>15</sup> Grogan *J Workplace Law* 12<sup>th</sup> ed (2017) at 309.

<sup>16</sup> *National Workers Union v Department of Transport* KN 913 (unreported) CCMA award, 29 August 1997; *DISA v Denzel Informatics (Pty) Ltd* [1998] 10 BLLR 1014 (LC); *Visser v SANLAM* [2001] 3 BLLR 319 (LAC); *SACCAWU v Pep Stores* (1998) 19 ILJ 1226 (LC). See, also, *Atlantis Diesel Engines (Pty) Ltd v NUMSA*; *Kgethe v LMK Manufacturing (Pty) Ltd* [1998] 3 BLLR 248 (LAC); *Benjamin v Plessey Tellumat SA Ltd* (1998) ILJ 595 (LC); *SACCAWU v Pep Stores*.

<sup>17</sup> Grogan *Collective Labour Law* 79; *NEHAWU v University of the Western Cape* [1999] 4 BALR 484 (IMSSA); Grogan *Workplace Law* 381.

<sup>18</sup> *Atlantis diesel ENGINES (Pty) Ltd v NUMSA* (1994) 15 ILJ 1247 (A).

<sup>19</sup> *UPUSA v Grinaker Dureset* (1998) 2 BLLR 190 (LC).

union must represent a majority of employees.<sup>20</sup> Another requirement is that the information requested must be relevant. The Labour Relations Amendment Act<sup>21</sup> (LRAA) has also added its voice on this by allowing a commissioner to grant the right to disclosure of information to a trade union, which does not represent the majority of employees, but is the most representative trade union in the workplace, on condition that it already acquired rights in section 12; 13; 14 and 15, and there is no other trade union exercising the right to information in that workplace.<sup>22</sup>

The need to disclose relevant information allows a trade union to establish whether the employer is genuine in its position with regard to the issues in dispute or whether its refusal to disclose is a technique to avoid engagements with the union. The purpose for which the disclosure of information is sought must be clearly specified. Special care is required where information disclosed is sourced from a source other than the employer itself. If the employer refuses to provide information that is requested by a trade union, this may affect the trust relationship between the parties and can force unions to resort to industrial action.

However, providing unions with information should be a conscious exercise as there can be negative consequences that may result from such disclosure – for example a negative effect on the reputation of the union or the employer's trade secrets can land in the hands of competitors. To avoid this from taking place, unions must prove a link between the information they seek and what they want to do with such information.<sup>23</sup> In addition, the circumstances of each case will determine whether the information requested is relevant (Van der Walt, 2003). The article argues that there must be careful management of striking a balance between the employer's right to keep certain information confidential and the union's right of access to information in possession of the employer. In *Burmeister & others v Crusader Life Assurance Corporation Ltd*,<sup>24</sup> the industrial court said:

I do however, agree with Mr Tiedemann that in order for there to be a meaningful consultation in the present matter, the applicants should be placed in possession of at least such of the details of the respondent's financial affairs to enable the applicants realistically to assess their own and respondent's position in relation to their retrenchments so as to make meaningful consultation.

Section 189(4) of the LRA lists the information that the employer can disclose to the union during retrenchments.

The LRA requires that such information must be in writing and should include the following:

the reasons for the proposed dismissals; the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of these alternatives; the number of employees likely to be affected and the job categories in which they are employed; the proposed method for selecting which employees to dismiss; the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed; any assistance that the employer proposes to offer the employees likely to be dismissed; the possibility of the future reemployment of the employees who are dismissed; the number of employees employed by the employer; and the number of employees the employer has dismissed for operational requirements in the preceding 12 months.

The list of information items in section 189(4) is not exhaustive and is intended to give the union or employees an opportunity to make informed representations and suggestions during negotiations.<sup>25</sup> The LRA requires the disclosure of only "relevant information" and the employer may refuse to disclose information that it considers not relevant. In this regard, the employer is not expected to disclose information that is not available to it; information that is not relevant to the issue under discussion; and information that can harm the employer's business interests if disclosed – for example, trade secrets and other confidential information that has the potential to harm the business.

