# A Critical Analysis of the Arena of Extension of Bargaining Council Collective Agreements to Non-Parties in South Africa: A Legal Perspective

**BY**

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## DEDICATION

This mini-dissertation is dedication to my late uncle Judge JJ Chulu, my late grandmother Elizabeth Chulu, my wife Thuto Chulu and our son Leatile Chulu.

## DECLARATION

I duly declare that the mini-dissertation for the Degree of Master of Law (Labour) at the North West University (Mafikeng Campus) hereby submitted has not been previously tendered by me for a degree at this institution or any other University. I further declare that this mini-dissertation is my own work in design, structure and execution and that all materials and sources contained herein have been acknowledged.

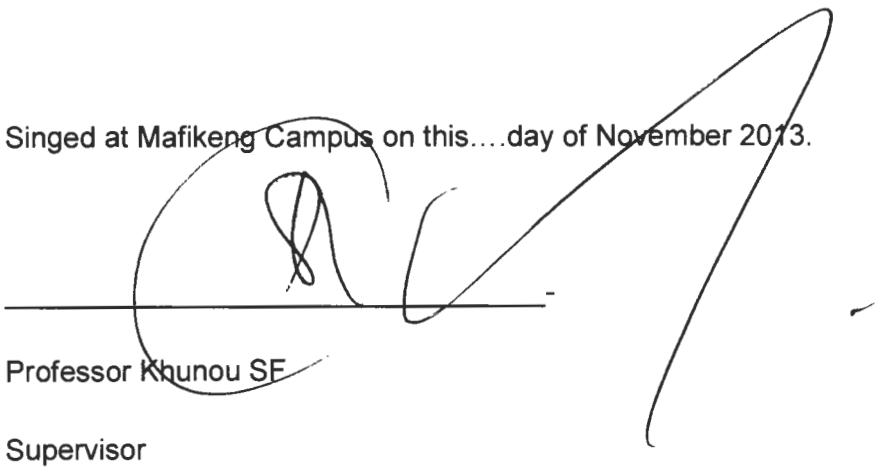
Boitumelo Ernest Chulu

Date_____

**SUPERVISOR`S DECLARATION:**

I, Professor Khunou S F, being the supervisor of this mini-dissertation, by Boitumelo Ernest Chulu, student number 16258258, duly approve it for submission as partial fulfilment of the requirement of the Masters` of Law (LLM) Degree in Labour and Social Security Law at the North West University of South Africa.

Singed at Mafikeng Campus on this....day of November 2013.



Professor Khunou SF

Supervisor

## LIST OF ABBREVIATIONS

| | |
|---|---|
| ANC | - African National Congress |
| BBBEE | - Broad Based Black Economic Empowerment |
| BCEA | - Basic Conditions of Employment Act |
| CCMA | -Commission for Conciliation Mediation and Arbitration |
| CEC | - Central Executive Committee [COSATU] |
| COSATU | - Congress of South African Trade Unions |
| EEA | - Employment Equity Act |
| FMF | - Free Market Foundation |
| ILO | - International Labour Organization |
| LAC | - Labour Appeal Court |
| LRA | - Labour Relations Act 1995 |
| NEASA | - National Employers` Association of South Africa |
| NEDLAC | - National Economic Development and Labour Council |
| NUM | - National Union of Mineworkers |
| NUMSA | - National Union of Metalworkers of South Africa |
| NP | - National Party |
| RSA | - Republic of South Africa |
| SANDU | - South African National Defence Union |
| SMMEs | - Small Medium and Micro Enterprises |
| SEDA | - Small Enterprise Development Agency |
| SBP | - SBP |

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## CHAPTER 1

### 1.1 Introduction

This research study seeks to investigate the disharmony in the implementation of the framework of extension of bargaining council collective agreements to non-parties. The system or framework is provided for in the Labour Relations Act 66 of 1995. This Act has been passed to give effect to the labour rights contained in the Bill of Rights in the Interim Constitution of the Republic of South Africa 200 of 1993 which was amended by the RSA Constitution of 1996.[1] The labour rights provisions in the Constitution gives compliance to South Africa`s International Law obligations.

