



A Critique of Recent Developments on the Regulation of Collective Agreements in South African Labour Law: Extension and enforcement to Non-Parties

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Declaration

I Tebogo Precious Phalane declare that this research is my own work submitted in partial fulfilment of the degree *Magister Legum* in Labour Law at North-West University it has not been submitted before for any degree or examination.

Phalane 30/05/2018

Student Date

30/05/2018

Supervisor Date

List of Acronyms and Abbreviations

LRA-	Labour Relations Act
ICA-	Industrial Conciliation Act
AMCU-	Association of Mineworkers & Construction Union
ILO-	International Labour Organisation
BLRRA-	Black Labour Relations Regulation Act
COSATU-	Congress of South African Trade Union
PAJA-	Promotion of Administrative Justice Act
NEDLAC-	National Economic Development & Labour Council
TULRCA-	Trade Union & Labour Relations (Consolidation) Act



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Abstract

Collective agreements play a significant role in the regulation of collective bargaining, they are referred to as an end result of the process of collective bargaining. Collective bargaining transpires either between an individual employer and a representative trade union at plant level, or between a majority trade union(s) and an employer's organisation(s) at a bargaining council at sectoral level. Collective agreements may be extended to and enforced upon non-parties in terms of the *Labour Relations Act* 66 of 1995, the extension and enforcement of a collective agreement is imperative to the endorsement of the objectives of the LRA which is to promote orderly and centralised collective bargaining.

The notion of the extension and enforcement of collective agreements to non-parties is based upon the principle of majoritarianism, irrespective of the principle having the propensity to impinge on the rights of non-parties. The idea behind the LRA and its provisions is to promote orderly collective bargaining.

This dissertation seeks to analyse the extensions and enforcement of collective agreements to non-parties in South Africa, and also discuss recent developments in respect of these extensions and enforcements. The dissertation will assess how the judiciary has been addressing these recent developments. A consideration of best practices will also be conducted between South Africa, Slovakia, Italy and United Kingdom to determine if South Africa's system works best or whether there is room for improvement.

Keywords: Collective agreements, extension, enforcement, majoritarian principle, collective bargaining, interpretation, application.

Chapter 1 Introduction

1.1 Introduction

The primary purpose of this chapter is to provide an overview of the study. The chapter commences with a background to the study which provides an overview of the extension and enforcement of collective agreements to non-parties in South Africa. The chapter further provides the research problem, the objectives, methodology, and finally the contribution of the study and a chapter outline of the rest of the study.

1.2 Background to the study

In South African law, the right to freedom of association entrenched in section 18 of *the Constitution of the Republic of South Africa, 1996*¹ serves as a foundation for collective bargaining.² Collective bargaining is a process upon which one or more trade union(s) engage in negotiations with an employer or an employer's organisation.³ The purpose of the process is to negotiate the regulation of terms and conditions of employment or matters of mutual interest, and collective agreements are a result of a voluntary collective bargaining process.⁴ These collective agreements are provided for and regulated by the *Labour Relations Act*,⁵ and they are defined in section 213 as follows:

A written agreement between one or more registered trade union and one or more employer/ registered employers' organisation, that entails terms and condition of employment or matters of mutual interest.⁶

Collective bargaining takes place at different levels, the first being plant level.⁷ It relates to a situation where collective bargaining is regulated by a collective agreement between one or more trade union(s) and an employer.⁸ A collective agreement

¹ Section 18 of the *Constitution of the Republic of South Africa, 1996* (hereinafter the *Constitution*).

² Sections 18 and 23 of the *Constitution*.

³ Selala KJ "The Right to Strike and the Future of Collective Bargaining in South Africa: An Explanatory Analysis" 2014 *International Journal of Social Science* 119-120.

⁴ Heald G *Why is Collective Bargaining Failing in South Africa: A reflection on How to Restore Social Dialogue in South Africa* (KR Publishers Sandton 2016) 1-9.

⁵ Chapter 3 part B and C of the *Labour Relations Act* 66 of 1995 (hereinafter the *LRA*).

⁶ Section 213 of the *LRA*.

⁷ Grogan J 2007 *Collective Labour Law* <https://books.google.co.za> accessed 12 May 2017.

⁸ Section 23 of the *LRA*; Grogan 2007 <https://books.google.co.za>.

voluntarily entered into by one or more trade union(s) and an employer, may be extended to employees who are not party to the agreement by virtue of section 23(1)(d) of the *LRA*.⁹

The second level of bargaining is at sectoral level, where bargaining takes place at a bargaining council and results in the conclusion of a collective agreement between employers' organisation and one or more registered trade union(s).¹⁰ Section 32 of the *LRA* provides that collective agreements concluded at the bargaining council may be extended by the Minister of Labour at the request of the council to members who are not parties to a bargaining council.¹¹ The extended collective agreement should be within the scope of the council. The main purpose of extending these collective agreements is to establish the terms and conditions of employment, and to attain a balance between an employee's weak bargaining stance against an employer's inherent bargaining power.¹²

In the event that non-parties fail to adhere to the provisions of the extended collective agreement, the *LRA* makes provision for the enforcement of these collective agreements to non-parties.¹³ Section 24 provides that the collective agreement must contain within itself a dispute resolution procedure in respect of their interpretation and application.¹⁴ This would include cases wherein non-parties refuse to be bound by the extended collective agreement, let alone adhere to its provisions. It is the requirement of the *LRA* for disputes regarding extended collective agreements to non-parties to be resolved through conciliation, where the resolution procedure has been frustrated, or the agreement does not contain one. However, should conciliation fail,¹⁵ the dispute may be resolved through arbitration at the Commission of Conciliation, Mediation and Arbitration (CCMA) and an award may be issued to that effect.¹⁶

⁹ Section 23 of the *LRA*; Grogan 2007 <https://books.google.co.za>.

¹⁰ Section 32 of the *LRA*; Van Der Merwe CG and du Plessis J *Introduction to the Law of South Africa* 2004 <https://books.google.co.za> accessed 12 may 2017.

¹¹ Section 32 of the *LRA*; Van Der Merwe and du Plessis 2004 <https://books.google.co.za>.

¹² Basson A *et al Essential Labour Law* 5th ed (Labour Law Publications Cape Town 2009) 273; Moll P "Compulsory Centralisation of Collective Bargaining in South Africa" 1996 *The American Economic Review* 326-329.

¹³ Sections 24, 33 and 33A of the *LRA*.

¹⁴ Section 24 of the *LRA*.

¹⁵ Section 24 of the *LRA*.

¹⁶ Section 24 of the *LRA*.

Collective bargaining agreements may be forced upon non-parties by a designated agent appointed by the Minister where non-parties fail to comply with its provisions.¹⁷ A dispute regarding the enforcement of a collective agreement may be referred for arbitration should the designated agent fail to enforce compliance upon non-parties.¹⁸

1.3 Problem statement

Collective agreements form an integral part of harmony in a workplace as they assist in the improvement of relationships between an employer and an employee, by regulating terms and conditions of employment and varying the contracts of employment where necessity dictates. They create room for democratisation and orderly collective bargaining both at plant and sectoral level.¹⁹ It then becomes crucial for them to be extended in terms of section 23 and 32, and enforced in terms of section 24, 33 and 33A upon non-parties.²⁰ The issue with the extension and enforcement of collective agreements is that, it impedes on the right of non-parties to be involved in the process of collective bargaining through their representatives as afforded by the *Constitution*.²¹ Therefore, limiting the non-parties' right to freedom of association.²²

Furthermore, collective agreements are extended to non-parties without consultation or an opportunity to make representations prior to the extension, this is an exercise that contravenes the *audi alteram partem* rule as well as provisions of the *Promotion of Administrative Justice Act*.²³ The extension of collective agreements in terms of section 23 of the *LRA* does have checks and balances applicable to the extension and of a collective agreement but they are not as extensive as those in section 32, this then means it is a little less complex to extend a collective agreement in terms of

¹⁷ Section 33(1) of the *LRA*.

¹⁸ Section 33A(4) of the *LRA*.

¹⁹ *Kem-Lin Fashions CC v Bruton* (2001) 22 ILJ 109 (LAC) para 19 (hereinafter *Kem-Lin Fashions CC v Bruton*).

²⁰ Section 24, 33 and 33A of the *LRA*.

²¹ Section 23(5) of the *Constitution*.

²² Section 18 of the *Constitution*.

²³ *Association of Mineworkers and Construction Union and Others v Chamber of mines of South Africa and Others* (2017) 38 ILJ 831 (CC) para 20 (hereinafter the *AMCU & Others v Chamber of Mines Case*), *audi alteram partem* means let the other side be heard or listen to the other side; section 3(2)(i) of the *Promotion of Administrative Justice Act* (hereinafter *PAJA*) provides *inter alia* that people affected unpleasantly by the administrative action should be afforded the opportunity to make representations.

section 23 as opposed to in terms of section 32 of the *LRA*. The extension of collective agreements to non-parties precludes minority trade unions to co-exist with majority trade unions, which is contrary to the fair operation of the majoritarian principle.²⁴ The application of the majoritarian principle illustrates factors entrenched in section 195 of the *Constitution*,²⁵ which establishes that the action is an exercise of public power. This raises the question of how the power is regulated and what safeguards are there to ensure a rational relationship between its exercise and attaining licit legislative ends.²⁶

1.4 Research question

How can the legislature improve the regulation of the extension and enforcement of collective agreements, based on recent developments so as to limit the impediments they have on non-parties rights?

1.5 Literature review

There are vast perceptions in practice and in theory expressed by various academics about the extension and enforcements of collective agreements to non-parties. These academics include Le Roux, Cheadle, Steenkamp and Badenhorst among others. All these different perspectives are incorporated into the study with the purpose of corroborating the findings of the study. It has been argued that sections 23 and 32 of the *LRA*²⁷ infringe on the non-parties' right to freedom of association which encompasses a negative aspect of the right not to associate.²⁸ However, Cheadle²⁹ states that the justifiability of the limitation of the non-parties' right to associate and bargain collectively through their trade unions is dependent on the necessity for sectoral bargaining and extension mechanisms to secure the integrity of collective bargaining.³⁰ Furthermore, the right is not abrogated and there are exemption provisions wherein non-parties can negotiate outside the scope of the provisions of

²⁴ Cohen T "Limiting Organisational Rights of Minority Unions: POPCRU v Ledwaba (2013) 11 BLLR 1137 (LC)" 2014 *Potchefstroom Electronic Law Journal* 60.

²⁵ Section 195 of the *Constitution*.

²⁶ *AMCU & Others v Chamber of Mines Case* Para 69-70.

²⁷ Section 23 and 32 of the *LRA*.

²⁸ Basson *et al Essential Labour Law* 257.

²⁹ Cheadle H "Collective Bargaining and the Law" 2006 *Law, Democracy & Development* 150-151.

³⁰ Cheadle 2006 *Law, Democracy & Development* 150.

the collective agreement extended.³¹ Thus the limitation of non-parties' rights is justifiable in light of the above.

Du toit³² holds the view that, the *LRA*'s purpose is to advance collective bargaining as an intermediary of securing labour peace, social justice and employee equality in the workplace. Collective agreements, as a result of collective bargaining, are a significant part of achieving the *LRA*'s attempts in this regard. Hence it is important for them to be extended to non-parties so they may not be seen as redundant. The Freedom of Association Digest³³ provides that collective bargaining must be voluntary as opposed to being recourse to measures of compulsion that alters its voluntary nature. After all section 1(d) of the *LRA* that speaks of promoting orderly collective bargaining,³⁴ says nothing about compelling parties to bargain collectively.

In the case of *S v Prefabricated Housing Corp (Pty) Ltd & Another*.³⁵ The court held that collective agreements are not a contract or even a piece of legislation. They form a *sui generis*³⁶ act peculiar to labour law.³⁷ However, Landman's³⁸ view of collective agreements rebuts the decision in the *Prefabricated Housing Corp case*. He states that the extension of collective agreements creates a bond between parties and non-parties, creating have a wider scope as opposed to the narrow one of common law contracts. The *LRA* does not provide clarification as to the legal foundation of collective agreements, and in his opinion these collective agreements are a form of delegated legislation.³⁹

In the case of *AMCU and Others v Chamber of Mines*,⁴⁰ the court held that the *LRA* is clear with regards to the extension and enforcement of collective agreements to non-

³¹ Cheadle 2006 *Law, Democracy & Development* 150.

³² Du toit D "Collective Bargaining and Worker Participation" 2000 *International Law Journal* 326-327.

³³ *Freedom of Association: Digest of Decisions & Principles of Freedom of Association Committee of the Governing Body of the ILO* (5ed, 2006) para 1052 (hereinafter *Freedom of Association: Digest*).

³⁴ Section 1(d)(i) of the *LRA*.

³⁵ *S v Prefabricated Housing Corp (Pty) Ltd & Another* 1974 (1) SA 535 (A) (hereinafter *The Prefabricated Housing Corp case*).

³⁶ *Sui generis* means of its own kind or unique.

³⁷ *The Prefabricated Housing Corp case*.

³⁸ Landman AA "Collective Agreements which Judicial Pigeon hole for New Bargaining Agreements" 1996 *Contemporary Labour Law* 74-75.

³⁹ Landman 1996 *Contemporary Labour Law* 74.

⁴⁰ *AMCU & Others v Chamber of Mines* para 61.

parties.⁴¹ However, the case did stipulate that there might be some changes to be effected to the extension and enforcements of collective agreements, seeing that the exercise of power involved here is a public one to be inclined to the principle of legality.⁴²

Furthermore, it was argued in the *AMCU & Others v Chamber of Mines* that, the extension of a collective agreement to a non-party unjustifiably limits its member's rights to freedom of association, fair labour practices and the right to bargain collectively through AMCU.⁴³ The Labour Appeal Court's view in the case of *National Union of Metal Workers of South Africa (NUMSA) obo Members v South African Airways (SAA) Soc Limited & Another*⁴⁴ differed with the above contention. The court held that the extension of collective agreements constitutes statutory authorised and constitutionally compliant limitation to fair labour practices, the limitation may be unfair in general but it is justifiable depending on the circumstances and facts of a particular case.

The provisions of the *LRA* are clear on the enforcement of collective agreements extended in terms of section 32; however, whether those extended in terms of section 23 may be enforced in terms of section 24 of the *LRA* remains a mystery. In *Hospersa obo Tshambi v Department of Health, Kwa-Zulu Natal*⁴⁵ the court held that, sections 23 and 24 of the *LRA* should not be read together. Further that the enforcement of collective agreements is merely a process following a positive finding about the application of such an agreement, it is not a facet of application. However, Revelas J⁴⁶ in the case of *NUCW v Oranje Mynbou en Vervoer Maatskappy BPK*⁴⁷ had a totally different view from that of the decision in the (*Hospersa* case). The decision of the court in the case of *Hospersa* was that, the enforcement of collective agreements

⁴¹ *AMCU & Others v Chamber of Mines* para 61.

⁴² *AMCU & Others v Chamber of Mines* para 73 and 84.

⁴³ *AMCU & Others v Chamber of Mines* para 16.

⁴⁴ *National Union of Metal Workers of South Africa (NUMSA) obo Members v South African Airways Soc Limited & Another* (2017) 38 ILJ 1994 (LAC) para 34 (hereinafter the *NUMSA v SAA* case).

⁴⁵ *In Hospersa obo Tshambi v Department of Health, Kwa-Zulu Natal* [2016] 7 BLLR 649 (LAC) Para 8 (hereinafter the *Hospersa* case).

⁴⁶ *NUCW v Oranje Mynbou en Vervoer Maatskappy BPK* [2000] 2 BLLR 196 (LC) para 8 (Hereinafter the *NUCW v Oranje Mynbou en Vervoer Matskappy*).

⁴⁷ The *NUCW v Oranje Mynbou en Vervoer Matskappy* para 8.

becomes an issue of dispute when there is a form of non-compliance and there is a party to the agreement who wishes to enforce its provisions to non-parties.⁴⁸ Therefore, a dispute about the application of a collective agreement in terms of section 24(1) of the *LRA*, is applicable to a situation of non-compliance and enforcement.⁴⁹ The word 'application' in section 24 of the *LRA* may be used interchangeably with the word enforcement.⁵⁰ Thus provisions of section 24 of the *LRA* may be seen as a form of enforcement mechanism in respect of extended collective agreements.

1.6 Scope and limitation of the study

The study falls within a broad scope of collective labour law, which consists of rules that regulate collective bargaining relationships. The study is limited to the regulation of collective agreements in relation to their extension in terms of section 23 and 32, as well as their enforcement in terms of section 24, 33 and 33A of the *LRA* to non-parties. The study also focuses on the advantages and disadvantages of these extensions and enforcements, the remedial measures afforded by the legislative framework as well as their effectiveness. The study takes into account the International Labour Organisation's (ILO) conventions and recommendations, reason being that international law plays a vital role in shaping and developing South Africa's labour legislation. The study will further consider recent developments on the subject. In this study a consideration of best practices is conducted in order to analyse different countries' legal systems, this is to see the type of measures they resort to in addressing contentious issues relevant to the extension and enforcement of collective agreements to non-parties.

The countries that will be used are Italy, Slovakia and the United Kingdom. The countries are comparable because of their common practice of recognising and implementing provisions of the ILO conventions.⁵¹ In Italy, there is no formal mechanism for extension of collective agreements. The agreements are legally binding only to parties of the associations that signed the agreement.⁵² In Slovakia, a voluntary

⁴⁸ The *NUCW v Oranje Mynbou en Vervoer Matskappy* para 8.

⁴⁹ The *NUCW v Oranje Mynbou en Vervoer Matskappy* para 9.

⁵⁰ The *NUCW v Oranje Mynbou en Vervoer Matskappy* para 9.

⁵¹ Infoplease 2000-2017 *Members of United Nations* <https://www.infoplease.com> accessed 28 July 2017.

⁵² Malo MA *Collective Bargaining reforms in Southern Europe during the Crisis: Impact in Light*

extension mechanism was inapplicable until amendments were included to the regulation of collective bargaining and since 2010 non-party's consent is required for a collective agreement to be extended.⁵³ The United Kingdom retains a voluntary tradition. That is, collective agreements are regarded as voluntary instruments which are binding in honour only. Therefore, they are only legally enforceable if they are incorporated in a contract of employment.⁵⁴

The above-mentioned countries use mechanisms that are very different to those applied in the South African legal system, and some of these mechanisms may serve as lessons for South Africa and improve the effectiveness and adequacy of South Africa's legal system. By adopting and incorporating those various mechanisms contradictions in South Africa's labour legislation may be eliminated, and issues raised in the problem statement will be addressed.