The onus is on the employer to show that the disclosure of certain information could harm its business interests. In *National Teachers Union v Superintendent General: Department of Education & Culture, KwaZulu-Natal and Another*,<sup>26</sup> the issue was whether the information requested by the union was relevant for the purposes of enabling the union to represent its members in terms of section 14(4) of the LRA. It was held that even though the union was sufficiently representative to qualify for a disclosure and the information requested was relevant for its secondary purpose, the Department of Education may nevertheless refuse to disclose it if the disclosure may cause substantial harm to an employee or the Department of Education.<sup>27</sup> In *Hoogenoeg Andoulusite v NUM*,<sup>28</sup> the court found that the company's reasons for refusing to disclose the full content of the report were two-fold – the report contained sensitive and confidential information which, if disclosed, could

<sup>20</sup>Section 16(2) of the LRA.

<sup>21</sup>Of 2014.

<sup>22</sup>Section 21(b) (8A) read with section 21(8B) of the LRAA.

<sup>23</sup>Grogan J *Collective Labour Law* 2 edition (2014) at 78.

<sup>24</sup>(1993) 14 *ILJ* 1504 (IC).

<sup>25</sup>In *FAWU & others v National Sorghum Breweries* (1998) 19 *ILJ* 613 (LC), the retrenchment was found to be unfair because the employees affected were given insufficient information about why their positions had been declared redundant.

<sup>26</sup>(2008) 29 *ILJ* 1727 (LC).

<sup>27</sup>Par [58].

<sup>28</sup>(1992) 13 *ILJ* 87 (LAC) at 93H-I.

prejudice the company's business. It was further held that from the evidence produced, it appeared that the sensitive and confidential information concerned negotiations with suppliers about cost savings and component prices. The second reason was that the bulk of the information was totally unrelated to the scope of the union's legitimate involvement in the retrenchment process.

Where information that is relevant to the issues under discussion is not available to the employer, it is expected that the employer will take whatever reasonable steps to gain access to such information. To emphasise this point the court held as follows in *Hoogenoeg Andoulusite v NUM*:<sup>29</sup>

The process of consultation is not one of tokenism or empty form. In order to accomplish the policy objectives [of the Act] and to satisfy the interest of all parties, consultation must be meaningful and geared towards being effective ... the employee confronting possible retrenchment is in a very real sense confined to his [ability] to persuade the employer to adopt an alternative different from that resulting in the loss of his job. Clearly, the capacity to persuade is predicated upon the pool of relevant information being common to or accessible by both parties.

The LRA further states that information may not be disclosed if it is private personal information relating to an employee, unless the employee consents to the disclosure.<sup>30</sup> Most of the private and personal information of the employee may be in the possession of the employer. This includes race, age, gender, sex, pregnancy status, marital status, nationality, ethnic or social origin, sexual orientation, physical or mental health, disability, religion and culture. Therefore, employers should be aware that most information collected from an employee will constitute personal information. The employer is duty-bound to secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent such information from being lost, and avoiding unauthorised access to or the processing of such information. The reasonable measures to protect the disclosure of personal information of an employee include the identification of possible security risks, establishing and maintaining safeguards against the identified risks, verifying the safeguards from time to time and updating those measures.

It is, however, difficult to determine whether the degree or amount of information provided is relevant and/or adequate. In this regard, it can be argued that both relevance and adequacy should be measured against the purpose the information is meant to serve. In *NUMSA v*

*Atlantis Diesel Engines (Pty) Ltd*,<sup>31</sup> the company was in financial difficulties and notified the union that it wanted to downsize the business. Pursuant to this, the union requested that the employer furnish it with a full CAG report to enable it to make a meaningful proposal with regard to retrenchments. The company's response was that the report was confidential, that its essence had already been communicated to the union, and that a disclosure of the full report could prejudice both its business and that of its suppliers. It was held that the purpose of the disclosure was to persuade the union of the economic necessity of the proposed retrenchments and to put it in a position to suggest alternatives. While in the appeal against the decision<sup>32</sup> the Appellate Division did not expressly disagree with this view, the court made it clear that an employer has a right to withhold information that is irrelevant.<sup>33</sup>

Section 189(4)(d) provides that the provisions of section 16 of the LRA (which regulates the entitlement of a majority union(s) to relevant information for the purpose of collective bargaining), read with the changes required by the context, apply to the disclosure of information in terms of section 189(3). Le Roux argues that section 16 and 189 should be read together. She states that "ordinarily section 16 is a tool aimed at advancing collective bargaining and it cannot be relied upon by individual employees".<sup>34</sup> However, when an individual employee is a consulting party during retrenchment, the words "read with the changes required by the context" in section 189(4)(d) imply that the individual employee is equally entitled to use section 16 in such a case.<sup>35</sup> In both sections 16(2) and 189(3), the LRA insists that the information required must be "relevant information". "Relevant information" in this regard is believed to be the kind of information that would or permit the union representative to perform its functions effectively and to allow the union to engage effectively in collective bargaining. Examples of potentially relevant information include financial statements, details of how the employer's assets are distributed, and future investment plans. If the union or employee representative is provided with relevant information, it is believed that good faith bargaining will take place and all parties will be committed to finding a solution to disputed issues (O'Neill, 2001).<sup>36</sup>

<sup>31</sup> (1993) 14 ILJ 642 (IC).