There has been growing opposition to the practical application of this framework. There are currently two cases before North Gauteng High Court[2] wherein applicants are seeking that this system be declared unconstitutional. In the process, there is concern in some quarters that the system is contributing to job

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[1] Section 23(1) Everyone has the right to fair labour practices.
(2) Every worker has the right –
(a) to form and join a trade union;
(b) ...;
(c) to strike.
(3) Every employer has the right –
(a) to form and join an employers` organisation ; and
(b) ...
(4) Every trade union and employers` organisation has the right –
(a) ...
(b) to organise; and
(c) to form and join a federation.
(5) Every trade union, employers` organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

[2] *FMF v Minister of Labour and Others* Case no: 13762/2013 North Gauteng High Court; *CAPES & others v Motor Industry Bargaining Council & others*, North Gauteng High Court. Case was before Court on 13/08/2013 and judgement has been reserved. In this case CAPES [labour brokers] are asking the Court to declare section 32 or section 198 LRA 1995 unconstitutional and alternatively to have an extended MIBC agreement regulating labour broker employees set aside. See an article by Faan Coetzee dated 15/08/2013 on http://mypr.co.za/2013/08/judgement-reserved-on-the-future-of-the-extension-of-bargaining-council-agreements-and-future-of-labour-brokers-in-the-motor-industry/ [Date of Access: 03/09/2013].

destruction and failure of small business.[3] Various opinions on this subject will be considered, the framework itself will be outlined and recommendations will be made. There is not much literature on the subject matter of this research study. Many books contain only a flirting mention of this subject during the authors` discussion of collective agreements and, or bargaining councils.[4] It is worth noting that in the midst of this jurisprudential turbulence, the subject matter is very flexible.

Much reliance is therefore placed on articles, as they come through, by current commentators on the subject, and on related published research. Case law highlighting challenges to other grounds within this system will also be interrogated. Much has been stated in articles about the contents of the Notice of Motion and Heads of Argument in the application by Free Market Foundation against the Minister of Labour and others.[5] FMF is challenging the constitutionality of this system of extension. The case is still before the Court[6]. This research study will therefor critically look at these documents.

Various esteemed research institutions and authors have investigated elements associated with this system or framework of extension of bargaining council agreements to non-parties.[7] None has however directly investigated whether or

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[3] Goldberg, LDD 6/1997 Page 88 defines Small Business by number of employees, assets and turn over. Consequently Small Business may be classified as such and compartmentalised into whether they are micro, very small, small or medium enterprises. Amongst these there are those who are formal [registered businesses] and informal. ; Schedule to National Small Business Act 102 of 1996.

[4] See for instance Van Jaarsveld & Van Eck 3rd ed *Principles of Labour Law* Lexis Nexis page 267 – 284.

[5] *FMF v Minister of Labour*: Notice of Motion. http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=36410 [Date of Access: 11/04/2013].

[6] North Gauteng case number: 13762/2013.

[7] COSATU 2012 Input to CEC Concept paper: towards new collective bargaining, wage and social protection strategies, learning from the Brazilian experience. http://www.cosatu.org.za/C6A53CF2-A659 [Date of Access: 25/04/2013]; Bhorat et al DPRU 12 / 149 ; Bhorat et al DPRU June 2007; Melvin Goldberg Law Democracy and Development 6/1997 : "Small enterprises, Labour Relations Act and collective bargaining in SA" ; Bhorat et al DPRU 12 / 154 "THE IMPACT OF SECTORAL MINIMUM WAGE LAWS ON EMPLOYMENT, WAGES AND HOURS OF WORK IN SOUTH AFRICA" ; CDE FOCUS Jan 2013 "JOB DESTRUCTION IN THE SOUTH AFRICAN CLOTHING INDUSTRY" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=35415 [Date of Access: 11/04/2013] ; SBP 22 July 2013 "Developing a new growth path for SMEs in South Africa" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=39331 [Date of Access: 23/07/2013]; SBP October 2005 "The impacts of sector-specific policies

not the system should be retained in the current format within the context of the prevailing economic conditions and the Constitution. Arguments by the framework`s detractors on the one hand and the unions and government on the other hand bring tension in the application of this framework. It is in this context that this research study is undertaken.