1.7 Rationale and justification

The study seeks to identify the negative and positive aspects of extension and enforcement of collective agreements to non-parties, by analysing provisions of extension in terms of section 23 and 32 as well as provisions of enforcement in terms of section 24, 33 and 33A of the *LRA*. The study further takes into account the emerging trends with the intention of making a contribution to the existing knowledge by other academics in respect of the extension and enforcement of collective agreements. The study, furthermore, seeks to have an effect on reforming labour legislation in the future by providing less restrictive measures that can be utilised.

1.8 Objectives of the study

The study seeks to make a considerable contribution to the field of collective labour law, in respect of the extension and enforcement of collective agreements to non-parties. This will be done by providing recommendations on how the legislative framework on collective agreements can be formulated and implemented in the future, in a manner that does not result in the infringement of non-parties' rights.

⁵³ of *International Standards* 2011 <https://www.eurofound.europa.eu> accessed 28 July 2017.
Malo 2011 <https://www.eurofound.europa.eu>.
⁵⁴ Malo 2011 <https://www.eurofound.europa.eu>.

1.9 Frame-work of the proposed study

The study comprises of six interrelated chapters as follows:

1. Introduction and problem statement
2. Historical background of the extension and enforcements of collective agreements in South Africa
3. International and legislative frameworks relevant to the extension and enforcement of collective agreements
4. The emerging trends pertinent to the extension and enforcement of collective agreements in South Africa
5. Consideration of best practices in relation to the extension and enforcement of collective agreements to non-parties
6. Conclusions and recommendations

1.10 Research methodology

The study assumed a qualitative method of research that is a desktop-based systematic method of exploring, analysing and conceptualising the law that regulates the extension and enforcements of collective agreements.⁵⁵ The methodology is concerned with understanding the process of the subject matter at hand and theory construction as opposed to testing it and obtaining a representative sample.⁵⁶ Although the method is inclined to questions of validity and reliability together with objectivity and subjectivity as well as ethical matters, the nature of the research and questions raised by it dictate the use of a qualitative method of research. The method was also chosen due to time constraints and financial implications.⁵⁷ The study relies on primary and secondary sources, case law, internet sources, statutes and international instruments.

1.11 Relevance for research unit theme

⁵⁵ Patton MG and Cochran M "A Guide to Using Qualitative Research Methodology" 2002 *Medeins South Africa's Frontier* 1-2.

⁵⁶ Neuman WL *Social Research Methods: Qualitative Approaches* 7th ed (Pearson Educated Limited 2014) 167.

⁵⁷ Neuman *Social Research Methods* 167.

This study falls within a broad focus of the research unit law, justice and sustainability. The study deals with affected rights of employers and employees who are non-parties to agreements concluded either, at plant level between an employer and trade union(s), or at sectoral level by a bargaining council. The study has a direct impact on the mannerisms of the collective bargaining process in South Africa, and slightly falls within the sub-project: vulnerability and new thinking. It proposes ways in which vulnerable non-parties can be protected against extensions and enforcements of collective agreements they were not party to in the first place. The subject field is of significance because of its contribution to the reformation of future legislation governing collective bargaining and agreements.

1.12 Ethical considerations

This study is conducted by the candidate and does not contain any form of plagiarism. The sources used in this study are duly acknowledged as primary, secondary or tertiary materials intended to find the correct approach to the above stated topic.

1.13 Overview of the next chapter

The next chapter focuses on the historical background of collective bargaining and agreements, as well as the extension and enforcement of collective agreements to non-parties. The chapter explains how the regulation of collective agreements came about in South Africa.

Chapter 2 Historical Background of the Extension and Enforcements of Collective Agreements in South Africa

2.1 Introduction

The history of South Africa's collective bargaining can be traced back to the systems of apartheid and industrialisation that characterised the twentieth century. These two

elements established a dualistic system of labour relations.⁵⁸ This chapter focuses on the history of collective agreements in South Africa, forums under which they were concluded and how they were regulated. The chapter further discusses the circumstances under which these collective agreements were extended and enforced, prior to the democratisation of labour relations in South Africa. The chapter also assesses the regulation of collective agreements and how it has evolved over the years. Therefore, the purpose of this chapter is to acquire an understanding of how South Africa reached its current legal position in relation to the extension and enforcement of collective agreements.

2.2 Collective bargaining and agreements in South Africa prior 1994

South Africa's industrial relations commenced in the 1900's when immigrants from Britain came up with the British system of trade unions and implemented it in South Africa.⁵⁹ The first Act to regulate collective relations was the *Transvaal Industrial Dispute Act*.⁶⁰ The promulgation of this Act was due to the industrial unrest in the mining industry, when black employees attempted to eradicate white trade union's monopoly of skilled work.⁶¹ In addition to the *Transvaal Act*, a second piece of legislation in 1924 was enacted to further regulate collective relations in South Africa.

2.2.1 The Industrial Conciliation Act No 11 of 1924

This was a second piece of legislation enacted to regulate collective relations after the *Transvaal Act*.⁶² The *ICA* 1924 was promulgated following the *Transvaal Act*, after the

⁵⁸ Vauthier SA *Collective Agreements: Comparative Study Between Belgium and South Africa* (LLM-dissertation University of South Africa 1998) 77.

⁵⁹ Vauthier *Collective Agreements: Comparative Study* 78.

⁶⁰ *Transvaal Industrial Dispute Act* of 1909, (hereinafter the *Transvaal Act*), The Act as a Primary source is unavailable hence the study did not resort to the relevant discussion of the Act (for example sections).

⁶¹ Thompson C & Benjamin P *South African Labour Law* 3rd ed (Juta Cape Town 1965) 1-22.

⁶² *Transvaal Act*; Section 1 of the *Industrial Conciliation Act* No 11 of 1924 (hereinafter the *ICA* 1924), Section 1 states that "This Act shall apply to every industrial and public utility undertaking to every industry, trade and occupation. And to every employer and employee engaged in or at any such undertaking industry, trade or occupation".

1920 protest action by White employees in the mining industry.⁶³ The reason for the strike was that the White employees were against the employer's attempts to permit people of colour in certain categories of skilled work previously monopolised by white trade unions.⁶⁴ The *ICA* 1924 made provision for the creation of statutory industrial councils, the purpose of which was to establish an enabling environment for negotiation in relation to matters of mutual interest, while the councils were used voluntarily by both employers and employees.⁶⁵

The councils created by the *ICA* 1924, introduced the system of trade unions and employers' organisations registration.⁶⁶ However, the system was discriminatory in that, it excluded black employees deliberately from application of the system by expressly excluding them from the definition of what constitutes an employee in the *ICA* 1924.⁶⁷ Black employees were permitted to form and join trade unions of their own choice and negotiate with their employers out of statutory structures.⁶⁸ The exclusion from the *ICA* 1924 meant that, they could not be members of a registered trade union, nor utilise collective bargaining mechanisms afforded by the *ICA* 1924.⁶⁹

In 1930's, the *ICA* 1924 was reviewed and altered. The revised Act referred to as the *Industrial Conciliation Act* No 36 of 1937 permitted the extension of collective agreements concluded at the industrial council, based on the best interests of employers and white employees, to black employees.⁷⁰ The collective agreements were published in the Government Gazette by the Minister of Labour. The provisions of these collective agreements would then be legally binding and enforceable on parties and non-parties for the duration of the agreement.⁷¹ The agreements

⁶³ Vauthier *Collective Agreements: Comparative Study* 78.

⁶⁴ Joseph JL *The Effectiveness of South African Labour Legislation in Dealing with Mass Industrial Action before the Promulgation of the Constitution Act 108 of 1996* (LLM-dissertation University of Kwa-Zulu Natal 2016) 21-22.

⁶⁵ Vauthier *Collective Agreements: Comparative Study* 78; Sections 2 and 4 of the *ICA* 1924.

⁶⁶ Steenkamp A, Stelzner S & Badenhorst N "The Right to Bargain Collectively" 2004 *Industrial Law Journal* 947-948.

⁶⁷ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 947.

⁶⁸ Jordaan C & Ukpere WI "South African Industrial Conciliation Act of 1924 & Current Affirmative Action: An Analysis of Labour Economic History" 2011 *African Journal of Business Management* 1094-1095.

⁶⁹ Jordaan & Ukpere 2011 *African Journal of Business Management* 1094.

⁷⁰ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 947; Section 48(1)(C) of the *Industrial Conciliation Act* No 36 of 1937.

⁷¹ Joseph *The Effectiveness of South African Labour Legislation* 21; Section 48(1)(C) of the

inherently had penalties for breach of any of the terms and conditions in it, and any dispute with regards to matters of mutual interest were referred to the industrial council for negotiation and settlement before a strike action or lock-out ensues.⁷² In areas where industrial councils were non-existent, employees or employers with sufficient level of representivity in that particular industry of occupation could apply to the Minister of Labour to appoint a conciliation board to assist in the settlement of the issues in dispute.⁷³ Industrial councils became established feature of labour relations in South Africa, however, they could not determine and settle disputes related but limited to engagement, promotion, transfer and *etcetera*.⁷⁴

2.2.2 The Botha Commission of Enquiry 1948

The Botha Commission of Enquiry was appointed by the National Party when it came into power to review the existing labour legislation.⁷⁵ The commission made a few recommendations. *Inter alia*, it recommended that trade unions consisting of black employees should be permitted to negotiate with statutory bodies only if the state approves.⁷⁶ Further, it recommended that, a conciliation board chaired by a state official must be created.⁷⁷ The commission went on to recommend that, black employees should be allowed to participate in a strike action only if it is primary in nature.⁷⁸ Based on the recommendations of the commission, a few pieces of legislation were enacted and others revised, and the courts made some observations and interpretations on collective agreements concluded at the industrial council. In the

⁷² *Industrial Conciliation Act* No 36 of 1937.
Joseph The Effectiveness of South African Labour Legislation 21; Section 48(1)(C) of the
Industrial Conciliation Act No 36 of
1937.

⁷³ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948.

⁷⁴ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948.

⁷⁵ Budeli M "Worker's Right to Freedom & trade unionism in South Africa: An Historical Perspective" 2009 *Fundamina* 65-66.

⁷⁶ Vettori MS *Alternative Means to Regulate Employment Relationship* (Doctoral-dissertation University of Pretoria 2005) 98-99.

⁷⁷ Budeli 2009 *Fundamina* 65.

⁷⁸ Vettori *Alternative Means to Regulate Employment Relationship* 98.

case of *South African Association of Municipal Employees v Pretoria City Council*,⁷⁹ the court held that:

The so called industrial council agreement is not really an agreement or a contract but a form of permitted domestic legislation by which the will of statutory body's majority vote is imposed on all members of a designated group of employers and employees irrespective of any concurrence by individuals affected and notwithstanding any positive disapproval by any such individual.⁸⁰

Recommendations of the Botha commission are aimed at alleviating oppression against Black employees and their trade unions, by White employees and their trade unions. However, based on court interpretations, the majoritarian principle has to be applied in deciding whether a council agreement deemed as a form of permitted domestic legislation can be imposed on designated groups and or affected individuals.⁸¹ More often than not the majoritarian principle is given primacy over individual interests, and because of this council agreements may be extended to designated groups or individuals.

2.2.2.1 The Industrial Conciliation Act 28 of 1956

To eradicate segregation and differentiation between White and Black workers, the *Industrial Conciliation Act*⁸² was enacted. The *ICA* 1956 is the revised version of the 1930 *Industrial Conciliation Act*, which gave effect to some of the recommendations of the Botha commission. It was later renamed and referred to as the *Labour Relations Act* 28 of 1956.⁸³ The primary purpose of the 1956 *LRA* was to organise employees in trade unions and employers in employers' organisations.⁸⁴ It also served to create

⁷⁹ Vauthier *Collective Agreements: Comparative Study* 82; *South African Association of Municipal Employees v Pretoria City Council* 1948 (1) SA 11 (T) 12.

⁸⁰ *South African Association of Municipal Employees v Pretoria City Council* 1948 (1) SA 11 (T) 12.

⁸¹ *South African Association of Municipal Employees v Pretoria City Council* 1948 (1) SA 11 (T) 12.

⁸² The *Industrial Conciliation Act* 28 of 1956 (hereinafter *ICA* 1956).

⁸³ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948; *Labour Relations Act* 28 of 1956 (hereinafter the 1956 *LRA*).

⁸⁴ Section 19(1) of the 1956 *LRA*.

industrial councils, determine terms and conditions of employment by agreement and combat unfair labour practices.⁸⁵

2.2.2.2 Black Labour Relations Regulation Act 1973

In order to acquire rights for Black workers that are equal to White workers in South Africa, Black employees embarked on a number of strike actions in the 1970's as a result the *Black Labour Relations Regulation Act (BLRRA)*⁸⁶ was enacted.⁸⁷ The *BLRRA* provided for the legalisation of strike actions by Black employees. Before the coming into operation of the *BLRRA*, strikes by Black employees were illegal.⁸⁸ However, even after the Act came into effect, there were few strikes that ensued from black employees.⁸⁹

The provisions of the *BLRRA* was so intricate that the first legal strike actions that took place resulted in the entire Black labour force being arrested even though their strikes were legalised.⁹⁰ The strike action was referred to as the 'Amourplate Strike of 1976'.⁹¹ The *BLRRA* made provision for the creation of liaison committees at plant level where these committees served as alternatives to the workers' committees.⁹² The purpose of liaison committees was to improve interaction between black employees and their employers.⁹³

The committees were introduced not to supplement but to replace the process of collective bargaining for two reasons. The first was that Black employees were deemed to be incapable of engaging responsibly in the process of collective bargaining at official level.⁹⁴ Secondly, White employees and their trade union feared the power that Black trade unions possessed. They were afraid that the black trade unions would dominate industrial relations and collective bargaining systems.⁹⁵

⁸⁵ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948.

⁸⁶ The *Black Labour Relations Regulation Act*, 1973 (hereinafter the *BLRRA*).

⁸⁷ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948; the *BLRRA* 1973.

⁸⁸ Bendix *Industrial Relations in South Africa* 74.

⁸⁹ Bendix *Industrial Relations in South Africa* 74.

⁹⁰ Bendix *Industrial Relations in South Africa* 74.

⁹¹ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948.

⁹² Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948-949.

⁹³ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948-949.

⁹⁴ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 948-949.

⁹⁵ Budeli 2009 *Fundamina* 65.

2.2.3 The Wiehahn Commission of Enquiry Report 1979

In the late 1970's, it became apparent that provisions of the *BLRRA* had failed in creating liaison committees and its attempt to improve interaction between Black employees and their employees, and also to appease the disgruntled and increasingly rebellious black labour movement.⁹⁶ At this very moment it became obvious that the dual system of labour relations was impractical. The Government then appointed a commission of enquiry and the commission was referred to as the Wiehahn commission.⁹⁷ The commission was tasked with adjusting the existing labour law system. The Government did not seek for the commission to address the issue of legalised racism and mistreatment of Black employees.⁹⁸

The report of the commission is seen as a significant defining moment of South Africa's labour history, irrespective of its inadequacies.⁹⁹ The commission recommended, *inter alia*, that trade unions comprising of Black employees must be afforded the same rights as those granted to White employees' trade unions.¹⁰⁰ It also recommended that before a trade union can be registered, there must be rigorous requirements that the unions must adhere to, and further that the legislation must include a provision for fair labour practices.¹⁰¹ Legislation was revised to give context to the recommendations of the commission.

2.2.3.1 The Industrial Conciliation (Amendment) Act of 1979

The *Industrial Conciliation (Amendment) Act*¹⁰² is one of the legislations revised in order to promote the principle of fair labour practices in South Africa as per recommendations of the 1979 Wiehahn commission. The *ICAA* provides for equality between Black and White employees, according to this Act, they could equally partake in statutory collective bargaining structures and embark on a legal strike action should

⁹⁶ Budeli 2009 *Fundamina* 65.

⁹⁷ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 949.

⁹⁸ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 949.

⁹⁹ SA History Online *Wiehahn Commission* 2014 <https://www.sahistory.org.za/article/wiehahn-commission> Accessed 6 January 2017.

¹⁰⁰ SA History Online 2014 <https://www.sahistory.org.za>.

¹⁰¹ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 950.

¹⁰² The *Industrial Conciliation (Amendment) Act*, 1979, (hereinafter the *ICAA*), The Act as a Primary source is not available hence the study did not resort to the relevant discussion of The Act.

mediation processes be unsuccessful.¹⁰³ Although Black trade unions were equal to White trade unions and received at certain workplaces, they often lacked sufficient representivity to engage in effective negotiation with employers' organisations and other unions at industry level on behalf of their members.¹⁰⁴

Representivity for Black trade unions was an issue to an extent that the unions preferred to bargain at plant level, outside the scope of statutory bargaining as opposed to bargaining at industry level.¹⁰⁵ The plant level preference resulted in the creation of a system referred to as the recognition agreement system. With this system, employers had to agree to give recognition to Black trade unions and grant them organisational rights.¹⁰⁶ Irrespective of revising legislation as per recommendations of the 1979 Wiehahn commission there were still gaps to be filled in labour law legislation.

2.2.4 The Wiehahn Commission of Enquiry of 1981

To fill gaps unforeseen by the 1979 Wiehahn commission in its enquiry another one was held by the same commission, and it issued a report in 1981 which included the following recommendations:

- (a) labour laws and practices should correspond with international conventions and codes;
- (b) statutory requirements and procedures for registration of trade unions should be revised;
- (c) urgent attention should be given to specific defects of the industrial court;
- (d) bargaining rights of workers councils should be laid down by statute;
- (e) the position of closed shop agreements should be clarified;
- (f) basic labour rights should be extended to the public sector;
- (g) specific legislation should be adopted regarding unfair labour practices;

¹⁰³ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 951; ICAA of 1979.

¹⁰⁴ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 951.

¹⁰⁵ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 951.

¹⁰⁶ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 951.