<sup>32</sup> (1994) 15 ILJ 1247 (LAC).

<sup>33</sup> Ibid.

<sup>34</sup> Le Roux *Retrenchment Law in South Africa* (2016) at 105.

<sup>35</sup> *De Klerk v Project Freight Group CC* (2015) 36 ILJ 716 (LC) 7211F.

<sup>36</sup> Good faith bargaining entails that each party must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach common ground. O'Neill B "What does it mean for nations to negotiate in good faith?" 2001 at 5, accessed at <http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf> on 23 May 2019.

<sup>29</sup> Ibid.

<sup>30</sup> Section 14(1) of the LRA.

However, the LRA makes exceptions to a request for relevant information. It provides that an employer need not provide information if such information is legally privileged, or where the disclosure of such information would entail a breach of the law or a court order, or where the information sought is private information about an employee and the employee has not consented to the disclosure.<sup>37</sup> An employer is also not compelled to disclose information if the disclosure thereof might cause a substantial harm to an employee or to his or her business. The following is an example of information that may cause substantial harm to the employer and his or her business if disclosed: a threat to the company's security, commercial standing or where the disclosure will undermine the company's competitive position.<sup>38</sup>

The information requested must not only be relevant but must also be adequate to place the union party in a position to make informed representations and suggestions on the subjects specified for consultation. On the other hand, the employer should come to a negotiating table with an open mind and be helpful in meeting the requests for information. In this regard, sufficient information must be disclosed to make the process of consultation meaningful. This includes information concerning the need for retrenchments, as well as information that will assist the employees or trade union, as the case may be, in making contributions about the ways of avoiding retrenchments, if retrenchments are a subject of discussion. In *FAWU v National Sorghum Breweries*,<sup>39</sup> the retrenchment was found to be unfair because the employees affected were given insufficient information about why their positions had been declared redundant.

## CAN THE EMPLOYER RAISE PRIVACY OR CONFIDENTIALITY OF INFORMATION DURING NEGOTIATIONS?

### The right to privacy

The right to privacy is a fundamental right protected in the Constitution.<sup>40</sup> It literally means "to be left alone" (Warren and Brandels, 1890).<sup>41</sup> It refers to a state where a person is free from public interference. The right to privacy is much younger than the other rights protecting the individual's personality, such as dignity, and autonomy, and particularly those rights close in substance and content, like the right to reputation and freedom of expression, which are based in part on human dignity

<sup>37</sup>Section 16(5) of the LRA.

<sup>38</sup>Grogan *Workplace Law* (2017) at 356.

<sup>39</sup>(1998) 19 *ILJ* 613 (LC).

<sup>40</sup>Section 14 of the Constitution, 1996.

<sup>41</sup>The phrase is frequently attributed to Warren J & Brandels M "The right to privacy" (1890) 4(5) *Harvard Law Review* 193, but they cite Judge Cooley in *Cooley on Torts* 2 ed 29 as the originator of the phrase.

and liberty.

The Constitution provides that:

"Everyone has the right to privacy, which includes the right not to have

- (a) Their person or home searched;
- (b) Their property searched;
- (c) Their possessions seized; or
- (d) The privacy of their communications infringed."<sup>42</sup>

The structure of section 14 of the Constitution is meant to guarantee a general right to privacy, which includes but is not limited to the listed rights (Van Niekerk, 1994).<sup>43</sup> The listed rights in section 14 relate specifically to intrusions into the private sphere. Rycroft argues that privacy consists of two separate concepts, namely freedom from intrusion and protection of autonomy (Rycroft, 2018). The first aspect of privacy is self-explanatory. However, autonomy is about personhood, about our inviolate personality (Warren and Brandels, 1890), belief and opinion, and it is inseparable from the constitutional recognition of the inherent dignity of all people.<sup>44</sup>

When one reads the provisions of the Constitution,<sup>45</sup> it is clear that its safeguard of the right to privacy protects a wide range of overlapping and interrelated rights (International Labour Office, 1993).<sup>46</sup> For example, the right to privacy protects control over access to personal matters and control over the obtaining, fixation, (Neethling, 2004)<sup>47</sup> possession, dissemination and use of information on personal matters.<sup>48</sup>

It must be noted that it is not only the Constitution that recognises the right to privacy, the common law also recognises it as an independent personality right.<sup>49</sup> The common law defines privacy as "a condition of human life

<sup>42</sup>Section 14 of the Constitution.