### **1.1.2** *Problem Statement*

The ministerial power to extend collective agreements concluded in bargaining councils is clearly provided for in the Labour Relation Act 66 of 1995.[8] The

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and regulations on the growth of SMEs in 8 sectors of the South African economy" http://www.thepresidency.gov.za/docs/pcsa/economic/sbp.pdf [Date of Access: 08/05/2013]; Bhorat et al DPRU September 2007 "Analysing Wage Formation in the South African Labour Market: The Role of Bargaining Councils" ; Bhorat et al DPRU 09 / 135 "Analysing Wage Formation in the South African Labour Market: The Role of Bargaining Councils" ; Johann Maree Law Labour Conference 2011 "Is there a future for Collective Bargaining in South Africa?" ; Cheadle 2005 Law Democracy and Development "Collective Bargaining and the LRA"; Phillip LDD 14/2010 "Inequality and economic marginalisation: How the structure of the economy impacts on opportunities on the margins".

[8] 32 Extension of collective agreement concluded in bargaining council

(1) 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*-

*(a)* one or more registered *trade unions* whose members constitute the majority of the members of the *trade unions* that are party to the *bargaining council* vote in favour of the extension; and

*(b)* one or more registered *employers' organisations*, whose members employ the majority of the *employees* employed by the members of the *employers' organisations* that are party to the *bargaining council*, vote in favour of the extension.

(2) Within 60 days of receiving the request, the *Minister* must extend the *collective agreement*, as requested, by publishing a notice in the *Government Gazette* declaring that, from a specified date and for a specified period, the *collective agreement* will be binding on the non-parties specified in the notice.

(3) A *collective agreement* may not be extended in terms of subsection (2) unless the *Minister* is satisfied that-

*(a)* the decision by the *bargaining council* to request the extension of the *collective agreement* complies with the provisions of subsection (1);

*(b)* the majority of all the *employees* who, upon extension of the *collective agreement*, will fall within the scope of the agreement, are members of the *trade unions* that are parties to the *bargaining council*;
[Para *(b)* substituted by s. 7 *(a)* of Act 42 of 1996]

*(c)* the members of the *employers' organisations* that are parties to the *bargaining council* will, upon the extension of the *collective agreement*, be found to employ the majority of all the *employees* who fall within the scope of the *collective agreement*;
[Para *(c)* substituted by s. 7 *(a)* of Act 42 of 1996]

*(d)* the non-parties specified in the request fall within the *bargaining council*'s *registered scope*;

*(e)* provision is made in the *collective agreement* for an independent body to hear and decide, as soon as possible, any appeal brought against-

framework providing for this instance has come under intense challenge lately. Organised labour sees the said attacks or challenges to this power as an attack

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(i) the *bargaining council's* refusal of a non-party's application for exemption from the provisions of the *collective agreement*;

(ii) the withdrawal of such an exemption by the *bargaining council*;

[Para *(e)* substituted by s. 2 *(a)* of Act 127 of 1998]

*(f)* the *collective agreement* contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of *this Act*; and

[Para *(f)* substituted by s. 2 *(a)* of Act 127 of 1998]

*(g)* the terms of the *collective agreement* do not discriminate against non-parties.

(4)...

[Sub-s (4) deleted by s. 2 *(b)* of Act 127 of 1998]

(5) Despite subsection (3) *(b)* and *(c)*, the *Minister* may extend a *collective agreement* in terms of subsection (2) if-

*(a)* the parties to the *bargaining council* are sufficiently representative within the *registered scope* of the *bargaining council*; and

[Para *(a)* substituted by s. 7 *(b)* of Act 42 of 1996 and by s. 5 *(a)* of Act 12 of 2002]

*(b)* the *Minister* is satisfied that failure to extend the agreement may undermine collective bargaining at *sectoral* level or in the *public service* as a whole.

[Para *(b)* substituted by s. 7 *(b)* of Act 42 of 1996]

(6) *(a)* After a notice has been published in terms of subsection (2), the *Minister*, at the request of the *bargaining council*, may publish a further notice in the *Government Gazette*-

(i) extending the period specified in the earlier notice by a further period determined by the *Minister*; or

(ii) if the period specified in the earlier notice has expired, declaring a new date from which, and a further period during which, the provisions of the earlier notice will be effective.

*(b)* The provisions of subsections (3) and (5), read with the changes required by the context, apply in respect of the publication of any notice in terms of this subsection.