- (h) the Wage Act should be retained but amended; and
- (i) conditions of employment and working circumstances of female employees should be revised in various aspects.¹⁰⁷

Action was taken by the Government to give effect to the recommendations of the commission in subsequent legislation¹⁰⁸ however, black trade unions were not very welcoming of the centralised system of collective bargaining.¹⁰⁹ Black trade unions insisted on continuing to bargain collectively at plant level by virtue of recognition agreements entered into with employers. Although there is bargaining at industry level, plant level collective bargaining is still a practiced custom today.¹¹⁰ In the case of *Consolidated Frame Cotton Corporation v Minister of Manpower & Others*¹¹¹ the court held that, collective agreements concluded at industry level do not constitute contractually binding agreements. These agreements take the form of gentlemen's agreements until promulgation where they obtain the binding force of subordinate legislation.¹¹² Once the agreements are promulgated to obtain the necessary binding force, a plant level agreement regulating the same thing that the industry level agreement regulates becomes redundant because the latter receives primacy over the former.

Recommendations of the commission brought about change in the divergence between statutory and non-statutory bargaining in that after a series of benchmark decisions of the courts, a duty to bargain collectively was imposed upon employers.¹¹³ The duty was later defined as the duty to bargain collectively in good faith. The Labour Appeal Court in the case of *East Rand Gold & Uranium co v National Union of*

¹⁰⁷ Vettori *Alternative Means to Regulate Employment Relationship* 98; *The Wiehahn Commission of Enquiry* 6th Report tabled in Parliament on 30th September 1981, The abovementioned Recommendations appear exactly as they are laid out in the report.

¹⁰⁸ The *Labour Relations Amendment Act* No 57 of 1981, this is the legislation that was enacted To give effect to the 1981 Wiehahn commission recommendations.

¹⁰⁹ Vettori *Alternative Means to Regulate Employment Relationship* 99-100.

¹¹⁰ Vettori *Alternative Means to Regulate Employment Relationship* 100.

¹¹¹ *Consolidated Frame Cotton Corporation v Minister of Manpower & Others* (1984) 5 ILJ 309 (D) 317.

¹¹² *Consolidated Frame Cotton Corporation v Minister of Manpower & Others* (1984) 5 ILJ 309 (D) 316; Vauthier *Collective Agreements: Comparative Study* 83.

¹¹³ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 950.

Mineworkers,¹¹⁴ explained negotiations in good faith as “to meet and negotiate with an honest intention of reaching an agreement”.¹¹⁵

The revised legislations as per recommendations of the Wiehahn Commission did very little to please black employees as they were seeking implementation of significant labour rights in the workplace.¹¹⁶ The failure of the legislation to achieve this aggravated the employees to embark on a strike action in an attempt to obtain real change in the labour regime.¹¹⁷

2.2.5 *The era between 1990-1994*

In light of the inability of the legislation to assist Black employees to implement labour rights in the workplace, strike action ensued. These strike were coupled with an alarming increase of violent strike actions embarked on by black employees in the 1990's. This was an illustration of the resistance against the apartheid government and the unilateral decision making of employment terms and conditions by employers.¹¹⁸ These violent strike actions created a platform of consultation and negotiation process between trade unions and employers' organisations. The platform gave rise to the (SNC) agreement of 1991 between the South African Employer's Consultative Committee on Labour Affairs (SAACCOLA), Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions.¹¹⁹ This is the agreement that proposed amendments to the 1956 *LRA*.¹²⁰

The agreement between the above mentioned parties resulted in the amendment of the *LRA* 1956. The era of 1990-1994 was a significant part of the entrenchment of labour rights in the *Interim Constitution of the Republic of South Africa Act*,¹²¹ and

¹¹⁴ *East Rand Gold & Uranium co v National Union of Mineworkers* (1981) 10 ILJ 683 (LAC)

¹¹⁵ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 951; *East Rand Gold & Uranium co v National Union of Mineworkers* (1981) 10 ILJ 683 (LAC) para 6997F.

¹¹⁶ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 952.

¹¹⁷ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 952.

¹¹⁸ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 952.

¹¹⁹ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 952-953.

¹²⁰ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 952-953, The agreement also addressed the extension of benefits of trade unionism and collective bargaining to the Education, Public and Agricultural sectors which remained excluded from the scope of the Labour legislation.

¹²¹ The *Interim Constitution of the Republic of South Africa Act* 200 of 1993 (hereinafter the *Interim Constitution*).

subsequently the final draft.¹²² Every action taken in respect of labour related laws and rights was an effort to adhere and give effect to provisions of chapter 2 of the *Constitution*.¹²³

2.3 Collective bargaining and agreements after 1994

The methodology of collective bargaining provided for by the *LRA*¹²⁴ is voluntary as the parties cannot be coerced to bargain collectively. Therefore, the *LRA* imposes no duty on employers to engage in collective bargaining.¹²⁵ However, the entrenchment of the right to bargain collectively in the *Constitution* raises the question of whether a reciprocal duty to bargain collectively is imposed.¹²⁶ Cheadle's¹²⁷ perspective is that the legislature envisioned only the right but not the right and the reciprocal duty to do so.

The *LRA* does not impose the duty, but it affords employees and their representative bodies an opportunity to coerce employers, legally so, to engage in collective bargaining with them.¹²⁸ This is done by exercising economic power in the form of a strike action, which is a powerful reaction to an employer's refusal to bargain. However, before employees embark on a strike, a non-binding advisory arbitration award must be acquired on the question of whether collective bargaining should ensue.¹²⁹

2.3.1 Levels of collective bargaining

The *LRA* provides for two levels of collective bargaining, one which is centralised on the one hand and one which is decentralised on the other hand.¹³⁰

¹²² Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 953.

¹²³ Chapter 2 of the *Constitution*; Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 953.

¹²⁴ Section 1 of the *LRA*.

¹²⁵ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 953-954.

¹²⁶ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 954.

¹²⁷ Cheadle H "Collective Bargaining & Workers Participation" 2006 *Law, Democracy & Development* 153-154.

¹²⁸ Cheadle 2006 *Law, Democracy & Development* 153.

¹²⁹ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 955.

¹³⁰ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 956.

2.3.1.1 The Centralised level of collective bargaining

The *LRA* provides in section 1 that, it promotes bargaining collectively at sectoral level as one of its core objectives.¹³¹ The *LRA* provides for the formation of bargaining councils. These are established when one or more trade unions and one or more employers' organisations agree to the creation of a council for a particular industry.¹³² Bargaining councils are replacements of industrial councils, regulated by sections 27 to 38 and 49 to 63 of the *LRA*.¹³³ The *LRA* also provides for the creation of statutory councils, established by a representative trade union or a representative employers' organisation applying to the Registrar of the Labour Relations for establishment.¹³⁴ Statutory councils are regulated by sections 39 to 45 and 49 to 63 of the *LRA*.¹³⁵ The role of bargaining and statutory councils is to negotiate collective agreements in respect of terms and conditions of employment, and any other matter of mutual interest.¹³⁶

2.3.1.2 The decentralised level of collective bargaining

Decentralised level of collective bargaining is the exact opposite of centralised level of collective bargaining. In this level of bargaining, negotiation of collective agreements takes place between an individual employer and a trade union at plant level.¹³⁷ In this context, collective agreements are successors to recognition agreements.¹³⁸ This level of bargaining is preferred by employers as opposed to employees, reason being that collective agreements have the power to vary any contract of employment initially concluded between an employer and employee.¹³⁹

2.3.2 The extension and enforcement of collective agreement

¹³¹ Section 1 of the *LRA*.

¹³² Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 956.

¹³³ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 956; sections 27-38 and 49-63 of the *LRA*.

¹³⁴ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 956.

¹³⁵ Sections 39-45 and 49-63 of the *LRA*.

¹³⁶ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 956.

¹³⁷ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 953.

¹³⁸ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 953.

¹³⁹ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 953.

In terms of section of the 1956 *LRA*, the Minister could extend an industrial council agreement to non-parties only if he/she is satisfied that the parties to the council were sufficiently representative.¹⁴⁰ Collective agreements were binding to non-parties. However, in order to enforce these agreements a variety of methods had to be assumed to enforce their terms and conditions upon members of a union.¹⁴¹ The agency and automatic incorporation was a theory used in order for collective agreements to be legally binding and enforceable to non-parties. With this theory, terms and conditions of collective agreements were incorporated into an individual's contract of employment.¹⁴²

The agency and automatic theory was not the only theory used in respect of the enforcement of collective agreements, the following theories were also used: *stipulatio alteri*,¹⁴³ in terms of this theory the union acts as a *stipulans* when concluding a collective agreement. The benefits of that particular agreement are regarded as a form of *stipulatio alteri*, wherein they are considered to be in favour of third parties who are union members and other employees.¹⁴⁴ The second theory was unfair labour practices wherein, the Industrial Court had an immense unfair labour practice jurisdiction in terms of which it could be argued that failure to conform to a collective agreement constituted unfair labour practice.¹⁴⁵ The last theory was equity, presiding officers of the Industrial court would enforce collective agreements by recognising it on equitable grounds of sound labour relations and labour peace.¹⁴⁶ In the case of *Collins v Volkskas Bank*¹⁴⁷ the council held that, terms and conditions of an employment contract negotiated collectively are binding and enforceable against

¹⁴⁰ Section 48(A) of the 1956 *LRA*; Godfrey S *et al Collective Bargaining in South Africa: Past, Present and Future?* (Juta Cape Town 2010) 70-71.

¹⁴¹ Vauthier *Collective Agreements: Comparative Study* 87.

¹⁴² Vauthier *Collective Agreements: Comparative Study* 87.

¹⁴³ *Stipulatio Alteri* means a contract in favour of a third party or benefit of the third party.

¹⁴⁴ Vauthier *Collective agreements: Comparative Study* 85; *Mngomezulu v Khuthula Mining Services (Pty) Ltd* (1994) 15 ILJ 374 (IC) The court held that, "employees must be deemed to have authorised the trade union to negotiate and conclude recognition and wage agreements. In the absence of sufficient evidence of requisite authority, a collective agreement can be viewed as a form of contract for the benefit of third parties and tacitly accepted by employees".

¹⁴⁵ Vauthier *Collective Agreements: Comparative Study* 86.

¹⁴⁶ Vauthier *Collective Agreements: Comparative Study* 87.

¹⁴⁷ *Collins v Volkskas Bank* 1994 15 ILJ 374 (IC) 1399.

individual members of a union, either through common law or the above mentioned theories.¹⁴⁸

Collective agreements are applicable to parties who participate in concluding them¹⁴⁹ however, the *LRA* in its current form makes provision for the extension and enforcement of collective agreements in both centralised and decentralised levels of collective bargaining.¹⁵⁰ In terms of the decentralised level of bargaining, the *LRA* requires that collective agreements may be extended to non-members of a trade union in terms of section 23(1)(d). In relation to the enforcement of these extended agreements, the *LRA* provides that a collective agreement must include within itself a mechanism for dispute resolution in respect of the interpretation or application of these agreements.¹⁵¹

In terms of centralised level of bargaining, the *LRA* provides that collective agreements may be extended to non-members of a bargaining council in terms of section 32(1).¹⁵² The *LRA* provides, in relation to their enforcement in section 33(1) and 33A(3), that an agent may be appointed by the Minister upon request by the council or by provisions of the collective agreement. The appointed agent will promote, monitor and enforce compliance.¹⁵³ The *LRA* provides further that, disputes in relation to the compliance with collective agreements may be referred to the CCMA for arbitration.¹⁵⁴

2.4 Conclusion

South Africa has come a long way since the establishment of a democratic and open workplace. Therefore, the process of collective bargaining and agreements has

¹⁴⁸ Vauthier *Collective Agreements: Comparative Study* 87; *Collins v Volkskas Bank* 1994 15 ILJ 374 (IC) 1399.

¹⁴⁹ Sections 23 and 31 of the *LRA*.

¹⁵⁰ Vauthier *Collective Agreements: Comparative Study* 89.

¹⁵¹ Section 23(1)(d) of the *LRA*.

¹⁵² Section 32(1) of the *LRA*, "A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within its registered scope and are identified in the request, if at a meeting of the bargaining council".

¹⁵³ Section 33(1) of the *LRA*, "The Minister may, at the request of a bargaining council, appoint any person as the designated agent of that bargaining council to promote, monitor and enforce compliance with any collective agreement concluded in that bargaining council".

¹⁵⁴ Section 33A(4)(a) of the *LRA*, "The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the council".

evolved over the past years.¹⁵⁵ The recommendations of the Wiehahn Commission of Enquiry together with strike actions embarked on by black employees in the 1980's played a significant role in shaping labour relations in South Africa.¹⁵⁶

The chapter discussed South Africa's history in respect of the process of collective bargaining and agreements prior the democratic era, and post 1994. The chapter analysed reports and recommendations of the commissions as well as the pieces of legislations that were used to regulate collective agreements and the process of collective bargaining in South Africa. The chapter provided an understanding of South Africa's historical background and how the current regulation of collective bargaining and agreements came about.

2.5 Overview of the next chapter

The next chapter reflects on International and legislative frameworks which are relevant to the extension and enforcement of collective agreements to non-parties. This is aimed at providing a clear illustration of how South Africa governs the extension and enforcement of collective agreements to non-parties. And further indicate international instruments relevant to the extension and enforcement of collective agreements.

¹⁵⁵ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 961.

¹⁵⁶ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 961.

Chapter 3 International and Legislative Frameworks Relevant to the Extension and Enforcement of Collective Agreements

3.1 Introduction

It is trite in South Africa that a liaison between two or more parties be inclined to lawful regulation in order to guarantee fairness and protection of the best interests of all the parties.¹⁵⁷ An employment relationship between an employer and an employee is not exempted, such a relation is also inclined to regulation.¹⁵⁸ The chapter explores the provisions of Chapter 2 of the *Constitution* and its role and effect in respect of the regulation of collective agreements in South Africa. Further, the chapter reflects on the international and legislative framework relevant to the extension and enforcement of collective agreements both directly and indirectly.

The purpose of this chapter is to provide a clear illustration of laws that regulate collective agreements, and how they go about addressing the extension and enforcement of collective agreements to non-parties in South Africa. Furthermore, the chapter analyses the role played by the ILO in South Africa's labour law.

3.2 International Labour Organisation

The ILO is an edifice of the United Nations formulated in 1919 by the Versailles Treaty. It is an important source of labour standards in many countries.¹⁵⁹ The standards set by the ILO undertake an assortment of forms which include conventions, recommendations, codes of conduct as well as universal declarations, conventions being the most important of them all.¹⁶⁰ These standards have a direct bearing on the

¹⁵⁷ Conradie M "The Constitutional Right to Fair Labour Practices: A Consideration of the Influence & Contained Importance of the Historical Regulation of Unfair Labour Practices Pre-1997" 2016 *Fundamina* 163-204.

¹⁵⁸ Conradie *Fundamina* 163.

¹⁵⁹ ILO date unknown *Labour Law International*
<https://www.ilo.org/inform/online-information.resources/research-guides/labourlaw/lang-en/indexhtm> Accessed 28 May 2018.

¹⁶⁰ Buhman K 2017 *Changing sustainability norms through communication process: The Emergence of the business and human rights regime as transnational law*
<https://www.books.google.co.za/books?id=VutBDWAAQBAJ&PT100&lpg=pt100&dg> Accessed 27 May 2018.

development of labour law in South Africa, by virtue of ratifying the conventions of the ILO.¹⁶¹

The ILO espoused a declaration on fundamental principles and rights at work.¹⁶² The declaration provides that member states have a responsibility to recognise, endorse and acknowledge the principles that are the focus of the core conventions.¹⁶³ This means that once a member state has ratified a convention, it is obligated to take necessary action in order to implement provisions of that particular convention into its legal system. Another form of the ILO standards includes recommendations, although they are not binding on member states because they are incapable of ratification. They do however, have a tremendous impact on the development of labour legislation and policies.

According to the ILO conventions, save to say that South Africa's labour legislation is on par with standards required by the ILO. The ILO, like South Africa's labour legislation states that the extension of a collective agreement to non-parties is not a principle that contravenes the principle of freedom of association.¹⁶⁴ This signifies that, the limitation on the right to freedom of association by sections 23(1)(d) and 32(1) of the *LRA* is justifiable, as long as the collective agreement was concluded by a trade union that has the majority of employees at that particular workplace as their members.¹⁶⁵

Although international law plays a vital role in shaping South African labour law, and the ratification of conventions obligates member states to take necessary action, whether the ILO can administer application of its conventions has always been a subject of debate. There are extensive mechanisms to ensure the implementation of

¹⁶¹ Buhman 2017 <https://www.books.google.co.za> ; Hughes P & Ferrett E *International Health & Safety at Work: For the NEBOSH International General Certificate in Occupational Health and Safety* (Routledge United Kingdom 2015) 10-11.

¹⁶² ILO date unknown *ILO Declaration on Fundamental Principle and Rights At Work* https://www.ilo.org/declaration/lang_en/index.htm Accessed 18 May 2018.

¹⁶³ ILO date unknown https://www.ilo.org/declaration/lang_en/index.htm The four fundamental principles and rights at work are "1) child labour, effective Abolition of child labour; 2) discrimination at work, elimination of discrimination in respect of employment and occupation; 3) forced labour. Elimination of all forms of forced labour or compulsory labour; 4) freedom of association and the right to collective bargaining".

¹⁶⁴ *Freedom of Association: Digest* para 1052.

¹⁶⁵ *Freedom of Association: Digest* para 1052.

conventions and these mechanisms include member states periodically reporting to the Committee of Experts on the Application of Conventions and Recommendations (CEACR).¹⁶⁶

The CEACR reviews the reports from member states and they also state their observations in their own report, they may go as far as inviting a member state to account in respect of their omissions and reasons thereto.¹⁶⁷ Despite all these extensive mechanisms to monitor the implementation of conventions, the ILO lacks the necessary power to ensure that member states implement provisions of ratified conventions into their legal systems.¹⁶⁸

3.3 The Constitution of the Republic of South Africa, 1996

The Bill of Rights in chapter 2 of the *Constitution* plays a significant role in the determination of the labour law legislative framework.¹⁶⁹ With that being said, the *Constitution* is the Supreme law of the land and every law or conduct ought to be consistent with its provisions.¹⁷⁰ The labour law legislative framework should not be seen as rendering the importance of the provisions of the *Constitution* ineffectual by giving its provisions primacy over those of the *Constitution* without a justifiable reason.¹⁷¹

3.3.1 The principle of legality

Section 1(c) of the *Constitution* provides that, South Africa is an autonomous Republic, based on the values of *inter alia*, the omnipotence of the *Constitution* and the rule of law.¹⁷² The Constitutional Court held in the case of *United Democratic Movement v*

¹⁶⁶ Articles 22 and 19 of the *Constitution of the International Labour Organisation* (ILO) 1919 (hereinafter the *ILO Constitution*).