<sup>43</sup>See, generally, De Waal, Currie & Erasmus *The Bill of Rights Handbook* 4 ed (2001) 267–287; Davis, Cheadle & Haysom *Fundamental Rights in the Constitution* (1997) 91–101; Van Niekerk "The right to privacy in employment" (1994) 3 *CLL* 97.

<sup>44</sup>Section 10 of the Constitution.

<sup>45</sup>Section 14 in particular.

<sup>46</sup>Privacy has been described as a broad value that represents concerns about autonomy, individuality, persona, space, solitude, intimacy, anonymity, and a host of related concerns (see International Labour Office 'Worker's Privacy Part II: Monitoring and Surveillance in the Workplace' (1993) 12(1) *Conditions of Work Digest* 10). See, also, note 18 above for examples of these inter-related rights.

<sup>47</sup>See, for example, *Prinsloo v RCP Media Ltd t/a Rapport* 2003 4 SA 456. See, also, Neethling J, "Constitutional compatibility of the common law of wrongful and malicious deprivation of liberty as *inuria*" 2004 *SALJ* 520, which describes fixation as the embodiment of private facts by, e.g., photography, photocopying and tape recordings.

<sup>48</sup>*National Media v Jooste* 1996 3 SA 262 (SCA) 271 – privacy is "the competence to determine the destiny of private facts".

<sup>49</sup>*Bernstein v Bester NNO* 1996 2 SA 751 (CC) para 68; *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C) 247F-249D and *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A) 455H-456H; see, also, *Janse van Vuuren NNO v Kruger* 1993 4 SA 842 (A) 849; see Neethling *et al* (2005) 217–220; see, also, Reinhardt B, *The Law of the Internet in South Africa* (2004) 172.

characterized by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined to be excluded from the knowledge of outsiders and in respect of which he or she has the will that they be kept private.”<sup>50</sup> In *NM v Smith*,<sup>51</sup> the Constitutional Court stated that the right to privacy is the right “to be left alone” or the right “to live your life as it pleases you”.<sup>52</sup> The Court further described factors that can give rise to the right to privacy as “those facts the disclosure of which will cause material distress and injury to anyone possessed of ordinary feelings and intelligence in the same circumstances and in which there is a will to keep them private”.<sup>53</sup> The Supreme Court of Appeal and the Constitutional Court, also regard privacy as an independent personality right inseparable from the right to dignity.<sup>54</sup> In *Bernstein v Bester*<sup>55</sup>, the applicants contended that their privacy was invaded when they were forced to disclose books and documents that they wished to keep confidential and to reveal information they wished to keep to themselves. No real information was furnished as to the nature and content of the documents or the information in respect of which privacy was claimed.

At common law, the right to privacy is protected by an action called *action iniuriarum*. The *inuria* of breach of privacy occurs when there is an unlawful and intentional acquaintance with private facts by outsiders contrary to the determination and the will of the person whose right is infringed, with such acquaintance taking place by an intrusion or by disclosure (Neethling et al, 2005).<sup>56</sup> In *S v A*,<sup>57</sup> a private detective who installed a listening device in the plaintiff’s apartment (on his estranged wife’s orders) and listened into his private conversations was found guilty of *crimen inuria*. The court found that it was simply not possible to pronounce on the issue of privacy unless their contents were disclosed. The court further held that the investigator’s actions amounted to a serious impairment of the complainant’s *dignitas*.