(7) The *Minister*, at the request of the *bargaining council*, must publish a notice in the *Government Gazette* cancelling all or part of any notice published in terms of subsection (2) or (6) from a date specified in the notice.

(8) Whenever any *collective agreement* in respect of which a notice has been published in terms of subsection (2) or (6) is amended, amplified or replaced by a new *collective agreement*, the provisions of this section apply to that new *collective agreement*.

(9) For the purposes of extending *collective agreements* concluded in the Public Service Co-ordinating Bargaining Council or any *bargaining council* contemplated in section 37 (3) or (4)-

*(a)* any reference in this section to an *employers' organisation* must be read as a reference to the State as employer; and

*(b)* subsections (3) *(c)*, *(e)* and *(f)* and (4) of this section will not apply.

[Sub-s (9) added by s. 7 *(c)* of Act 42 of 1996]

(10) If the parties to a *collective agreement* that has been extended in terms of this section terminate the agreement, they must notify the Minister in writing.

[Sub-s (10) added by s. 5 *(b)* of Act 12 of 2002]

Section 198 of LRA provides to the same extend but, it relates to temporary employment services [labour brokers]. A collective agreement can be extended to cover a labour broker, its employees and its clients who fall within the registered scope of a bargaining council.

on hard earned workers' rights.[9] Some in business see this framework as cartel activity[10] and legalized bullying. Within this context, there are arguments that organized labour wields too much power and is destructive to foreign direct investment appetite.[11]

Courts have been approached to challenge specific bargaining council collective agreements.[12] Small business on the other hand, it is argued for them that, some aspects of the said agreements have as a consequence, total shut down of their business.[13] This research study seeks to investigate the veracity or otherwise of both these schools of thought.

### **1.1.3** *Background Perspective*

It is generally argued that collective bargaining is central to the South African labour relations system.[14] Further, that given the country's history[15], it was prudent for the drafters of both the Interim Constitution and the 1996 Constitution to include this right in the Bill of Rights.[16] The 1995 LRA renamed industrial councils[17] as bargaining councils[18] and opened them to include categories of employees previously excluded by its predecessor. These councils are empowered to negotiate and enforce collective agreements; prevent and

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[9] "Crush the Free Market Foundation`s attack on worker rights" COSATU special declaration 2013 Collective Bargaining, Organising and Campaigns Conference. http://www.cosatu.org.za/docs/declarations/2013/dec10315c.html [Date of Access: 08/ 04 / 2013].

[10] Graham Giles "Collective bargaining or legalised cartel" 26 February 2013 http://www.gilesfiles.co.za/collective-bargaining-2/collective-bargaining-or-legalised- [Date of Access: 11/04/2013].

[11] Sej Motau "ANC refusal to reform labour framework killing jobs" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=38458 [Date of Access: 20/06/2013].

[12] See for instance *NEASA v Minister of Labour and others* JR3062/11 (LC) [Unreported]; *CUSA v Tao Ming Metal Industries and others* [2008] ZACC 15; etc.

[13] Alice Li Mail & Guardian 30 May 2013 "Minimum wage disputes: Is it worth the fight in Newcastle?" http://mg.co.za/article/2013-05-29-made-in-newcastle-cut-from-a-different-cloth-china [Date of Access: 30/05/2013].

[14] Transcript service: Summit TV interview of Jonathan Snyman, 18 Jan 2013: "Usefulness of bargaining councils in question" http://www.bdlive.co.za/national/labour/2013/01/08/usefulness-of-bargaining-council [Date of Access: 17 April 2013]; Western Cape Government 2004 "Know your LRA Chapter 5: Centralised Collective Bargaining" http://www.westerncape.gov.za/text/2004/4/know-your-lra-chap5_pdf [Date of Access: 30 May 2013].

[15] See Chapter 2 *infra.*

[16] *Supra* Bhorat June 2007 at Par 3.4.

[17] See Chapter 2 *infra.*

[18] See Chapter 4 *infra.*

resolve labour disputes; decide what issues can found a strike or lock-out; and to make inputs on economic policy; amongst others.