¹⁶⁷ *International Labour Office the Application of International Labour Standards Report III* (Part 1A) 105th Session International Labour Conference 2016 1-2.

¹⁶⁸ International Labour Office 2003 *The ILO Fundamental Conventions* <http://www.ilo.org/declaration/in-focus-programme-on-promoting-the-declaration> accessed 12 January 2018, conventions are not mandatory they are binding only if they are ratified by A member state and the *ILO Constitution* is not binding upon member states it is merely a Policy guideline.

¹⁶⁹ Chapter 2 of the *Constitution*.

¹⁷⁰ Mogapaesi T *Sexual Harassment in the Workplace: Lessons for Botswana from South African Legal Perspective* (LLM-dissertation North-West University 2014) 55-56.

¹⁷¹ Mogapaesi *Sexual Harrassment* 55.

¹⁷² Section 1 of the *Constitution*.

*President of RSA*¹⁷³ that, these values are imperative seeing that they have an impact on the interpretation of other provisions of the *Constitution*. These values also set positive principles which all laws must adhere to in order to be considered valid.¹⁷⁴ Provisions of sections 23(1)(d) and 32 of the *LRA* are bound by values entrenched in section 1 of the *Constitution* therefore, in invoking these sections they are inclined to the principle of legality like any other law in order to be considered valid.

3.3.2 *The right to freedom of association*

The extension and enforcement of a collective agreement to non-parties must be in line with the principle of legality before their limitation on rights like freedom of association can be said to be justifiable. The right to freedom of association is governed by section 18 of the *Constitution* and it is the foundational element of collective bargaining and a pre-requisite to the attainment of other rights.¹⁷⁵ Without the right to freedom of association rights such as collective bargaining,¹⁷⁶ joining of trade unions and *etcetera* would not exist because they flow from right to freedom of association. The right is considered to be a positive right that safeguards the interests of both employers and employees. However, the right also encompasses a negative element to it which is the right not to associate.¹⁷⁷ The negative aspect of the right to freedom of association basically means that no one may be coerced to belong to a union or a union that is not of their own choice.¹⁷⁸ This negative aspect is also a right and the extension and enforcement of collective agreements to non-parties impedes on the right not to associate, and therefore coercing non-parties to participate in activities of a union they do not belong to.

3.3.3 *The right to bargain collectively*

Section 23 of the *Constitution* generally provides for labour relations, provisions of which are much more relevant to labour laws and related rights than any other.¹⁷⁹ Subsection (5) of section 23 provides for the right to bargain collectively. This right

¹⁷³ *United Democratic Movement v President of RSA* 2003 (1) SA 495 (CC) para 19.

¹⁷⁴ *United Democratic Movement v President of RSA* 2003 (1) SA 495 (CC) para 19.

¹⁷⁵ Section 18 of the *Constitution*.

¹⁷⁶ Section 23(5) of the *Constitution*.

¹⁷⁷ Basson *et al Essential Labour Law* 245-247 & 257.

¹⁷⁸ Basson *et al Essential Labour Law* 257.

¹⁷⁹ Section 23 of the *Constitution*.

relates to both trade unions and employers' organisations. It is a right that permits a balanced relationship between employees and their employers.¹⁸⁰ The concept of collective bargaining may be defined as a technique upon which employees and employers make assertions upon each other and settle them through a process of negotiation.¹⁸¹

The negotiations in a process of collective bargaining lead to the conclusion of collective agreements that are mutually beneficial to both parties.¹⁸² The right is considered to be a prominent element of the process of collective bargaining and is used as a vehicle to conclude collective agreements between employers and employees through their trade unions and employers' organisations.¹⁸³

3.3.4 The Limitation Clause

Section 36(1) of the *Constitution* states that any limitation to the rights enshrined in chapter 2 of the *Constitution* is ought to be done through a law of general application.¹⁸⁴ The *LRA* qualifies as a law of general application therefore, its limitation of the rights in the *Constitution* is justifiable however, and any limitation to the rights in the bill is inclined to a test of reasonability in an open and democratic society, based on human dignity, equality and freedom.¹⁸⁵ As it encroaches on the above mentioned rights.¹⁸⁶

The clause endorses the concept of accountability on the part of legislatures. It also emboldens them to enact laws that are consistent with the core values, purport and spirit of the *Constitution* to avoid the enactment of null and void laws.¹⁸⁷

¹⁸⁰ Section 23(5) of the *Constitution*; Basson *et al Essential Labour Law* 245.

¹⁸¹ Basson *et al Essential Labour Law* 245.

¹⁸² Basson *et al Essential Labour Law* 247.

¹⁸³ Botha MM "Responsible Unionism During Collective Bargaining & Industrial Action: Are We Ready yet?" 2015 *De Jure* 330-331.

¹⁸⁴ Section 36(1) of the *Constitution*.

¹⁸⁵ Section 36(1) of the *Constitution*.

¹⁸⁶ Section 36(1) of the *Constitution*.

¹⁸⁷ Section 1 of the *Constitution*.

3.4 The Labour Relations Act 66 of 1995

The *LRA* is the prime legislation administering employment relationships in South Africa. It encompasses one of the government's crucial aims within it, which is to rearrange and democratise the economy in the labour relations field.¹⁸⁸ The *LRA* marks a significant transition in the statutory framework of the labour relation system in South Africa.¹⁸⁹ Section 1 of the *LRA* provides that its main purpose is to give context and effect to the labour related rights afforded by the *Constitution*.¹⁹⁰ Furthermore, the section provides that in interpreting provisions of the *LRA*, effect must be given to chief objectives of the *LRA* and ensure that its provisions comply with those of the *Constitution*.¹⁹¹

3.4.1 The purpose of the LRA

Section 1(c) of the *LRA*¹⁹² provides that its role is:

To provide a legislative framework within which employees and their trade unions as well as employers and their employers' organisations can bargain collectively to determine wages, terms and conditions of employment as well as matters of mutual interests.¹⁹³

Subsection (d) states further that, the primary function of the *LRA* is to endorse *inter alia* orderly collective bargaining.¹⁹⁴ The relevance and prominence of this section is the word 'promote'. The section speaks of endorsement as opposed to compulsion,¹⁹⁵ whereas the extension and enforcement of collective agreements to non-parties strips them off their right to bargain collectively through their chosen trade unions. This is an exercise that contravenes the purpose of the *LRA* therefore causing the legislation to be seen as contradicting itself by speaking of endorsement while sections 23(1)(d) and 32(1) of the *LRA* does the exact opposite.

¹⁸⁸ Section 1 of the *LRA*.

¹⁸⁹ Botha MM 2015 *De Jure* 320.

¹⁹⁰ Section 1(a) of the *LRA*; Work@law 2017 *Labour Relations Act 66 of 1995* <https://www.Worklaw.co.za/searchdirectory/legislation/LRACH1.ASP> Accessed 03 January 2018.

¹⁹¹ Section 1(a) of the *LRA*.

¹⁹² Section 1(c) of the *LRA*; Work@law 2017 <https://www.worklaw.co.za>.

¹⁹³ Section 1(c) of the *LRA*; Work@law 2017 <https://www.worklaw.co.za>.

¹⁹⁴ Section 1(d) of the *LRA*.

¹⁹⁵ Section 1(d) of the *LRA*; Work@law 2017 <https://www.worklaw.co.za>.

3.4.2 The Interpretation of the LRA

Section 3 of the *LRA* provides that, any person applying the *LRA* is obligated to interpret its provisions in a manner that gives effect to its primary objectives, and these objectives include the promotion of economic development, social justice as well as labour peace and democracy.¹⁹⁶ In extending and enforcing collective agreements provisions of section 3 of the *LRA* must be taken into account. The interpretation of sections 23(1)(d) and 32 of the *LRA* it must be in accordance with the provisions of the *Constitution*, and also in compliance with the state's public international law obligations incurred by being a member state of the United Nations.¹⁹⁷

3.4.3 Powers of the Labour Court

Section 158(1)(g) provides that, the Labour Court may evaluate the performance or supposed performance of any function provided for in the *LRA* on any basis that are acceptable in law.¹⁹⁸ Notwithstanding provisions of section 145 of the *LRA* which states that the commencement of a review proceeding does not rusticate the operation of an arbitration award unless the applicant furnishes security to the court's satisfaction.¹⁹⁹ Non-parties may rely on this section to have a chance at setting aside an arbitration award in favour of the extension and enforcement of a collective agreement upon them.

3.4.4 The extension of collective agreements

3.4.4.1 The extension of collective agreements at plant level

Section 23 of the *LRA* generally regulates the legal mandatory effect of collective agreements at plant level that is between one or more trade union(s) and an individual employer.²⁰⁰ Section 23(1)(d) makes provision for the extension of these collective agreements to non-parties,²⁰¹ only if the employees are acknowledged in the

¹⁹⁶ Section 3 of the *LRA*.

¹⁹⁷ Section 3 of the *LRA*.

¹⁹⁸ Section 158(1) (g) of the *LRA*.

¹⁹⁹ Section 145 of the *LRA*.

²⁰⁰ Section 23 of the *LRA*.

²⁰¹ Section 23(1)(d) of the *LRA*.

agreement,²⁰² the agreement unambiguously binds the employees,²⁰³ and the trade unions that concluded the collective agreement have as their members the preponderance of employees employed by the employer in the workplace.²⁰⁴ All these requirements must be complied with before a collective agreement can be extended to a non-party.²⁰⁵

Subsection 2 provides that a collective agreement binds for an entire specified duration and the section further stipulates in subsection (3) that, where necessity dictates a collective agreement will fluctuate a contract of employment between an employee and an employer.²⁰⁶ Subsection (4) provides that the only time a collective agreement may be terminated by any party to it is when the duration of its application is indefinite.²⁰⁷ The party seeking termination of the particular collective agreement must give reasonable notice to other parties of the agreement.²⁰⁸

3.4.4.2 The extension of collective agreements at sectoral level

Section 32 of the *LRA* regulates the extension of collective agreements concluded at a bargaining council, this is where a majority trade union(s) negotiate and conclude collective agreements with an employer's organisation.²⁰⁹ The section provides in subsection (1) that, a bargaining council may entreaty the Minister of Labour in writing, to extend a collective agreement concluded at a bargaining council to non-parties recognised in their request and within its jurisdiction.²¹⁰

The requirements of section 32 on collective agreement extensions is that at the gathering of the council pursuing to extend the agreement, one or more registered trade union(s) whose members constitute the majority of the members of a trade union that are party to the bargaining council, vote in favour of the extension.²¹¹ It

²⁰² Section 23(1)(d) (i) of the *LRA*.

²⁰³ Section 23(1)(d) (ii) of the *LRA*; *Aunde SA (Pty) Ltd v NUMSA* 2011 10 BLLR 945 (LAC).

²⁰⁴ Section 23(1)(d) (iii) of the *LRA*; *Aunde SA (Pty) Ltd v NUMSA* 2011 10 BLLR 945 (LAC).

²⁰⁵ *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v CCMA and Others* (2014) 35 ILJ 1959 (LAC) para 25-26.

²⁰⁶ Section 23(2)-(3) of the *LRA*; *Fakude v Kwikot (Pty) Ltd* 2013 34 ILJ 2024 (LC).

²⁰⁷ Section 23(4) of the *LRA*.

²⁰⁸ Section 23(4) of the *LRA*; *Aunde SA (Pty) Ltd v NUMSA* 2011 10 BLLR 945 (LAC).

²⁰⁹ Section 32 of the *LRA*.

²¹⁰ Section 32(1) of the *LRA*; Brown JM "Enforcement difficulties in the public and private sectors" 2009 *Law, Democracy & Development* 104-107.

²¹¹ Section 32(1)(a) of the *LRA*, Brown 2009 *Law, Democracy & Development* 106.

further provides that, a majority registered employer's organisation should also vote in favour of the extension of the collective agreement.²¹²

Subsection (2) states that the Minister of Labour is required to extend the collective agreement as implored by publishing a notice in the Government Gazette, the notice will state a precise date and time frame upon which the collective agreement will be binding on non-parties.²¹³ The publication of the notice and the extension of the collective agreement to non-parties should both be accomplished by the Minister within 60 days after having received the request.²¹⁴ Subsection (3) provides that, a collective agreement may not be extended in as per provisions of subsection (2) unless, the Minister is satisfied that the decision of the council to extend such a collective agreement complies with subsection (1).²¹⁵

The majority of the employees whom upon the extension of collective agreements will plunge within the latitude of the agreement, are members of trade unions that are party to the bargaining council.²¹⁶

The members of the employers' organisations, whom are parties to the bargaining council will upon the extension of collective agreement, be found to employ the majority of the employees who fall within the scope of the collective agreement.²¹⁷

In the request of the extension of a collective agreement, non-parties whom the agreement will be extended to must be specified.²¹⁸ Subsection (3)(e) of section 32 states that provision must be made in a collective agreement for a self-regulating body that will have the jurisdiction to adjudicate any appeal brought against the council's repudiation of a non-party's application for exemption from the provisions of a collective agreement, or the withdrawal of such an exemption by the council.²¹⁹

A collective agreement must also comprise of a standard that must be utilised by the self-regulating body when it entertains an appeal and that those standards are fair

²¹² Section 32(1)(b) of the *LRA*.

²¹³ Section 32(2) of the *LRA*.

²¹⁴ Section 32(2) of the *LRA*; Brown 2009 *Law, Democracy & Development* 106.

²¹⁵ Section 32(3)(C) of the *LRA*; Brown 2009 *Law, Democracy & Development* 106.

²¹⁶ Section 32(3)(b) of the *LRA*.

²¹⁷ Section 32(3)(c) of the *LRA*.

²¹⁸ Section 32(3)(d) of the *LRA*; Brown 2009 *Law, Democracy & Development* 106.

²¹⁹ Section 32(3)(e) of the *LRA*.

and they uphold the primary objectives of the *LRA*.²²⁰ The Minister of Labour must be satisfied that failure to extend a collective agreement may demoralise the process of collective bargaining at sectoral level. The Minister may, at the request of the bargaining council extend the period specified in the earlier notice if it has not expired.²²¹

3.4.5 The enforcement of collective agreements

In an event where a collective agreement is extended to a non-party and they do not adhere to provisions of the particular agreement, the extender of the agreement may invoke the following measures to ensure that non-parties comply with the extended agreement.

3.4.5.1 The enforcement of collective agreements at plant level

Section 24 of the *LRA* regulates the application and interpretation of collective agreements including those extended in terms of section 23 of the *LRA* at plant level.²²² Section 24 provides that, a collective agreement must comprise of a procedure to resolve any quarrel about the interpretation or application of a collective agreement.²²³ The dispute resolution procedure in the collective agreement in relation to the application and interpretation must necessitate parties to the agreement to try resolving a dispute through conciliation or arbitration, should the matter remain unresolved at conciliation.²²⁴ Upon the occurrence of a dispute regarding the interpretation or application of a collective agreement, any party to the dispute may refer the matter in writing to the CCMA if the collective agreement does not include a

²²⁰ Section 32(3)(f) of the *LRA*.

²²¹ Section 32(5)(b) of the *LRA*; Brown 2009 *Law, Democracy & Development* 106.

²²² Section 24 of the *LRA* The application and interpretation of collective agreements regulated By section 24 are agency shop agreements and closed shop agreements in sections 25 and 26 of the *LRA*; Brown 2009 *Law, Democracy & Development* 104.

²²³ Section 24(1) of the *LRA*; Gilesfiles 2016 *Collective Agreement: read interpretation or application Together* [https:// www.gilesfiles.co.za/collective-agreement-read-interpretation-or-application-Together](https://www.gilesfiles.co.za/collective-agreement-read-interpretation-or-application-Together) Accessed 04 January 2018.

²²⁴ Section 24(1) of the *LRA*; Gilesfiles 2016 <https://www.gilesfiles.co.za>.

dispute resolution or,²²⁵ the resolution has become inoperative or,²²⁶ a party to the agreement exasperated the dispute resolution.²²⁷

A copy of referral of a dispute must be served to all the other parties to the dispute, the commissioner must have prior to the arbitration of the matter, made an attempt to conciliate the dispute.²²⁸ An arbitration award issued in relation to the application and interpretation of a collective agreement, may be reviewed by the Labour Court.²²⁹

3.4.5.2 The enforcement of collective agreements at sectoral level

Section 33(1) of the *LRA* provides that the Minister may, at the request of a bargaining council, employ any person as a designated agent of that particular council to encourage, monitor and enforce compliance with provisions of the collective agreement.²³⁰ The appointed agent may secure acquiescence by publicising the contents of a collective agreement, piloting inspections, investigating grievances and any other means the council may approve of.²³¹ Schedule 10 of the *LRA* provides for the powers which a designated agent of a bargaining council possesses.²³²

Section 33A(3) of the *LRA* states that a collective agreement may empower the appointed designated agent in terms of section 33, to issue a compliance order that obliges any person bound by the collective agreement to comply with its provisions.²³³ Subsection (4) provides that the council may refer an unsettled dispute in respect of compliance with the provisions of a collective agreement for arbitration, to be arbitrated by an arbitrator selected by the council.²³⁴ Subsection (8) contains the types of awards that an arbitrator may issue in settling compliance issues relating to collective agreements.²³⁵

²²⁵ Section 24(2)(a) of the *LRA*; Gillesfiles 2016 <https://www.gilesfiles.co.za>.

²²⁶ Section 24(2)(b) of the *LRA*.

²²⁷ Section 24(2)(c) of the *LRA*; Gillesfiles 2016 <https://www.gilesfiles.co.za>.

²²⁸ Section 24(3)-(5) of the *LRA*.

²²⁹ Section 145 of the *LRA*.

²³⁰ Section 33(1) of the *LRA*; Brown 2009 *Law, Democracy & Development* 107.

²³¹ Section 33(1A)(a)-(b) of the *LRA*.

²³² Section 33(4) of the *LRA*.

²³³ Section 33A(3) of the *LRA*; Brown 2009 *Law, Democracy & Development* 107.

²³⁴ Section 33A(4) of the *LRA*; Brown 2009 *Law, Democracy & Development* 107.