### The right to privacy in juristic persons

The right to privacy is not only limited to natural persons, but also protects juristic persons. The Constitution grants juristic persons the right to privacy. It provides that “a

juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person”.<sup>58</sup> In this regard, a juristic person may argue for the right to privacy in order to protect its commercial interests. This means that there is nothing that can prevent the employer from putting forward the privacy of the information as defence when the union requests information despite the fact that this is not mentioned in the LRA. However, the protection of the right to privacy in juristic persons does not include other rights that are associated with privacy like the protection of human dignity, as juristic persons are not the bearers of human dignity. The fact that juristic persons do not enjoy the right to human dignity has been emphasised by the Constitutional Court in *Bernstein & others v Bester*, when it said a company is not a private matter.<sup>59</sup> The reason for this is that there are concomitant responsibilities including statutory obligations of proper disclosure and accountability to shareholders. Therefore, the privacy rights of a juristic person can never be as intense as those of human beings. As stated above, this does not, however, mean that juristic persons are not protected by the right to privacy. Like private persons, juristic persons do have control over information concerning the exercise of their rights to, for example, property and commercial activities. This control may not be interfered with unless the requirements for interference with a protected right(s) are complied with.<sup>60</sup>

However, there is an argument that if employers can be allowed to raise the defence of privacy of information during negotiations, the collective bargaining process would be substantially hampered as this move will not give the union an opportunity to engage fruitfully in negotiations. In order for a business to succeed, it is expected that it designs a strategy that will lead and enable it to flourish in a competitive market. Secrecy would be an invariable part of this strategy and at first glance it is difficult to justify an invasion of an enterprise’s privacy strategy and practice. However, like all rights enshrined in the Bill of Rights,<sup>61</sup> the right to privacy in juristic persons may be interfered with, in an attempt to serve a justified purpose and using justified methods. The level of justification for any particular limitation of a right will have to be judged in the light of the circumstances of each case. Relevant circumstances would include whether the subject of the limitation involves a natural or juristic person, as well as the nature and effect of the invasion of privacy.<sup>62</sup> The environment in which businesses operate is very competitive. So, in order to survive under such demanding conditions the enterprise

<sup>50</sup> The definition was first proposed by Neethling in *Die Reg op Privaatheid* (1976 thesis UNISA) and given wider circulation in his *Persoonlikheidsreg* (1979), and has the approval of the Supreme Court of Appeal (in *National Media Ltd v Jooste* 1996 (3) SA 262 (A)).

<sup>51</sup> 2007 (7) BCLR 751 (CC), 2007 (5) SA 250 (CC).

<sup>52</sup> Par [32].

<sup>53</sup> *Idem* par [34].

<sup>54</sup> *O’Keeffe v Argus Printing & Publishing* 1954 (3) SA 244 (C); *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 455–456; *Bernstein v Bester NO* 1996 (2) SA 751 (CC); *Jansen van Vuuren v Kruger NO* 1993 (4) SA 842 (A).

<sup>55</sup> See note 4 *supra*.

<sup>56</sup> Neethling et al (2005) 221.

<sup>57</sup> 1971 (2) SA 293 (T).

<sup>58</sup> Section 8(4) of the Constitution.

<sup>59</sup> *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) para 85.

<sup>60</sup> Section 36(1) of the Constitution.

<sup>61</sup> See chapter 2 of the Constitution.

<sup>62</sup> *Investing Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 18.



or the employer may want to have certain information not disclosed to other parties – for example, to a trade union. In *NUMSA v Rafee NO & others*<sup>63</sup> the employee had contended that the employer had violated his right to privacy in terms of section 14 of the Constitution. The Labour Court found that the employee's right to confidentiality had to be weighed against the employer's right to preserve the privacy of its business information. The employee's right to preserve the confidentiality of his personal data on his cell phone did not entitle him to retain data about the employer which he obtained without permission and which was stored on the same device.

### Confidential information

As stated above, the LRA allows the union to request relevant information from the employer and the latter should disclose such information to the union with certain exceptions.<sup>64</sup> One such exception is where the information is confidential and if disclosed it may cause substantial harm to an employee or the employer.<sup>65</sup> The question that arises is what constitutes "confidential information". The term "confidentiality" is extracted from the word "confidence", which means trust. It refers to a situation when important information is kept secret between two individuals until the person to whom the information belongs permits the disclosure. In this way, it is entrusted that the information which is told in confidence to someone, will be kept secret from the reach of unauthorised people, until the parties agree to uncover the information.