It is said that the number of existing registered bargaining councils is declining.[19] The effectiveness of these councils is questioned, with some arguing that they are unrepresentative and have catastrophic consequences for small business.[20] The power that the Minister of Labour has to extend these agreements to non-parties[21], it is argued, is similarly destructive and unhelpful, in the face of consistent economic down turn.[22] Because South Africa's work place is labour intensive, the closure of even a single small factory robs some people of their livelihoods. It is within this perspective that the objections to the existence of this framework of extension of collective agreements concluded in bargaining councils to non-members should be reflected on.

### **1.1.4** *Research Methodology*

This research study centres on, South African literature review; case law; published articles by various commentators on this subject; and relevant internet material. This research is desk based in that the researcher conducted research from already existing literature as opposed to conducting interviews. There has also been court cases challenging aspects of the framework under review and there are currently cases before a Court wherein the entire framework is being challenged.[23]

### **1.1.5** *Limitations/ Anticipated Problems*

There is not much literature on the subject matter of this research study. Many authors mention this topic casually in their discussion of collective bargaining or bargaining councils. On a daily bases there is public and robust engagement by business; labour; government; political parties; and members of independent

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[19] SAPA "Use of bargaining councils declining 16/01/2013" [Date of Access: 16/04/2013] http://www.polity.org.za/print-version/bargaining-councils-declining-2013-01-16 ; Johann Maree "Is there a future for collective bargaining in South Africa?" UCT Labour Law Conference 2011 http://www.lexisnexis.co.za/pdf/workshop-4-1-is-there-a-future-for-collective-bargaining-presented-by-Prof-Johann-Maree-ppt [Date of Access: 30/05/2013].

[20] See note 12 and 16 above.

[21] See Chapter 5 *infra*.

[22] *Ibid.*

[23] See note 2 above.

research institutions on aspects associated with collective agreements and the extension of collective agreements framework.

Much reliance is therefore on availlable published articles by these groups as a source of information.

**1.1.6** *Aims and Objectives*

There are arguments on almost a daily basis on the practical effects of the implementation of the system of extension of collective agreements concluded in bargaining councils. Some say the results of the framework are destructive to job creation; it is unconstitutional; and contributes immensely to unemployment. On the other hand there is intense support for the framework and a proposal that the framework must be strengthened and enforcement be radicalised.

*Primary objectives*:

- To investigate the veracity of both these conflicting arguments;
- To identify possible problems in the framework; and
- To recommend possible solutions.

*Secondary objectives*:

- To understand the history of collective agreements in South Africa;
- To understand the impact of the constitutional dispensation on collective agreements;
- To understand the actual framework of extension of collective agreements concluded in bargaining council to non-parties; and
- To investigate whether the framework should be retained, amended, or totally set aside.

It is hoped that this research will influence positively the suggestions geared towards strengthening the collective bargaining system currently enforceable in the country. The Labour Relation Act 66 of 1995 is not cast in stone; neither is the Basic Conditions of Employment Act 75 of 1997. The labour climate in the country is not static. Consequently, constant dialogue on emanating practical problems which the system creates should be revisited and adapted regularly to encourage both economic growth and upliftment of the continuously impoverished masses.

### **1.1.7** *Chapter Organization*

This study is divided into nine interrelated and corroborative chapters which are as follows:

Chapter 1: Deals with the explanation of Research question, Methodology, Aims and Objectives, and lists Beneficiaries;

Chapter 2: Deals with a brief Historical Background of collective labour law in South Africa;

Chapter 3: Deals with constitutional inroads by both 1993 and 1996 Constitutions;

Chapter 4: Deals with legislative framework of collective agreements and bargaining councils;

Chapter 5: Deals with the framework of extension of bargaining council collective agreements to non-parties;

Chapter 6: Discussion and Interpretation of the research questions;

Chapter 7: Identifies problems and proposes interventions or recommendations;

Chapter 8: Conclusion; and

Chapter 9: Bibliography.

### **1.1.8** *Beneficiaries of this Dissertation*

The purpose of this research study is to meaningfully enhance the prevailing debate on the relevance of bargaining councils and the challenges to ministerial power of extension of collective agreements to non-parties. The results should be able to assist, Organized Business and Organized Labour, Government, Labour practitioners, Students and Academia.