²³⁵ Section 33A(8) of the *LRA* "an arbitrator conducting an arbitration in terms of this section may make an appropriate award, including -(a) ordering any person to pay any amount owing in terms of a collective agreement; (b) imposing a fine for a failure to comply with a collective

3.5 The Promotion of Administrative Justice Act

The *Promotion of Administrative Justice Act (PAJA)*,²³⁶ may be referred to as the pioneering legislation that generates a way of implementing the right to be treated fairly in administrative actions.²³⁷ It seeks to protect the public from unlawful, irrational and procedurally unfair administrative decisions.²³⁸

The relevance of *PAJA* to the topic is that, it covers administrative action taken by natural or juristic person other than an organ of state,²³⁹ this would include one or more sufficiently representative trade union(s) and/or a bargaining council. The extension of collective agreements to non-parties constitutes an exercise of public power by private actors, this power is exercised in terms of an empowering provision.²⁴⁰ The administrative action is reviewable under the principle of legality provided by the *Constitution*,²⁴¹ and reiterated by *PAJA*.²⁴²

Where a collective agreement is concluded without following due process,²⁴³ *PAJA* affords people who are unpleasantly affected by the administrative action an opportunity to make representations,²⁴⁴ and also to institute proceedings in a court of law or a tribunal for a judicial review of an administrative action.²⁴⁵ However, where a collective agreement was extended without following due process the commissioner may consider whether or not it was reasonable and justifiable to extend such an agreement.²⁴⁶ This would obviously be assessed based on the merits of each case seeing that the conclusion of a collective agreement is fact driven for example, by a

agreement in accordance with subsection (13); (c) charging a party an arbitration fee; (d) ordering a party to pay the costs of the arbitration; (e) confirming, varying or setting aside a compliance order issued by a designated agent in accordance with subsection (4) (f) any award contemplated in section 138"; *Brown 2009 Law, Democracy & Development* 107.

²³⁶ The *Promotion of the Administration Justice Act* 3 of 2000 (hereinafter *PAJA*).

²³⁷ The Public Service Commission 2006 *Compliance with the PAJA 2000* <https://www.psc.gov.za/documents/2007/k-5337-psc-admin%justice> Accessed 10 September 2017.

²³⁸ The Public Service Commission 2006 www.psc.gov.za.

²³⁹ Section 1(b) of the *PAJA*; Williams RC "The concept of a Decision as the Threshold for Judicial Requirement Review in Terms of the Promotion of Administrative Justice Act" 2011 *Potchefstroom Electronic Journal* 237-238.

²⁴⁰ *AMCU & Others v Chamber of Mines Case* Para 69.

²⁴¹ Section 1 of the *Constitution*.

²⁴² Section 6 of *PAJA*.

²⁴³ Section 3(2)(a)-(b) of the *PAJA*; Williams 2017 *Potchefstroom Electronic Journal* 237.

²⁴⁴ Section 3(2)(i) of the *PAJA*.

²⁴⁵ Section 6 of the *PAJA*.

²⁴⁶ Section 3(4)(b) of the *PAJA*.

trade union's level of representivity in the workplace, or by considering whether the terms and conditions of the agreement are in the interest of the majority or whether it promotes orderly collective bargaining and labour peace.

3.6 Conclusion

This chapter discussed the laws applicable to the topic of the study and a clear indication of the superiority of the *Constitution*. As depicted above, all the legislation referred to in relation to the extension and enforcement of collective agreements stems from the provisions of the *Constitution*. The various legislations referred to in the chapter state that, their prime objective is to *inter alia* give effect to provisions of the *Constitution*.²⁴⁷ The chapter also illustrated that although the *Constitution* is supreme, rights entrenched in it are not absolute and that they are subject to limitation,²⁴⁸ also that the *Constitution* cannot on its own enforce these rights without the context given to the rights by the relevant legislation.²⁴⁹ The chapter also reflected on the importance of international law in shaping and developing South African labour legislation.

The chapter focused on all the constitutional provisions related to the extension and enforcement of collective agreements in South Africa. The chapter also reflected on the legislative framework relevant to collective agreements, their extension as well as their enforcement. Furthermore, the chapter reflected on the standards of the ILO in relation to the extension and enforcement of collective agreements to non-parties.

3.7 Overview of the next chapter

Chapter four of the study provides a clear and concise idea, or rather a picture of how collective agreements are extended and enforced in South Africa. The chapter also focuses on recent developments in relation to the extension and enforcement of collective agreements. It also highlights on how the judiciary has been addressing these developments. The chapter also reflects on the arguments for and against the extension and enforcement of collective agreements, as well as the constitutionality

²⁴⁷ Section 1 of the *LRA*; Section 1 of the *PAJA*.

²⁴⁸ Section 36 of the *Constitution*.

²⁴⁹ *South African National Defence Union v Minister of Defence & Others* (2007) 9 BLLR 785 (CC) para 53-56.

and the administrative action justice concerned in the extension and enforcement of collective agreements.

Chapter 4 Emerging Trends Pertinent to the Extension and Enforcement of Collective Agreements in South Africa

4.1 Introduction

The extension and enforcement of collective agreements to non-parties has since been the order of the day in South Africa since the 1900's,²⁵⁰ and the judiciary has over the years concurred with provisions of the *LRA*, which has even emboldened the extension and enforcement of collective agreements to non-parties.²⁵¹ The provisions pertinent to the extension and enforcement of collective agreements to non-parties seem to be cast in stone. However, there are recent developments in relation to these provisions. These emerging trends in relation to the extension and enforcement of collective agreements are a clear indication that, just as time moves forward the law also evolves.

This chapter aims to provide a critical analysis of the applicable law in respect of the extension and enforcement of collective agreements to non-parties. It further highlights recent developments in relation to the extension and enforcement of collective agreements. The chapter also discusses how the majoritarian principle plays a role in the extension and enforcement of collective agreements to non-parties. Furthermore, the chapter focuses on how the judiciary has been addressing these emerging trends. Arguments for and against the extension and enforcement of collective agreements to non-parties are also presented.

4.2 The Majoritarian Principle

The principle of majority is a premise and a repeated theme throughout the *LRA*, the purpose of this principle is to ensure the advancement of the *LRA*'s primary objective which is to promote orderly collective bargaining and labour peace.²⁵² This signifies that any limitation of rights due to the majoritarian principle is sufficiently justifiable.²⁵³

The principle is internationally recognised, and it was acknowledged by South Africa's judiciary from the case of *Kem-Lin Fashions v Bruton*,²⁵⁴ sections 23(1)(d) and 32(1) are one of the many sections in the *LRA* which encapsulates the legislative policy of

²⁵⁰ Vauthier *Collective Agreements: Comparative Study* 78.

²⁵¹ Sections 23, 24, 32, 33A and 33 of the *LRA*; *Consolidated Frame Cotton Corporation v Minister of Manpower & Others* 1984 5 ILJ 309 (D) para 316; *Collins v Volkskas Bank* 1994 15 ILJ 374 (IC) para 1399; *AMCU & Others v Chamber of Mines* para 1.

²⁵² *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v CCMA and Others* (2014) 35 ILJ 1959 (LAC) para 45.

²⁵³ *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v CCMA and Others* (2014) 35 ILJ 1959 (LAC) para 50.

²⁵⁴ *Kem-Lin Fashions v Bruton*.

the majoritarian principle.²⁵⁵ In respect of collective labour law, the interests of the majority triumphs over those of an individual. For this reason, the conclusion and extension of a collective agreement cannot be done by a trade union that does not have sufficient representivity as this would undermine the principle of majority.²⁵⁶

This principle precludes minority unions to co-exist, members of a minority union are not afforded the chance to bargain collectively through their union on matters of mutual interest. In the conclusion of a collective agreement and the extension thereof, non-parties are deemed to have been represented by a union which is not their chosen trade and this limits their right to freedom of association.²⁵⁷

The implementation of the principle oppresses minority unions,²⁵⁸ resulting in the exact opposite of what section 21 of the *LRA*²⁵⁹ seeks to achieve. The question then becomes what is the purpose of the provisions of section 21 and minority unions if an employer and a majority trade union have already regulated all its affairs relating to their members and the decision is made to be binding on every employee in the workplace.²⁶⁰ This is a practice in contravention with what is referred to as fair operation of the majoritarian principle.²⁶¹

4.3 The Extension of collective agreements at plant and Sectoral Level

Clause 21 of the draft of Labour Relations Bill²⁶² is the forerunner of section 23 of the *LRA*; however, it made no provision for the extension of collective agreements to non-parties.²⁶³ Section 23(1)(d) stems from the National Economic Development and

²⁵⁵ *NUMSA v SAA Case* para 20; *Aunde SA (Pty) Ltd v NUMSA* 2011 BLLR 945 (LAC) para 32.

²⁵⁶ *South African Correctional services Workers Union (SACOSWU) v Police & Prisons Civil Rights Union (POPCRU) & Others* (2017) 38 ILJ 2009 (LAC) para 19.

²⁵⁷ *NUMSA v SAA Case* para 37.

²⁵⁸ *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v CCMA and Others* (2014) 35 ILJ 1959 (LAC) para 55.

²⁵⁹ Section 21 of the *LRA*, seeks to eradicate the oppression against minority unions simply because they lack sufficient representivity therefore not affording them the necessary tools to utilise in representing their members.

²⁶⁰ Snyman S 2015 *The Principle of Majoritarianism in the Case of Organisational Right for Trade Unions-Is it Necessary for Stability in the Workplace or Simply a Recipe for Discord* <https://www.saslaw.org.za/index.php/downloads/category/55-2015-conference.resources> Accessed 23 April 2018.

²⁶¹ Cohen 2014 *Potchefstroom Electronic Law Journal* 60.

²⁶² The *Labour Relations Draft Bill* GN 97 of 1995, GG 16259 of 10 February 1995.

²⁶³ *AMCU & Others v Bafokeng Rasimone Management Services (Pty) Ltd & Others* [2016] ZALCJHB549; 201738 ILJ 931 (LC) para 73 (hereinafter *AMCU & Others v Bafokeng*

Labour Council (NEDLAC) negotiation process, and successive parliamentary processes.²⁶⁴

Collective agreements entered into at a bargaining council have been extended to non-parties since the recognition and regulation of labour relations in South Africa,²⁶⁵ in the past the extension of these agreements was not as complicated as it is today.²⁶⁶ Employer's organisations and employee's trade unions would reach decisions in respect of terms and conditions of employment at sectoral level. Those very same decisions would be applicable to employers and employees at factory level even though they did not participate in the negotiations.²⁶⁷

4.4 Impediments for Extending Collective Agreements to Non-Parties

Section 23 of the *LRA* has pre-requisites to be adhered to prior to an extension of a collective agreement to a non-party.²⁶⁸ However, they are not as extensive as the checks and balances in section 32 of the *LRA*. Section 23(1)(d)(iii)²⁶⁹ created a fundamental hypothesis that a minority union is incapable of securing a better deal than a majority union, and also that the will of the majority triumphs over that of the minority.²⁷⁰

It can be argued that Section 23(1)(d) infringes on the following constitutional rights; the rule of law,²⁷¹ the right to fair labour practices,²⁷² the right to freedom of association,²⁷³ the *audi alteram partem* principle,²⁷⁴ and the right to fair administrative justice action.²⁷⁵ The provisions of section 32 just like the extension of collective

Rasimone).

²⁶⁴ Section 23 (1)(d) of the *LRA*; *AMCU & Others v Bafokeng Rasimone* para 73.

²⁶⁵ *Consolidated Frame Cotton Corporation v Minister of Manpower & Others* (1984) 5 ILJ 309 (D).

²⁶⁶ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 942-961.

²⁶⁷ Steenkamp, Stelzner & Badenhorst 2004 *Industrial Law Journal* 942-961.

²⁶⁸ *AMCU & Others v Chamber of Mines* para 12.

²⁶⁹ Section 23(1)(d)(iii) of the *LRA* provides that "collective agreement binds employees who are Not members of the registered trade union or trade unions party to the agreement if *inter alia*, that trade union(s) have as their members the majority of employees employed by the Employer in the workplace".

²⁷⁰ *AMCU & Others v Chamber of Mines* para 174.

²⁷¹ Section 1 of the *Constitution*.

²⁷² Section 23(1) of the *Constitution*.

²⁷³ Section 18 of the *Constitution*.

²⁷⁴ *AMCU & Others v Bafokeng Rasimone* para1.

²⁷⁵ Section 33 of the *Constitution*.

agreements at plant level, do infringe on the same constitutional and statutory rights afforded to non-parties. However, there is a slight difference in respect of collective agreements extended in terms of section 32 of the *LRA*. This is due to the requirements included in the extension of a bargaining council agreement.²⁷⁶

4.4.1 *The Rule of Law*

The concept of the rule of law refers to the method in which people are governed according to regulations that are just, fair and apply equally to everyone.²⁷⁷ There is an erudite form of the rule of law identified as the principle of legality, which necessitates that the law in terms of which the state acts must be general, prospective, clear and relatively stable.²⁷⁸

Section 1(c) of the *Constitution* provides that, the Republic of South Africa is a sovereign, democratic state established on values of *inter alia* supremacy and the rule of law.²⁷⁹ The Constitutional Court held in the case of *AMCU & Others v Chamber of Mines* that, a collective agreement extended in terms of section 23 is reviewable under the principle of legality.²⁸⁰ Notwithstanding this, review only happens after a collective agreement has already been extended this means that, non-parties are not protected from the use of authority by private actors and they are excluded from participating in the decisions making process, concerning matters of mutual interest as required by section 1(d)(iii) of the *LRA*.²⁸¹ This is basically a breach of the rule of law and qualifies as an action that is potentially arbitrary or unpredictable.²⁸²

Compliance with the principle of legality should serve as motivation to include under section 23(1)(d) extensive requirements to be adhered to, prior to the extension of collective agreements so as to protect non-parties from the unrestraint use of authority by private actors. The fundamental principle of legality must never be seen to be

²⁷⁶ Section 32 of the *LRA*.

²⁷⁷ Maswanganyi M *Rule of Law in South Africa* (LLB-dissertation University of Limpopo 2010) 2-3.

²⁷⁸ Maswanganyi *Rule of Law in South Africa* 2.

²⁷⁹ Section 1(c) of the *Constitution*.

²⁸⁰ *AMCU & Others v Chamber of Mines* para 73 and 84.

²⁸¹ Section 1(d)(iii) of the *LRA* provides that the purpose of the Act is to promote Employee Participation in the decision-making in the workplace.

²⁸² *Free Market Foundation v Minister of Labour & Others* [2016] 8 BLLR 805 (GP) para 45.

renounced. However, circumstances of each case must be examined to determine whether factual certainty requires the betterment of legality, and if so, to what extent.²⁸³

4.4.2 Public Administration

Public administration can be pronounced as the expansion, execution and learning of government policy, public administration and assessment.²⁸⁴ It includes the pursuit of public good and the expansion and progression of civil society by certifying that public service is well run fairly so, and that the services are operational in achieving the objectives of the state.²⁸⁵ Section 195 of the *Constitution* provides for basic values and principles of governing public administration.²⁸⁶

The extension of collective agreements to non-parties may be an act exercised by private actors however, in respect of section 32 of the *LRA* it becomes an exercise of power by an organ of state once the Minister gets involved.²⁸⁷ An extension in terms of section 23 of the *LRA* may be carried out by private actors but the invocation of it confers public power to private actors,²⁸⁸ in order to determine whether an action constitutes an exercise of public power the following factors are ought to be taken into account:

- There must be an element of coercion or power that the actor has in its capacity as a public institution;
- The decision must have an impact towards the public;
- The origin or source of that power; and
- And whether there is a need for the decision to be exercised in the interest of the public.²⁸⁹

²⁸³ *National Employers Association of SA v Minister of Labour & Metal and Engineering industries bargaining Council* (JR860/13) [2014] ZALCJHB 542 (LC) para 60.

²⁸⁴ Jordaan J *Public Financial Performance Management in South Africa: A Conceptual Approach* (PHD-Dissertation University of Pretoria) 46-47.

²⁸⁵ Jordaan *Public Financial Performance Management in South Africa* 46.

²⁸⁶ Section 195 of the *Constitution*.

²⁸⁷ Section 32(2)-(5) of the *LRA*.

²⁸⁸ *AMCU & Others v Chamber of Mines* para 74.

²⁸⁹ *Chirwa v Transnet Ltd* 2007 ZACC 23; 2008 (4) SA 367 (CC); 2005 (3) BCLR 251 (CC) para 186.

The above mentioned elements are present in extending a collective agreement to a non-party.²⁹⁰ In applying the majoritarian principle an element of coercion is apparent, side-lining minority trade unions and stripping non-parties off their right to bargain collectively through their unions as well as participate in decisions affecting them. Private actors or rather majority unions, rams decision in relation to the extension and of collective agreements down the throat of non-parties. Furthermore, for the duration of the collective agreement non-parties are not only bound by the collective agreement, they also forfeit the right to take any action regarding an issue regulated by that particular collective agreement.²⁹¹

The extended collective agreement binds non-parties haphazardly, therefore having far-reaching effects upon non-parties for the duration of the agreement.²⁹² This satisfies the second element of public administration mentioned above. The exercise of power is authorised by a general legislation²⁹³ and deemed to be in the interest of promoting orderly collective bargaining,²⁹⁴ irrespective of it being unfair. This goes to show that the extension of a collective agreement to a non-party is not merely a private matter between private parties, the basis of its power together with its exercise affects the interests of the public.²⁹⁵ Therefore, being inclined to provisions of section 195 of the *Constitution*.

4.4.3 *Constitutional and Statutory Labour Rights*

4.4.3.1 Freedom of association

Section 18 of the *Constitution* speaks of the right to freedom of association,²⁹⁶ a positive right which encompasses a negative element referred to as the right not to associate, which basically means no person may coerce an employee to fit into a union

²⁹⁰ *AMCU & Others v Chamber of Mines* para 78.

²⁹¹ *AMCU & Others v Chamber of Mines Case* para 78.

²⁹² *AMCU & Others v Chamber of Mines* para 78.

²⁹³ Sections 23(1)(d) and 32 of the *LRA*.

²⁹⁴ Section 1(d)(i) of the *LRA*.

²⁹⁵ *AMCU & Others v Chamber of Mines* para 79.