When information has been classified as "confidential", it is expected that the person to whom the information has been shared will not divulge it to any other person. In *Langalibalele v Active Packaging (Pty) Ltd*,<sup>66</sup> the question that the court had to address was what constitutes confidential information in companies or juristic persons. It was stated that the financial statements of public companies are confidential until they are published and made available to the public. In *NUMSA v Atlantis Diesel Engines*,<sup>67</sup> it was found that confidential information refers to "work related information such as trade secrets". In *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* 1960 RPC 128 (CA), referred to in *Multi Tube Systems (Pty) Ltd v Ponting and others*,<sup>68</sup> the court stated as follows:

As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it

<sup>63</sup> (2018) 39 ILJ 2122.

<sup>64</sup> See section 16(5) of the LRA.

<sup>65</sup> Section 16(5)(c) of the LRA.

<sup>66</sup> [2001] 1 BLLR 37 (LAC).

<sup>67</sup> (1993) 14 ILJ 642 (LAC).

<sup>68</sup> 1984 (3) SA 182 (D) at 189B-I.

as a springboard for activities detrimental to the person who made the confidential communication; as springboard, it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public... Therefore, the possessor of the confidential information still has a long start over any member of the public.

Secrecy or confidentiality is invariably part of the business's success and at first glance it is difficult to justify an invasion of an enterprise's private strategy and practice. To prevent an invasion into areas of privacy and secrecy, restraint of trade agreements are often concluded by businesses. Restraint of trade aims to protect the privacy or trade secrets of an enterprise. It can usually assist as a contractual remedy and cannot help to prevent a union from accessing confidential or private information the employer may not want to see divulged or disclosed to outsiders. This means that there are certain aspects of the meaning of private facts that need to be improved. Firstly, the phrase "in respect of which there is a will to keep them private" reflects the possibility that the right may be waived and the waiver of rights is governed by the general principles pertaining to all rights. Secondly, the right to privacy is not only limited by a "disclosure" of information of private personal facts, it may also be limited by merely acquiring information on such matters without disclosing it to third parties – for example, by opening and reading the mail addressed to other people, by listening to their telephone conversations, by prying through their business files, or by peeping through chinks in their curtains. Privacy can also be infringed by mere access to private matters without discovering any new information about them. In this regard, the parties to negotiations have a duty to maintain the secrecy and sensitive information or documents until permission has been granted that the information may be made available to the other party or members of the public.

### THE CONSEQUENCES OF A REFUSAL TO PROVIDE INFORMATION

It is not a given outcome that the employer will always provide information whenever and wherever such information is requested by the union.<sup>69</sup> A failure to disclose information may have a negative impact on the role of a trade union representative and consequently on the employees and on the success of collective bargaining (Manamela, 2018). Such refusal can negatively impede the prospects for a successful collective agreement or an amicable settlement of a labour dispute. In the absence of information that the union perceives as being important for their proper

<sup>69</sup> *Baloyi v M & P Manufacturing* [2000] 4 BLLR 383 (LC) par 37.

engagement on negotiations or discussions on matters affecting labour, the unions would not have bargaining power equal to that of the employer. The union's ability to challenge the employer's proposals may be weakened.

In the case of section 189 of the LRA procedure, a refusal to provide relevant information to the consulting party during negotiations can render a retrenchment exercise procedurally unfair, if negotiations are about retrenchments.<sup>70</sup> Du Toit argues that a collective bargaining based on inadequate access to information may lead to industrial action.<sup>71</sup> Where the disclosure of information is disputed, the first issue that needs clarification is whether the information is relevant. Employers are also not obliged to disclose information that does not exist. For instance, in *SACCAWU & Others v Sun International SA Ltd (a Division of Kersaf Investments Ltd)*,<sup>72</sup> the employer experienced a reduction in revenue and decided to reduce its staff and outsource some of its services. The union requested information on the identity of the outsourced companies and copies of the contracts with the outsourced companies. The court indicated that ordinarily this would be relevant information and should be disclosed, but since the employer had not yet identified the companies, it could not be expected to disclose information that does not exist.<sup>73</sup>

Thus, a balance needs to be struck between the employer's refusal to provide information to the union and the latter's ability to negotiate without the necessary information at its disposal. If information is relevant, but disclosure is likely to cause harm to both the employer and the union, the parties should investigate ways of making the information available in such a way that it excludes or minimises the risk of harm and levels the playing field for both parties to negotiate on an equal basis.