²⁹⁶ Section 18 of the *Constitution*; Basson *et al Essential Labour Law* 251.

or be in a union that is not of their choice.²⁹⁷ The right is also given effect by section 4 of the *LRA*.²⁹⁸

The *International Labour Organisation's (ILO) Freedom of Association Committee*²⁹⁹ held that, the extension of a collective agreement to non-parties who are employees of a workplace covered by the agreement is not a principle that contradicts those of freedom of association.³⁰⁰ Reason being that even though the right is afforded by the *Constitution*,³⁰¹ it may be limited by law of general application³⁰² so as to adverse the interests of the majority. For this reason the committee further held that, this applies as long as the representation of those non-parties to the agreement is made by a trade union that has the majority of the employees employed at that particular workplace as its members.³⁰³

Notwithstanding the above, the extension and enforcement of collective agreements to non-parties infringes on the right to freedom of association in a sense that it forces association upon non-parties who do not wish to associate, contravening the negative element encompassed in the right to freedom of association. The extension and enforcement of collective agreements further disregards the non-parties rights to choose their own trade unions, irrespective of the freedom to do so being entrenched in the *Constitution* as a right and given context by the *LRA*. In concluding and extending these collective agreements non-parties are represented by majority trade unions,³⁰⁴ which renders the purpose of their chosen trade union redundant.

4.4.3.2 Collective bargaining

Section 23 of the *Constitution* regulates labour relations, and it provides in subsection (1) that everyone has the right to fair labour practices.³⁰⁵ The extension of a collective agreement to a non-party restricts this right, it divests members of a minority union

²⁹⁷ Basson *et al Essential Labour Law* 257.

²⁹⁸ Section 4 of the *LRA*, "(1) Every employee has the right- (a) to participate in forming a trade union or federation of trade unions; and (b) to join a trade union, subject to its constitution".

²⁹⁹ *Freedom of Association: Digest* para 1052.

³⁰⁰ *Freedom of Association: Digest* para 1052.

³⁰¹ Section 18 of the *Constitution*.

³⁰² Section 36 of the *Constitution*.

³⁰³ *Freedom of Association: Digest* para 1052.

³⁰⁴ Sections 23(1)(d)(iii) and 32(1)(a)-(b) of the *LRA*.

³⁰⁵ Section 23(1) of the *Constitution*.

an opportunity to contest the fairness of the application of a collective agreement they never concluded, before it is extended.³⁰⁶ Fair labour practice is a matter that concerns mutual interests, it is not an all-embracing right but rather a distinct labour right.³⁰⁷

In the case of *Sikhosana & Others v Sasol Synthetic Fuels*,³⁰⁸ the court held that although the *Constitution* affords the right to everyone, employees do not have an individual right to fair labour practices. Instead, it is a collective right.³⁰⁹ This takes us back to the principle of majoritarianism which dictates that if the conclusion of a collective agreement is made on the foundation of the interests of the majority and it is extended to non-parties, their right to fair labour practices is seen to have been granted through majority trade unions.³¹⁰ This is to eradicate superfluous competition between employers and to establish uniformity in the sector.³¹¹ It was the applicant's contention in the case of *AMCU & Others v Bafokeng Rasimone* that, the principle of majority unfairly discriminates against non-parties on the basis of their chosen trade union.³¹² The principle demoralises the significance of the right to freedom of association, irrespective of the right being the foundation of collective bargaining.³¹³

Section 23(5) of the *Constitution* provides for a trade union's and an employer's organisation's right to collective bargaining.³¹⁴ The *LRA* gives context and effect to the right in section 1 which provides that the purpose of the *LRA* is to *inter alia*, endorse orderly collective bargaining at sectoral level.³¹⁵ The provisions of both these sections do not create a duty to bargaining, the *LRA* only encourages collective bargaining therefore instituting a principle of voluntarism and not coercion.³¹⁶ The extension of collective agreements to non-parties infringes the rights of the non-parties to freely negotiate terms and conditions applicable between an employer and employee

³⁰⁶ *AMCU & Others v Bafokeng Rasimone* para 167; *AMCU & Others v Chamber of Mines* para 16.

³⁰⁷ *AMCU & Others v Bafokeng Rasimone* para 168-169.

³⁰⁸ *Sikhosana & Others v Sasol Synthetic Fuels* 2000 21 ILJ 649 (LC) para 657 GH.

³⁰⁹ *Sikhosana & Others v Sasol Synthetic Fuels* 2000 21 ILJ 649 (LC) para 657 GH.

³¹⁰ *AMCU & Others v Bafokeng Rasimone* para 171.

³¹¹ Section 1(d) of the *LRA*.

³¹² *AMCU & Others v Bafokeng Rasimone* para 26.

³¹³ Section 18 of the *Constitution*.

³¹⁴ Section 23(5) of the *Constitution*.

³¹⁵ Section 1(d)(i-ii) of the *LRA*.

³¹⁶ *POPCRU v Ledwaba No & Others* (2014) 35 ILJ 1037 (LC) para 23 & 27.

through their trade unions.³¹⁷ The involvement of non-parties in the workplace's decision making is endorsed by section 1 of the *LRA*, and the extension of collective agreements contravenes this endorsement.

The extension of collective agreements should be given primacy over provisions of the *LRA* because section 3³¹⁸ states that, these provisions must be interpreted *inter alia* in accordance with objectives of the *LRA*, and section 1 endorses collective bargaining at sectoral level.³¹⁹ Notwithstanding the above-mentioned, the legislation should be read as a whole and not separately. In giving collective agreements primacy it goes to show that some provisions in the *LRA* are far more important than others, the question then becomes why such provisions are even entrenched in the legislation if they are going to be seen as of little significance in contrast with others.

Section 1(d) of the *LRA* encourages bargaining collectively at sectoral level.³²⁰ This endorses the principle of majoritarianism even more at sectoral level than at plant level, which basically strips minority unions off the right to bargain collectively on behalf of their members and participate in the decision making process that affects them in the workplace. Therefore precluding minority unions to co-exist with majority trade unions.³²¹

4.4.4 Administrative Action

Administrative law governs legal relations of public authorities whether with private individuals or organisations or other public authorities. It regulates the actions of bodies that exercise public powers to perform public functions regardless of these bodies not being public authorities in a strict sense.³²² The purpose of administrative

³¹⁷ *Bengwenyana Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others* 2011 (4) SA 113 (CC) Para 84-85.

³¹⁸ Section 3 of the *LRA*.

³¹⁹ Section 1 of the *LRA*; *Minister of Health v New Clicks SA (Pty) Ltd & Others* 2006 (2) SA 311 (CC) para 13.

³²⁰ Section 1(d)(ii) of the *LRA*.

³²¹ Section 1(d)(iii) of the *LRA*; *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v CCMA & Others* (2014) 35 ILJ 1959 (LAC) para 55.

³²² Wikipedia 2012 *South African Administrative Law* https://www.en.m.wikipedia.org/wiki/South_African_Adminlaw Accessed 05 November 2017.

law is to prevent the misuse of power, to preserve a balance of fairness and maintain public interests to encourage operative use of administrative power.³²³

Section 33 of the *Constitution* provides for just administrative action afforded as a right to everyone.³²⁴ This right is given effect by provisions of *PAJA*.³²⁵ *PAJA* states that an administrative action entails a decision taken or omission to take a decision, including an exercise of public power or carrying out public function of any legislation by an organ of state or a natural or juristic person other than an organ of state.³²⁶

Section 3 of *PAJA* provides that where an administrative action negatively affects the rights or expectations of a person it must be procedurally fair,³²⁷ meaning that the affected party must be provided with reasons for the action and afforded an opportunity to challenge the decision.³²⁸ The extension and enforcement of collective agreements to non-parties disregards the provisions of *PAJA* in a sense that, non-party's constitutional and statutory rights are infringed and in the midst of extending these agreements, they are not afforded an opportunity to make representations prior to the extension.³²⁹ This is in contradiction with the antique principle of *audi alteram partem* rule,³³⁰ where an administrative action like extending a collective agreement transpires non-parties should be informed by notice that an extension is about take place. And further afford those non-parties an opportunity to state through their trade unions whether or not they accept to be bound by a collective agreement they did not conclude, if not, non-parties should provide sufficient reasons as to why they refuse to be associated with that particular collective agreement.

Where non-parties disagree with the extension of a collective agreement, they are ought to be furnished with reasons as to why it is important to have such an agreement extended to them.³³¹ However, provisions of sections 23(1)(d) and 32 of the *LRA* only afford these opportunities after the collective agreement has already

³²³ Wikipedia 2012 [http:// www.en.m.wikipedia.org](http://www.en.m.wikipedia.org).

³²⁴ Section 33 of the *Constitution*.

³²⁵ Section 1 of *PAJA*.

³²⁶ Section 1(b) of the *PAJA*.

³²⁷ Section 3 of the *PAJA*.

³²⁸ Sections 5 & 3(2)(i) of the *PAJA*.

³²⁹ *AMCU & Others v Chamber of Mines* para 73; *AMCU & Others v Bafokeng Rasimone* para 37.

³³⁰ *AMCU v Chamber of Mines* para 73; *AMCU & Others v Bafokeng Rasimone* para 37.

³³¹ Section 5 of *PAJA*.

been extended. The *audi alteram partem* rule requires the other side to be heard first before a decision can be made.

Murphy J held in *Free Market Foundation v Minister of Labour*³³² that:

Laws made by administrative functionaries exercising delegated powers might be categorised as administrative, but laws made by original legislative bodies can rarely be so described.³³³

Landman³³⁴ holds the view that there is no elucidation as to the derivation of collective agreements in the *LRA*, further that they are a form of delegated legislation with an extensive scope of coverage as opposed to the narrow scope of common law contracts, establishing a bond between parties for the duration of the collective agreement.³³⁵ In *Fedsure Life Assurance Ltd v Greater JHB Transitional Metropolitan Council & Others*³³⁶ the court held that, “the exercise of original or unhurried law making powers by legislative bodies does not concern administrative action”.³³⁷ The negotiation of a collective agreement and the request to the Minister to promulgate it however might be considered as the establishment of regulation not as original legislation, but delegated rule making.³³⁸

In terms of section 32, it is the Minister who promulgates by extending a collective agreement preceding the request by the bargaining council, such conduct is strictly speaking not legislative in nature.³³⁹ The consequence of the action does not constitute the enactment of law. The request of the council can therefore be seen as the forerunner administrative part of a delegated law making procedure.³⁴⁰ In the case of *Minister of Health v New Clicks SA (Pty) Ltd & Others*³⁴¹ the court held that, provisions

³³² *Free Market Foundation v Minister of Labour* 2016 37 ILJ 1635 (GP) 2016 (4) SA 496 (GP); [2016] 8 BLLR 805 (LC) para 80-81, (hereinafter the *Free Market Foundation v Minister of Labour*).

³³³ *Free Market Foundation v Minister of Labour* para 80-81.

³³⁴ Landman 1996 *Contemporary Labour Law* 74.

³³⁵ Landman 1996 *Contemporary Labour Law* 74.

³³⁶ *Fedsure Life Assurance Ltd v Greater JHB Transitional Metropolitan Council & Others* 1999 (1) SA 374 para 155, (hereinafter the *Fedsure Life Assurance Ltd Case*).

³³⁷ *Fedsure Life Assurance Ltd Case* para 155.

³³⁸ *Fedsure Life Assurance Ltd Case* para 155.

³³⁹ *Fedsure Life Assurance Ltd Case* para 155.

³⁴⁰ *Fedsure Life Assurance Ltd Case* para 155.

³⁴¹ *Minister of Health v New Clicks SA (Pty) Ltd & Others* 2006 (2) SA 311 (CC) para 13 (hereinafter *Minister of Health v New Clicks SA Pty Ltd & Others*).

of *PAJA* ordinarily will apply, and thus the decision of the council to extend the collective agreement will be subject to review under *PAJA*.³⁴² And, if the decision is not an administrative action, it is reviewable on grounds of reasonableness, rationality and legality under the rule of law.³⁴³

4.5 Interpretation and Application of Collective agreements at Plant level

A dissention over the interpretation of a collective agreement occurs if the parties disagree over the meaning of a particular provision.³⁴⁴ A dissention regarding the application of a collective agreement occurs when the parties disagree over whether the agreement is applicable to or in a certain set of facts and circumstances. It is possible for a dispute over the interpretation, and a dispute over the application of a collective agreement to occur simultaneously in one case.³⁴⁵

In accordance with provisions of section 24 of the *LRA*, a collective agreement must encompass a procedure for dispute resolution which endorses resolution through conciliation or arbitration if conciliation fails.³⁴⁶ The section further provides that any party to the dispute may in writing involve the commissioner if the dispute resolution becomes defective, frustrated or the collective agreement does not contain one.³⁴⁷

The current interpretation of section 24 of the *LRA* permits the exclusion of minority trade unions that are not party to the agreement and leaves them oblivious to what took place in the process, and also deprives them of information.³⁴⁸ This is in contravention with provisions of section 21 of the *LRA*, which seeks to protect minority trade unions from the oppression of majority trade unions.³⁴⁹ There is still a dispute whether provisions of section 24 of the *LRA* may be seen as a form of enforcement, and whether the words application and enforcement can be used interchangeably.

³⁴² *Minister of Health v New Clicks SA (Pty) Ltd & Others* para13.

³⁴³ *Minister of Health v New Clicks SA (Pty) Ltd & Others* para 13.

³⁴⁴ Grogan 2007 <https://books.google.co.za>; *Hospersa (somers) v MEC for health KZN & Others* (2016) 37 ILJ 1839 (LAC) para 32.

³⁴⁵ Grogan 2007 <https://books.google.co.za>; *Hospersa (somers) v MEC for health KZN & Others* (2016) 37 ILJ 1839 (LAC) para 32.

³⁴⁶ Section 24 of the *LRA*.

³⁴⁷ Section 24 of the *LRA*.

³⁴⁸ *AMCU & Others v Bafokeng Rasimone* para 27.

³⁴⁹ *AMCU & Others V Bafokeng Rasimone* para 27.

This dispute was addressed in the case of (*Hospersa*)³⁵⁰ where it was held that the notion that a breach of a right that stems from a collective agreement is automatically a dispute in terms of section 24 is wrong.³⁵¹ The notion is wrong because both these sections establish the legal edifice for the legal effect of collective agreements and disputes.³⁵² Therefore, section 24 is merely a procedure to oil the wheels of collective bargaining, and an effective resolution of disputes about collective agreements.³⁵³

Thompson and Benjamin³⁵⁴ however, believe that collective agreements are legally enforceable instruments, and that any dispute over the interpretation or application would include the enforcement of that particular collective agreement.³⁵⁵ The court held in (*Hospersa Case*) that, Thompson and Benjamin's statement is unmotivated because it suggests that once application is proven, the referring party can acquire more than just a declaratory order, and can obtain pursuant to such finding substantive relief.³⁵⁶

Revelas J³⁵⁷ held that:

The enforcement of an agreement only becomes an issue when there is some form of non-compliance with provisions of a collective agreement, and there is a party who wishes to enforce the agreement it would be *inter alia* because it believes that the agreement is applicable to the party in breach.³⁵⁸

Therefore, a dissention about the application of a collective agreement is applicable in circumstances wherein there is non-compliance with a collective agreement, and one of the parties wishes to enforce the terms and conditions of the collective agreement.³⁵⁹

The court further held in (*Hospersa*) that the terms interpretation or application are not discrete terms and they are ought to be read as though they are linked to each

³⁵⁰ *Hospersa Case* para 19.

³⁵¹ *Hospersa Case* para 19.

³⁵² *Hospersa Case* para 19.

³⁵³ *Hospersa Case* para 19.

³⁵⁴ Thompson C & Benjamin P *South African Labour Law* 3rd ed (Juta Cape Town 1965) 1-22.

³⁵⁵ Thompson & Benjamin *South African Labour Law* 1-22.

³⁵⁶ *Hospersa Case* para 22.

³⁵⁷ *NUCW v Orange Mynbou en Vervoer Maatskappy* para 8-9.

³⁵⁸ *NUCW v Orange Mynbou en Vervoer Maatskappy* para 8-9.

³⁵⁹ *NUCW v Orange Mynbou en Vervoer Maatskapp* para 8-9.

other. Disputes about what the agreement means and to whom it applies fits properly with an understanding of section 24 as a stratagem that is a subordinate to collective bargaining.³⁶⁰

4.6 The Enforcement of Collective Agreements at Sectoral Level

The legislature incorporated section 33 and 33A in the *LRA*,³⁶¹ as a specifically intended mechanism to provide a remedy for an event where there is a contention of a breach of a right that stems from the operation of section 32 of the *LRA*.³⁶² Section 33 and 33A provide a purpose built frame work to enforce compliance with the council's collective agreement, to hold otherwise might be seen to undermine one of the primary objectives of the *LRA* which is to promote collective bargaining.³⁶³

The capability of the employers' organisations and trade unions to regulate the behaviour of their electorate at lower levels is key for ensuring that decisions taken at higher levels are actually reflected at lower levels and effectively implemented.³⁶⁴ The co-ordinations and centralisation of collective agreements at both these levels without compliance and enforcement are simply ineffective.³⁶⁵

In accordance with provisions of section 33 of the *LRA*, a Minister may at the request of the council employ a designated agent who will monitor and enforce compliance with the collective agreement.³⁶⁶ Section 33A provides that, the employed agent may issue a compliance order compelling the legally bound parties in terms of section 32 of the *LRA* to adhere to provisions of the extended collective agreement.³⁶⁷ Section 206(1) of the *LRA* provides for defects and irregularities in a bargaining council that may have a consequence on the cogency of a collective agreement.³⁶⁸ However,

³⁶⁰ *Hospersa Case* para 25.

³⁶¹ Section 33 and 33A of the *LRA*.

³⁶² Section 32 of the *LRA*; *Rukwaya & Others v The Kitchen Restaurant* (2018) 39 ILJ 180 (LAC) Para 22 (hereinafter *Rukwaya & Others v The Kitchen Restaurant*).

³⁶³ *Rukwaya & Others v The Kitchen Restaurant* para 48; section 1(d)(i)-(ii) of the *LRA*.

³⁶⁴ OECD *Employment Outlook* (OECD Publishing Paris, France 2017) 154-156 (hereinafter the *OECD Employment Outlook*).

³⁶⁵ OECD *Employment Outlook* 155.

³⁶⁶ Section 33 of the *LRA*.

³⁶⁷ Section 33A of the *LRA*.

³⁶⁸ Ritief J "Paper v Practice_ Examining the Scope & Limit of Section 206 of the Labour Relations Act in Providing a Remedy for Non-parties to Extend Collective Agreements" 2012 *Obiter* 574; Section 206(1) of the *LRA*.

subsection (2) provides for an unblemished depiction of what constitutes a defect in terms of subsection (1).³⁶⁹ Where there is an inconsequential shortcoming in the council or its constitution, a party cannot institute a legal dispute based on that minor error. This endorses the notion that the court should not concern itself with trivialities.³⁷⁰ Van Niekerk J³⁷¹ held that, Section 206 of the *LRA* protects the council's collective agreement against any attacks on its cogency on account of any irregularities or defect.³⁷²

4.7 Analysis

The *LRA* was conceded into law and before it came into operation in 1996, the Constitutional Court licensed it as constitutionally compliant.³⁷³ The system regulating relations between an employee and an employer is erudite yet intricate, as it warrants the scrutiny of a judge where equivocal notions such as reasonableness and justifiability in a free democratic society are in dispute, and collective bargaining law is polycentric in nature.³⁷⁴

An attempt to adjust delicate industrial relations balance in one part of the system which might have abrupt effects in another. The lesson of evolution of our labour regime display undoubtedly that legislation is equipped to strike a balance between interests of an individual employee, union, employer and the public.³⁷⁵ In the case of *Transport Allied Workers Union of SA v Putco Ltd*,³⁷⁶ it was held that every case must

³⁶⁹ Section 206(2) of the *LRA*, "a defect referred to in subsection (1) means – (a) a defect in, or omission from, the constitution of any registered trade union, registered employers' organisation or council; (b) a vacancy in the membership of any council; (c) any irregularity in the appointment or election of (i) a representative to the council; (ii) an alternate to any representative to the council; (iii) a chairperson or any other person presiding over any meeting of a council or a committee of a council; or (iv) the director or a commissioner".

³⁷⁰ Ritief 2012 *Obiter* 575.

³⁷¹ *National Employers Association of SA v Minister of Labour & Others* 2012 (2) BLLR 98 (LC) para 20.

³⁷² *National Employers Association of SA v Minister of Labour & Others* 2012 (2) BLLR 98 (LC) para 20.

³⁷³ *AMCU & Others V Bafokeng Rasimone* para 72.

³⁷⁴ *AMCU & Others V Bafokeng Rasimone* para 88.

³⁷⁵ *AMCU & Others V Bafokeng Rasimone* para 88.

³⁷⁶ *Transport Allied Workers Union of SA v Putco Ltd* (CCT94/15) [2016] ZACC 7; 2016 37 ILJ 1091 (CC) Para 28.

be judged on its own merits, and as supreme as the *Constitution* is the rights entrenched within it are not absolute, they are limited by law of general application.³⁷⁷

The *LRA* has strong incentives in encouraging collective bargaining at sectoral level. It also endorses the majority principle as well as the extension and enforcement of collective agreements to non-parties. However, there is very little that is done to benefit non-parties as well as to protect them seeing that the rights protecting them under the constitution are subject to limitation therefore inclining the infringement of these rights to justifiability.³⁷⁸ It is very rare for the courts to strike down an extension of a collective agreement to a non-party, both in terms of section 23 and 32 of the *LRA*.³⁷⁹

4.8 Conclusion

The chapter discussed the extension of collective agreements both at sectoral and plant level, together with the enforcement of collective agreements at these levels. The chapter further discussed the application of the majoritarian principle in extending and enforcing collective agreements to non-parties. The chapter further looked at recent developments in respect of extension and enforcement of collective agreements to non-parties, problems associated with that, the rights infringed as well as arguments for and against the extension and enforcement of collective agreements. Furthermore, the chapter discussed how the judiciary has been addressing all these developments.

4.9 Overview of the next chapter

The next chapter entails a consideration of best practices. It discusses legal position in relation to the extension and enforcement of collective agreement in United Kingdom, Slovakia and Italy. The chapter further compare and contrast these legal systems with the system utilised in South Africa, this is to determine whether South Africa's labour frame-work is adequate or if there is room for improvement.

³⁷⁷ Section 36 of the *Constitution*.

³⁷⁸ Sections 1, 23, 24, 32, 33A and 33 of the *LRA*.

³⁷⁹ Section 23 and 32 of the *LRA*.

Chapter 5 A Consideration of best practices in Relation to the Extension and Enforcement of Collective Agreements

5.1 Introduction

International law is a substantial aspect of the sources of South African law. It offers world-wide principles to abide by in order to attain passable governance in different expanses of law.³⁸⁰ It is for this reason that section 39 of the *Constitution*³⁸¹ provides that when a right entrenched in the Bill is interpreted, consideration must be given to international law.³⁸² In *S v Makwenyane* Chaskalson J³⁸³ held that:

³⁸⁰ Basson *et al Essential Labour Law* 15-16.

³⁸¹ Section 39 of the *Constitution*.

³⁸² Section 39(1)(b) of the *Constitution*.

³⁸³ *S v Makwenyane & Another* [1995] ZACC 3 SA 391 (CC) para 35 (hereinafter the *S v Makwenyane*).

In dealing with comparative law, we must bear in mind that we are required to construe to South African constitution and not an international instrument or the constitution of some foreign country. The comparison must be done with due regard to South African legal system, history, circumstances and the structure. Assistance may be derived from public international law & foreign case law but we are in no way bound to follow it.³⁸⁴

The chapter conducts a consideration of best practices by comparing the legal perspectives of various countries in respect of the extension and enforcement of collective agreements to non-parties. The countries to be considered in contrast with the South Africa's legal position are Slovakia, the United Kingdom and Italy.

5.2 The Legal Position in Slovakia

The process of collective bargaining and collective agreements in Slovakia are governed by the *Collective Bargaining Act*.³⁸⁵ Section 2 states that collective agreements in Slovakia administrate individual and collective relations between employers and employees, as well as the rights and duties of contractual parties.³⁸⁶ Subsection (2) states that, these collective agreements may be concluded by respective trade union bodies and employers or their organisations.

Section 2(3) of the *Collective Bargaining Act*³⁸⁷ distinguishes between for two forms of collective agreements which are company and higher degree collective agreements. They are defined as follows:

- (a) A company collective agreement is concluded between respective trade unions body and an employer who is also a service officer.
- (b) A higher degree collective agreement is concluded for a majority number of employers (whom is normally the state), between the respective higher trade union body and the organisation(s) of employers.
- (c) A higher degree collective agreement often regulates remuneration, procedures in compliance with separate regulation between respective trade

³⁸⁴ *S v Makwenyane* para 35.

³⁸⁵ *Section 1 of the Collective Bargaining Act 2/199/Coll* (hereinafter the *Collective bargaining Act*).

³⁸⁶ *Section 2(1) of the Collective Bargaining Act.*

³⁸⁷ *Section 2(3) of the Collective Bargaining Act.*

higher trade union body, representatives authorised by government and representative employer's proxies.³⁸⁸

5.2.1 *The extension of collective agreements to non-parties in Slovakia*

5.2.1.1 Company collective agreement

The *Collective Bargaining Act* states that a collective agreement shall be obligatory to the contractual parties, as well as employers who are concomitant with employers' organisations that entered into a higher degree collective agreement.³⁸⁹ A collective agreement is also obligatory on employees and trade union bodies, whom the collective agreement was concluded on their behalf by a respective superior trade union body.³⁹⁰

5.2.1.2 Higher degree collective agreement

A higher degree collective agreement is compulsory for employers in a subdivision, to which the obligatory effect of the higher degree collective agreement has been extended to by virtue of section 7(1) provisions.³⁹¹ A higher degree collective agreement is binding also for an employer who is not a member of the employers' organisation that has entered into the higher degree collective agreement, provided the employer acceded to the extension of the collective agreement.³⁹² The contracting parties who concur to the accession of a higher degree of a collective agreement should notify the Ministry of employers within a period of 15 days after the employer's consent,³⁹³ subsection (5) states that a representative trade union concludes the collective agreement also on behalf of employees who are not members of trade union.³⁹⁴ Section 7 provides that subject to conditions of the *Collective Bargaining Act*,

³⁸⁸ Section 2(3) of the *Collective Bargaining Act*; IBP Inc *Slovak Republic Labour Laws & Regulations Handbook* (International Business Publications United States of America 2013) 57-58.

³⁸⁹ Section 5 of the *Collective Bargaining Act*.

³⁹⁰ Section 5(b)-(c) of the *Collective Bargaining Act*; IBP Inc *Slovak Republic Labour Laws* 57.

³⁹¹ Section 5(3) of the *Collective Bargaining Act*; IBP Inc *Slovak Republic Labour Laws* 57.

³⁹² Section 5(4) of the *Collective Bargaining Act*; Lexology 2013 *Amendment to the Slovak Act on Collective Bargaining Under Scrutiny* <https://www.lexology.com/library/detail.aspx?g=7c902> Accessed 12 January 2018.

³⁹³ Section 5(4) of the *Collective Bargaining Act*.

³⁹⁴ Section 5(5) of the *Collective Bargaining Act*; Frankowski S & Stephan III PB *Legal Reform in Post-Communist Europe: the View from within* (Martin Nijhoff Publishers Leiden 1995) 440-441.

the ministry may extend the binding effect of a collective agreement to all employers in a sector where the collective agreement is applicable.³⁹⁵

5.2.2 *The enforcement of collective agreements to non-parties in Slovakia*

There are duties enclosed in the normative part of a collective agreement which can be enforced by employees before the court, and there are also obligations that stem from the contracting part of the collective agreement which may be enforced by a specific procedure before a mediator or an arbitrator.³⁹⁶ The provisions of the *Collective Bargaining Act*³⁹⁷ makes it compulsory for parties to settle disputes regarding the execution of a collective agreement before a mediator, and possibly an arbitrator.³⁹⁸ The arbitrator's decision in collective labour disputes in relation to the implementation of provisions of a collective agreement is legally effective and executable but, a review against the decision may be filed with the Regional Court and the jurisdiction of the court depends on where the defendant carries his/her business.³⁹⁹

The Regional Court has the authority to withdraw the legal effectiveness of the arbitrator's decision if it is in contravention of legal regulations or with the collective agreement.⁴⁰⁰ The court's decision is resolute and does not allow an appeal or restitution of proceedings.⁴⁰¹ After the decision of the arbitrator is reversed by the Regional Court, it is sent back to the arbitrator for re-examination of the facts and make a new decision. Unless a party to the quarrel disagrees, then a new arbitrator may be appointed by the Ministry of Labour, Social Affairs and Family of the Republic.⁴⁰² If after the decision is made obligations of the collective agreement are still not fulfilled, the other contracting party may request a judicial execution of the arbitrator's decision.⁴⁰³

³⁹⁵ Section 7(1) of the *Collective Bargaining Act*.

³⁹⁶ H Barancava & A Alosvska *Labour Law in Slovak Republic* (Kluwer Law International 2011) 190-191.

³⁹⁷ Barancava & Alosvska *Labour Law in Slovak* 190.

³⁹⁸ Barancava & Alosvska *Labour Law in Slovak* 190.

³⁹⁹ Barancava & Alosvska *Labour Law in Slovak* 190.

⁴⁰⁰ Barancava & Alosvska *Labour Law in Slovak* 190.

⁴⁰¹ Barancava & Alosvska *Labour Law in Slovak* 190.

⁴⁰² Barancava & Alosvska *Labour Law in Slovak* 190.

⁴⁰³ Barancava & Alosvska *Labour Law in Slovak* 190.

5.2.3 Summary

Slovakia has two types of collective agreements one concluded at plant level and the other at sectoral level, both these collective agreements are legally binding even to parties whom are not party to the agreement. Failure by non-parties to adhere to the extended collective agreements results in the enforcement of the collective agreement to a non-party before a mediator, arbitrator or the court. While the decision of an arbitrator is reviewable, the decision of the court is final therefore not affording non-parties a resolution if judgment is against them.

It does not suffice to take into account one country's legal system in order to determine the adequacy of South Africa's legal system, especially if the legal system of both these countries are only slightly different. For this reason the study also considers the legal system of the United Kingdom in respect of the extension and enforcement of collective agreements to non-parties.

5.3 The Legal Position in the United Kingdom (UK)

A collective labour agreement or a collective bargaining agreement is a distinct kind of agreement, which is discussed collectively between the management (on behalf of the company) and trade unions (on behalf of the employees).⁴⁰⁴ The collective agreement governs the terms and conditions of employment, their responsibilities together with the responsibilities of the employer.⁴⁰⁵ A collective agreement is normally the outcome of a process of collective bargaining between an employer(s) and a trade union representing the employees.⁴⁰⁶

In the case of *Ford Motor co Ltd v Amalgated Union of Engineering and Foundry Workers & Others*,⁴⁰⁷ the High Court held that collective agreements were not legally binding. The provisions of the *Industrial Relations Act*⁴⁰⁸ introduced by Robert Carr

⁴⁰⁴ Mc Mullen J "Collective Agreements" at the XIVth Meeting of European Labour Court Judges (4 September 2006 *Cour de cassation* Paris) 1-3.

⁴⁰⁵ Mc Mullen "Collective Agreement" 1.

⁴⁰⁶ Mc Mullen "Collective Agreement" 2.

⁴⁰⁷ *Ford Motor co Ltd v Amalgated Union of Engineering and Foundry Workers & Others*, *Managerial Law*, Vol (6) 1969.

⁴⁰⁸ Section 6 of the *Industrial Relations Act* of 1971, (hereinafter the *Industrial Act*).

who was the Employment Minister in Edward Heat's Cabinet stated that, collective agreements were binding unless there is a written clause that declared otherwise.⁴⁰⁹

5.3.1 *The extension of collective agreements to non-parties in UK*

Collective bargaining together with its agreements in the United Kingdom are regulated under the *Trade Union and Labour Relations (Consolidation) Act*.⁴¹⁰ Section 179 of the *TULRC Act* provides that collective agreements are irrefutably considered as not legally binding.⁴¹¹ This presupposition is rebuttable as the written agreement could contain an explicit provision declaring that the agreement should be legally enforceable.⁴¹² The collective agreement itself is not enforceable, but many of its terms and conditions relating *inter alia* to remuneration, pensions and severance pay⁴¹³ may be incorporated into an employee's contract of employment irrespective of an employee being member of a trade union, and the contract of employment is enforceable.⁴¹⁴ If any of the new terms and conditions are undesirable to any individuals, the individuals may object to their employer, but if the majority of employees have consented to the new terms and conditions, the company will be able to dismiss the complaints normally with impunity.⁴¹⁵

5.3.2 *The Enforcement of collective agreements to non-parties in UK*

For a collective agreement to be legally enforceable, the parties must have intended to enter into a legal relationship, if so the collective agreement will contain aspirational principles and values that both the union and employer agree to abide by.⁴¹⁶ The phrasing of words in the collective agreement may be ambiguous and inexact which makes it difficult to enforce its provisions. There is a common law presumption that

⁴⁰⁹ Section 7 of the *Industrial Relations Act*.

⁴¹⁰ *Trade Union and Labour Relations (Consolidation) Act* 1992 (hereinafter the *TULRC Act*).

⁴¹¹ Section 179 of the *TULRC Act*.

⁴¹² Mc Mullen "Collective Agreements" 2.

⁴¹³ Mc Mullen "Collective Agreements" 2.

⁴¹⁴ Mc Mullen "Collective Agreements" 2.

⁴¹⁵ Mc Mullen "Collective Agreements" 2.

⁴¹⁶ A Phillips *et al* "Reviewing & changing of Employment" *In a Specially Commissioned Report* (Thorogood Publishing Ltd 2005) 46-47.

collective agreements should not be legally enforceable unless parties explicitly agree that it should.⁴¹⁷

The common law presupposition was elucidated in section 179 of the *TULRC Act*⁴¹⁸ which provides that, collective agreements should be irrefutably assumed not to have been intended by parties to be legally enforceable unless the agreement is:

- (a) In writing; and
- (b) Contains a provision (however it may be expressed) stating that the parties intend that the agreement should be a legally enforceable contract.⁴¹⁹

If a collective agreement does comply with the above mentioned requirements, it should be conclusively acknowledged by any court or tribunal to be legally enforceable as intended by the parties,⁴²⁰ if the parties to the agreement confirm in writing that one or all parts of the agreement should be legally enforceable.⁴²¹ Oral agreements between an employer and a union can never be legally enforceable. Furthermore, the requirement that there should be a clear statement of a party's intention to accept legal liability for their obligations necessitates the parties to commit to such a provision in a clear and unequivocal manner.⁴²² In light of the above it is apparent that, collective agreements cannot be forced upon non-parties whereas the common law presupposition states that collective agreements should not be intended to be legally enforceable. Collective agreements may be forced upon non-parties only if they contain a provision clearly stating that the agreement is intended to be legally enforceable to both parties and non-parties to the agreement. However, parties to the agreement should have consented to its enforcement.

5.3.3 Summary

For a collective agreement to be binding on non-parties it must include a clause explicitly stating that the collective agreement is legally binding, another way would be to incorporate the provisions of the collective agreement on the employment

⁴¹⁷ Phillips *et al* "Reviewing & Changing of Employment" 46.

⁴¹⁸ Section 179 of the *TULRC Act*.

⁴¹⁹ Section 179 of the *TULRC Act*.

⁴²⁰ Phillips *et al* "Reviewing & Changing of Employment" 46.

⁴²¹ Phillips *et al* "Reviewing & Changing of Employment" 46.

⁴²² Phillips *et al* "Reviewing & Changing of Employment" 46.

contract. However, the majority of unions must have consented to that prior to an extension. Prior to the extension of a collective agreement, non-parties are consulted and every trade union is afforded the opportunity to co-exist alongside majority unions irrespective of their level of representivity. Amongst other requirements, intent is an essential pre-requisite to be complied with before a collective agreement can be enforced, in UK enforcement includes the interpretation and application of a collective agreement.

While it may suffice to compare and contrast between two countries and South Africa, a comparison between three legal systems and South Africa provides a watertight argument in determining the adequacy of South Africa's legal system. For this reason the study also considers the legal position relevant to the extension and enforcement of collective agreements to non-parties in Italy.

5.4 The Legal Position in Italy

Italy has three levels of bargaining, the first being the Inter-Confederate level where bargaining transpires between the confederations of employers and employees in the public sector.⁴²³ The second level is referred to as the National Sector-Wide level, it is seen as the foundation of industrial relations in the organisation of labour.⁴²⁴ The collective agreements in this level of bargaining governs minimum wages, conditions of employment and etc.⁴²⁵ The last level is called the Company level, it is guarded by inflexible impartial and subjective guidelines laid down by national agreements.⁴²⁶ Company level negotiations also deal with changes introduced by the company like new working methods.⁴²⁷

The Italian system of industrial relations is too complex to be labelled as organised, as paragraph 1 of article 39 of the *Costituzione deller Repubblica Italiana* unconditionally recognised the freedom of trade unions.⁴²⁸ However, there are

⁴²³ Anon 2017 *Collective Bargaining in Italy* <https://www.google.co.za/url?sa=ta&sourceweb&rct=j&url=https://ecampus.itcilo.org> Accessed 04 January 2018.