Another question is whether the information, even though relevant, is subject to one of the limitations provided in section 16(5) of the LRA.<sup>74</sup> Section 16(4) further provides that the employer must notify the other consulting party in writing if the information disclosed is confidential. If the employer refuses to provide

information that is requested, s/he must prove that the information is not relevant for the purposes for which it is sought or is private information relating to one or more of its employees.<sup>75</sup>

Section 16(6) of the LRA makes provision for a dispute resolution mechanism to deal with disputes regarding disclosure of information. The aim of this section is to try to give effect to section 23 of the Constitution<sup>76</sup> and to promote orderly collective bargaining. In essence, section 16(6) of the LRA seeks to balance the competing rights and interests that the parties to a collective bargaining relationship might have on the disclosure of information. As such, a commissioner or any presiding officer dealing with the union's request for confidential information is enjoined by section 16(11) of the LRA to balance the harm that the disclosure is likely to cause to an employer against how the harm that the failure to disclose the information is likely to affect the ability of a representative trade union to engage effectively in consultation or collective bargaining. This means that the employee's right to disclosure of information must be balanced with the employer's business necessity and/or operational requirements.

On the other hand, the employer's privacy or secrecy of business interests or information must be balanced with the need for employees or union(s) to engage fruitfully in negotiations or to exercise their rights as representatives of employees without disturbance. In *Robbertze v Marsh SA (Pty) Ltd*, it was held that relevant information is not limited to information listed in section 189(3)(a) to (j).<sup>77</sup> The relevance of information will depend on whether it would contribute to the consultation on the topics that the parties are required to canvass during the consultation process.<sup>78</sup>

## JUSTIFICATIONS FOR REFUSAL TO PROVIDE INFORMATION

The question that arises is how to justify encroachment on someone's right to privacy by alleging right of access to information. The refusal to provide information may be justified on two grounds, namely, in terms of section 36 of the Constitution and in terms of the inherent requirements of the business. The aim with a justification in terms of section 36 of the Constitution is to establish whether the refusal to grant such information when needed is justified. In terms of the Constitution, there is no right that is absolute and all rights in the Bill of Rights are subject to the limitation clause in the Constitution. The truism that

<sup>70</sup> Section 189(4) and (5) of the LRA.

<sup>71</sup> Du Toit, Cooper, Giles, Cohen, Conradie & Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) at 292.

<sup>72</sup> (2003) 24 *ILJ* 594 (LC).

<sup>73</sup> *Ibid* para 32. See, also, *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC) 652A-B.

<sup>74</sup> In terms of section 16(4) of the LRA, the employer need not disclose information which -

- (a) is legally privileged;
- (b) the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
- (c) is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
- (d) is private personal information relating to an employee, unless that employee consents to the disclosure of that information, Section 16(5) of the LRA.

<sup>75</sup> Section 189(4)(b) of the LRA.

<sup>76</sup> Section 23 of the Constitution houses the labour relations clause.

<sup>77</sup> Par [27].

<sup>78</sup> *National Union of Mineworkers of SA & others v Comark Holdings (Pty) Ltd* (1997) 18 *ILJ* 516 (LC) 524F. See, also, *De Klerk v Project Freight Group CC* (2015) 36 *ILJ* 716 (LC) 720D.

no right is absolute implies that from the outset of interpretation, each right is always already limited by other rights accruing to other persons. In this regard, privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

The second ground upon which a refusal to grant information can be justified, would be in terms of the inherent requirements of the business. In this regard, the employer may put forward business interests to justify its refusal to provide information, despite the fact that the union perceives such information as relevant to negotiations or discussions between them. Business interests can justify even an extremely invasive conduct. Where the employer's interests are sufficiently strong or the invasive action is a customary business practice, privacy interests may be overridden. This emphasizes the point that there is no right that is absolute, for example employees have a right to privacy in respect of reasonable use of e-mails. However, this may be invaded if there are commercial reasons for doing so, for instance where an employee has access to highly confidential information. In such an environment, no legitimate expectation of privacy can be harboured.

## CONCLUSION

The issue of disclosure of information has been topical whenever unions and employers meet to discuss issues affecting them in the workplace. Usually the employer is the party that is in possession of the information required by the union. When employers refuse to disclose information that the union perceives as relevant, that becomes a point of contention between the parties. Employers usually put forward privacy and confidentiality of information as reasons for refusing to disclose such information. The article has argued that these defences can be overlooked in some cases in order to advance the interests of workers. The privacy and confidentiality of information can be limited in terms of the limitation clause of the Constitution and in terms of the inherent requirements of the business.

## CONFLICT OF INTERESTS

The author has not declared any conflict of interests.

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