⁴²⁴ Anon 2017 <https://www.google.co.za>.

⁴²⁵ Anon 2017 <https://www.google.co.za>.

⁴²⁶ Anon 2017 <https://www.google.co.za>.

⁴²⁷ Anon 2017 <https://www.google.co.za>.

⁴²⁸ Article 39 of the *Costituzione deller Repubblica Italiana* No 298 of 1957, (hereinafter the Italian

sequences of pre-requisites for trade unions to adhere to before they are legitimised to sign *erga omnes*⁴²⁹ agreements, which are binding for all employees.⁴³⁰ The provisions of the second part of article 39 of the *Italian Constitution*, is not interpreted to imply that the norm is unproductive, it is that it has a precluding effect that prevents the adoption of mechanisms to grant a collective agreement any *erga omnes* efficacy.⁴³¹

The 1993 Protocol referred to as the *Industrial Relations Charter* stated that, the role of a national collective agreement was to:

- (i) Define the legislative framework for the use of labour.
- (ii) Defend the purchasing power of wages through a mechanism based on the target inflation rate, and the non-automatic recovery of any under or overshoots with respect to underlying price trends. The anchoring of expectations of price increases has helped moderate wage demands and the resulting disinfection.⁴³²

5.4.1 *The extension of collective agreements to non-parties in Italy*

Collective agreements of any level in Italy are regarded as civil law agreements binding only *inter volentes*, amongst the participating parties.⁴³³ Collective agreements are considered as civil law contracts and there is no legal pyramid governing the relationships between agreements signed at different levels of collective bargaining, in order to ensure that conflicts are solved by the jurisprudence chronologically where most recent agreement prevail.⁴³⁴

Constitution); M Pallini 2016 *Italian Industrial Relations: Towards a Strongly Decentralised Collective Bargaining*

http://www.hwionline.org/HOL/AuthorProfile?action=edit&search_name=Pallini,Massimo&collection=Journal Accessed 05 January 2018.

⁴²⁹ *Erga Omnes* means towards all or towards everyone.

⁴³⁰ M Pallini 2016 <http://www.heinonline.org>, (a) registration as legal entities with democratic internal statute (b) participate in a National bargaining body which necessarily requires activation of public procedures aiming at Gauging number of members of various trade unions willing to take part in the beginning.

⁴³¹ M Pallini 2016 <http://www.heinonline.org>.

⁴³² *Industrial Relations Charter* of 1993.

⁴³³ M Pallini 2016 <http://www.heinonline.org>.

⁴³⁴ M Pallini 2016 <http://www.heinonline.org>.

The fundamental boundary of these agreements even if signed by the most representative trade unions and employers' association is that, they also have a civil law nature and are therefore legally binding only to participants and the topics that these parties represent.⁴³⁵

Although collective agreements are binding only parties to the collective agreement, there is a provision in article 8 of the *Decree Law*⁴³⁶ that allows a derogation to this effect. The article affords firm-level and local agreements *contratti di prossimità*,⁴³⁷ which is the option of derogating in disapproving terms not only from the industry-wide collective labour contracts but, also from legal provisions in disagreement to the characteristics of the Italian system which is based on national representation.⁴³⁸

The collective agreements covered all the employees affected as long as they were signed on grounds of a majority criterion, by the most representative employees' associations at national or local level or by their trade union representatives.⁴³⁹

5.4.2 *The enforcement of collective agreements to non-parties in Italy*

The legal enforcement of a collective agreement is secured in a similar manner to that of any private contract. A collective agreement ought to be interpreted in accordance to the general rules of interpretation of private law contracts.⁴⁴⁰ Any question that arises out of the interpretation or application of a collective agreement (dispute of rights) can be brought to an ordinary court by the employer(s) if it relates to the normative part of a collective agreement.⁴⁴¹ It can also be brought by trade unions and employers association in the case of a company level agreement where the obligatory part is concerned.⁴⁴²

⁴³⁵ M Pallini 2016 <http://www.heinonline.org>.

⁴³⁶ Article 8 of the *Decree Law* No. 138/2011.

⁴³⁷ *Contratti di Prossimità* means proximity contracts.

⁴³⁸ FD Amuri & C Gioriantonio *The Institutional & Economic Limits to Bargaining Decentralisation in Italy* (February 2015 IZA Policy Paper No 8) 6-10; Article 8 of the *Decree Law* No. 138/2011.

⁴³⁹ Amuri & Gioriantonio IZA Policy Paper No 8.

⁴⁴⁰ T Treu *Labour law in Italy* (Kluwer Law International 2011) 209-210; Article 1362 *Italian Civil Code* 2014.

⁴⁴¹ T Treu *Labour Law in Italy* 209.

⁴⁴² T Treu *Labour Law in Italy* 209.

The observation of the collective agreement however, is tenable firstly by the parties to the agreement themselves through a process of grievance resolution and unremitting bargaining.⁴⁴³ The process of conciliation is intended to settle disputes on the interpretation and application of the collective agreement. The processes of conciliation to settle disputes arising from the interpretation and application of a collective agreement are formulated mostly by nation-wide collective agreements and follow a standardised pattern.⁴⁴⁴ Most often than not individual objections are addressed firstly by representatives of management together with shop delegates and factory councils.⁴⁴⁵

Where grievances are unsettled they are referred for conciliation, the employee(s) who have a grievance are almost habitually assisted by a union representative in dealing with it even though he is not a union member.⁴⁴⁶ However, assisting an employee during a grievance is one of the most appropriate occurrences to be used to influence the employee to join the union.⁴⁴⁷

5.5 Analysis

The South African legal framework pertinent to the extension and enforcement of collective agreement to non-parties seems to be adequate and effective both on paper and in practice, as seen in the recent case of *AMCU & Others v Chamber of Mines*.⁴⁴⁸ However, because we live in a world where the law constantly evolves with time, there is always room for improvement. The improvement may be done by taking into consideration the legal mechanisms of other countries to determine whether South Africa could adopt them to ensure the fairness, adequacy and effectiveness of their legal system.

However, the legal systems of the above mentioned countries vary substantially from that of South Africa but, all these countries have the influence of the ILO by virtue of

⁴⁴³ T Treu *Labour Law in Italy* 209.

⁴⁴⁴ T Treu *Labour Law in Italy* 209.

⁴⁴⁵ T Treu *Labour Law in Italy* 209.

⁴⁴⁶ T Treu *Labour Law Italy* 209.

⁴⁴⁷ T Treu *Labour Law in Italy* 209.

⁴⁴⁸ *AMCU & Others v Chamber of Mines* para 78.

being member states of the United Nations just like South Africa. This comparison could provide valuable recommendations to the issue outlined by the study. Slovakia has two types of collective agreements, a company collective agreement at plant level and a higher degree collective agreement at sectoral level. The latter agreement binds employers and employees at plant level.

The extension of collective agreements to non-parties in Slovakia has been developed in a manner wherein non-parties still retain the autonomy to choose whether or not to bargain collectively through their representatives. However, the non-party must have acceded to the extension of the collective agreement before it can be said to be legally binding on them. Where an extension is made in respect of higher degree collective agreement by a superior trade union, authority from the Government as well as consent of the non-parties must be obtained prior to the extension.

The extension of a collective agreement to a non-party in Slovakia is similar to that of South Africa, there are two types of collective agreements at plant and sectoral level and collective agreements concluded at sectoral level is binding at plant level. While in Slovakia the Government grants authority for an extension, in South Africa an organ of state which is the minister is the one to extend a collective agreement to non-parties at the request of a bargaining council.⁴⁴⁹ The difference between Slovakia and South Africa is that, the consent of non-parties is not required prior to an extension in South Africa. Slovakia has adopted recommendations of the ILO in respect of the extension of collective agreements.⁴⁵⁰

The enforcement mechanism in Slovakia is similar to the one utilised in South Africa. The only material difference is that the court authorised to vary the decision of an arbitrator is the Labour Court although at times the jurisdiction of the Labour Court overlaps with that of the High Court. In Slovakia the decision of the Regional Court is resolute and does not allow for an appeal, in South Africa the decision of the Labour Court may be appealed and set aside if necessary by the Labour Appeal Court (LAC). The decision of the LAC may be appealed in the Constitutional Court, which is the highest court of the land provided there is an infringement of a constitutional right.

⁴⁴⁹ Section 32 of the *LRA*.

⁴⁵⁰ Para 5(C) of the *ILO R901-Collective Agreements Recommendation* 1951 (No. 91).

South Africa's mechanism affords non-parties with various avenues wherein they can seek assistance or rather protection.

The legal system of the United Kingdom allows for provisions of a collective agreement may vary terms of the contract, which is a standard and accepted practice even in South Africa. The legal system of the United Kingdom leaves it up to the contracting parties to decide whether the agreement is legally binding or not, this is done by incorporating a clause in the agreement which clearly stipulates that the agreement is binding and enforceable. Furthermore, representivity of a trade union in the extension of a collective agreement is insignificant. Every trade union is afforded the chance to co-exist and represent its members. In South Africa non-parties are not afforded the courtesy to choose whether they want to be legally bound by a collective agreement or not, and for that reason they are not consulted prior to an extension. In South Africa a collective agreement need not include a clause to be binding and enforceable, it just has to explicitly state that the collective agreement extends to non-parties and comply with requirements in the legislation.⁴⁵¹ While both these legal systems are based on a culture on voluntarism, South Africa limits the non-parties voluntariness by applying the principle of majority which triumphs over the interests of the minority.

In United Kingdom, intent is an important element in enforcing a collective agreement and the word enforcement in respect of collective agreements includes interpretation and application. In South Africa, whether the words enforcement and interpretation may be used interchangeably is still a subject of debate.

The legal system in Italy considers collective agreements to be law, South Africa does not. However, the systems are similar in that the decisions taken at a higher level also referred to as sectoral level are ought to reflect at a lower or industrial level. This is an effective system that ensures the endorsement of centralised bargaining. A trade union's level of representivity in a workplace is important when it comes to the conclusion of a collective agreement, however in Italy the agreement is only binding to participants who signed the agreement. But under exceptional circumstances the majority principle is applicable.

⁴⁵¹ Sections 23 and 32 of the *LRA*.

In South Africa, whether non-parties agree to the extension or not a collective agreement is legally binding if it is in the interest of orderly collective bargaining and requirements are complied with. South Africa and Italy share the same sentiments in respect of the enforcement of a collective agreement, issues regarding the interpretation and application of a collective agreement are settled through conciliation. The only difference is in South Africa, a collective agreement must encompass a resolute clause before resorting to conciliation and the words interpretation, application and enforcement are not used interchangeably.

5.6 Conclusion

The primary purpose of this chapter was to determine the differences and similarities between South Africa and the above-mentioned countries. The focus was predominantly on the regulation of the extension and enforcement of collective agreements to non-parties. The chapter also considered the procedures through which these aforementioned countries are permitted to extend and enforce collective agreements to non-parties. This chapter serves as an aid in suggesting and rearranging rational recommendations to the judiciary in addressing the issue at hand, and in developing legislation. The legal mechanisms of these countries may be adopted depending on their persuasion and applicability to South Africa's industrial relations system.

5.7 Overview of the next chapter

The next chapter provides general conclusions of the study on the above interrelated chapters, as well as recommendations to the issues raised in the problem statement of the study.

Chapter 6 Conclusions and Recommendations

6.1 Introduction

The main problem identified by the study is that, the extension and enforcement of collective agreements strips non-parties off their right to bargain collectively through their representatives, as opposed to just promoting collective bargaining as required by the *LRA*.⁴⁵² The legislation incorrectly implemented its plan as stated in section 1(d) of the *LRA*, together with the recommendations of the ILO in addressing the extension and enforcement of collective agreements to non-parties.⁴⁵³

⁴⁵² Section 1(d) of the *LRA* The section speaks of endorsing orderly collective bargaining as Opposed to compulsion.

⁴⁵³ Section 1(d) of the *LRA*; *ILO R901-Collective Agreements Recommendation* 1951 (NO.91).

This chapter discusses the findings and conclusions of the above interrelated chapters. The chapter further provides recommendations to the issues highlighted in the study in respect of the extension and enforcement of collective agreements to non-parties.

6.2 Broad-Findings

The main objective of this research was to analyse the regulation of the extension and enforcement of a collective agreement to non-parties, as well as requirements that private actors ought to adhere to before they can extend a collective agreement to non-parties. In quest of achieving this objective, the following challenges/issues were found to be associated with the extension and enforcement of collective agreements to non-parties.

Section 23(1)(d) of the *LRA* strips non-parties off their right to bargain collectively through their representatives, the section does not afford non-parties the opportunity to make observations nor representations before the decision to extend the collective agreement is made final. Although section 23(1)(d) has pre-requisites to be complied with before a collective agreement can be extended to employees who were not party to it in the first place,⁴⁵⁴ the requirements are not as extensive as those in section 32 of the *LRA*. The extension of collective agreements to non-parties is not a private matter between private parties, the invocation of section 23(1)(d) confers public powers to private actors which inclines their decision to provisions of section 195 of the *Constitution*.

Section 32 of the *LRA* provides pre-requisites to be adhered to by private actors before the Minister can extend a collective agreement to non-parties provided he/she is satisfied with the adherence of these private actors.⁴⁵⁵ Non-parties may request to be exempted from the extension of the collective agreement, should the bargaining council refuse to exempt the non-party they have another remedy which is to appeal the decision in terms of section 206 of the *LRA*.⁴⁵⁶

⁴⁵⁴ Section 23(1)(d) of the *LRA*, the employees are identified in the agreement; (ii) the agreement expressly binds the employees; and (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

⁴⁵⁵ Section 32 of the *LRA*.

⁴⁵⁶ Section 206 of the *LRA*.

However, the remedy afforded seems to be nothing more than just a written word on paper which serves no purpose at all in practice where the protection of non-parties from extension is concerned.⁴⁵⁷ In light of the above, it is apparent that it is far less complicated to extend a collective agreement in terms of section 23 as opposed to section 32, one might be under the impression that collective agreements concluded at plant level are of little significance compared to those concluded in a bargaining council.

The study also found that the extension of collective agreements in terms of section 32 of the *LRA* constitutes an administrative action, an administrative action is ought to be in line with provisions of section 33 of the *Constitution* together with provisions of *PAJA*.⁴⁵⁸ This is to ensure that public power is exercised correctly and rationally.

The study discovered that, section 24 of the *LRA* speaks of the interpretation and applications of a collective agreement to non-parties and it is the section used to enforce *inter alia*, collective agreements extended in terms of section 23 of the *LRA*. But there is a controversy regarding the issue of using the words interpretation, application and enforcement interchangeably, and the courts haven't provided clarity in respect of this issue. However, there are academics such as John Grogan⁴⁵⁹ who are of the opinion that the provisions of section 24 should be seen as a form of enforcement, and referred to as such as opposed to interpretation and application.⁴⁶⁰

In South Africa collective agreements are legally enforceable; therefore, any dispute over the interpretation and application constitutes the enforcement of that particular collective agreement.⁴⁶¹ Section 206 is a defence mechanism for non-parties in respect of collective agreements enforced in terms of section 33 and 33A of the *LRA* but, the provisions of section 206 seem to be a shield for extended collective agreements protecting it against attacks.⁴⁶² This is the same kind of protection which should be

⁴⁵⁷ Ritief 2012 *Obiter* 567-572.

⁴⁵⁸ Sections 1, 3 and 6 of *PAJA*.

⁴⁵⁹ Grogan 2007 <https://books.google.co.za>.

⁴⁶⁰ Grogan 2007 <https://books.google.co.za>.

⁴⁶¹ Thompson & Benjamin *South African Labour Law* 1-22.

⁴⁶² Ritief 2012 *Obiter* 567.

afforded to non-parties whom are victims of these extensions and enforcements of collective agreements.⁴⁶³

In chapter five the study discovered that, the legal positions of some of the mentioned countries (Slovakia, the United Kingdom and Italy) adhere to the ILO recommendations⁴⁶⁴ in addressing the extension and enforcement of collective agreements by affording non-parties the opportunity to make representations and an opportunity to consent to the private actor's decision to extend and enforce the collective agreements.

6.3 Recommendations

In collective labour law the interests of the majority triumph over an individual's interests,⁴⁶⁵ but the study is of the opinion that non-parties' autonomy to make their own decisions through their representatives should be taken into consideration as opposed to tossing it aside. This would also be fulfilling the principle of collectivity.

Similar extensive pre-requisites as those in section 32 should be added under provisions of section 23 of the *LRA*, and an agent can be appointed to ensure compliance with those pre-requisites. And further grant authority for the extension if he/she is satisfied just as the Minister does in section 32 of the *LRA*. The *LRA* could incorporate the ILO's suggested recommendations,⁴⁶⁶ by affording non-parties an opportunity to make representations as to why they should be exempted from the extension of a collective agreement before the decision is made final.

The *LRA* could adopt the mechanism used in Slovakia wherein it is mandatory for the consent of non-parties to be acquired before a collective agreement can be extended. This would promote the voluntariness in collective bargaining and also allow for non-parties to be involved in the making of decisions that affect them.

Section 24 of the *LRA* titled the interpretation and application of collective agreements⁴⁶⁷ could be amended to read as "enforcement of collective agreements

⁴⁶³ Section 206 of the *LRA*; Ritief 2012 *Obiter* 567-572.

⁴⁶⁴ *ILO R901-Collective Agreements Recommendation* 1951 (NO.91).

⁴⁶⁵ Basson *et al Essential Labour Law* 234 -244.

⁴⁶⁶ *ILO R901-Collective Agreements Recommendations* 1951 (NO.91).

⁴⁶⁷ Section 24 of the *LRA*.

extended at plant level". The mechanism used in Italy could be adopted, wherein collective agreements only apply to those who concluded them, which would result in the extension and enforcement of collective agreements upon non-parties being practically impossible.

Collective agreements may be mandatorily extendable and enforceable upon non-parties only if they include favourable terms and conditions of employment, which more often than not vary the initial contract of employment as done in the United Kingdom

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