### *1.2 Summary of dissertation*

Over the years, there have been significant challenges to the exercise of powers that the Minister of Labour has in terms of section 32 and section 198 of the Labour Relations Act 66 of 1995. Some of these challenges have, in instances, occasioned courts to pronounce on the validity or otherwise of a specific extension in as far as it relates to the litigants. Most of these challenges though, relates to irregularities in the exercise by the Minister of her powers in terms of this framework, while others relate to technical procedural or structural deficiencies of a specific bargaining council or its agreement.

Trade unions and some employer organisations have locked horns over the desirability or otherwise of this legislative practice. This research study seeks to strengthen that debate by investigating the source or cause of this tension and try to offer possible solution/s. The history of collective agreements and bargaining councils will be examined. The recent court challenges by business to this practice and its consequences will be critically studied.

It will be later argued that the system or framework does pass the constitutional muster and should be retained and beefed up. More considerations will be suggested for the Minister to consider before any extension is granted. This investigation is confined to extension of collective agreements concluded in bargaining councils to non-members in as far as the private sector is concerned.

Collective agreement regulation regime in or for the Public Service and nature and purport of and workings of any other level of bargaining prescribed by the LRA 1995 might only be referred to for relevance and completeness, but that's not the focus. This research study centres on the South African literature; case law; and internet research.

## CHAPTER 2

## Background Perspectives of Collective Bargaining in South Africa

### *2.1 Introduction*

This chapter examines and illustrates how the employment relationship developed and was viewed and what competing interests impacted on collective labour law. It will also be illustrated how labour regulation evolved and what philosophies geared or persuaded the angle of regulation that the government of the day took and the origin of the tripartite labour system, i.e. the interaction between labour, business and the State.

The third and fourth chapters will lay bare the influence of the Constitution of both 1993 and 1996 on the labour climate in the country in as far as collective agreements and their extension to non-members is concerned. The subsequent legislation that got promulgated in order to fulfil the constitutional prescripts on this subject will be pronounced on.

The fifth chapter will address the subject matter of this research study. This chapter will critically study the challenges inherent in this framework. Recent case law reflecting the said challenges will also be critically studied. The attitude of both business and organized Labour to this framework will be analysed. This investigation will offer possible solutions to the prevailing tension.

It is hoped this research study will influence positively the suggestion geared towards strengthening the collective bargaining system currently in place in the country. The system created should be revisited and adapted regularly to encourage both economic growth and upliftment of the continuously impoverished masses. It is noted that this research topic is engaged in, during a relatively difficult economic time for business and labour. The world has just experienced an economic recession. In that context, companies are restructuring and downsizing while labour disputes and strikes are intensifying and becoming more destructive.[24]

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[24] Marikana strike or massacre – August 2012; Western Cape – De Doorns farm labourer strike in 2012.

This research study will also offer possible solutions for the plight of small business in as far as they are affected by collective agreements binding them, in terms of Section 32 Labour Relations Act of 1995. Genuine attempt will be made to credit all the authorities and sources referred to and used in this research study. Where gender becomes relevant, the gender not used is incorporated by reference.

## 2.2 Colonial rule

History of the development of labour laws in South Africa is still scattered. No single complete literature on the subject is readily available. Work by various writers on this issue is referred to for an attempt at completeness of this research study. It is generally accepted that before the arrival of the white settlers in the Cape, the country was rural and agrarian.[25]

The arrival of settlers around 1652 brought changes in the manner in which the then inhabitants went about their lives.[26] The settlers were farmers therefore they required labour in order to farm.[27] The first groups of workers were agricultural workers.[28] Since this was during the era of the slave trade, slaves from other nations were brought in to supplement the black workers.[29] This, later complicated the evolution of South African employment law

It is also generally accepted that during that particular time the relationship between farmers and their workers was that of an employer and employee.[30] Therefore, no formal laws existed to regulate this relationship. In 1834 slavery was abolished.[31] The economy of the country was expanding.[32] Up to this stage, no regulation (formal) by then existed. In 1841 the Master and Servant Act was

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[25] Van Jaarsveld 3rd ed Chapter 1; A C Basson *et al Essential Labour Law* 5th ed Labour Law Publications Chapter 1; P S Nel *et al South African Employment Relations – Theory and Practice* 5th ed Van Schaick Publishers Chapter 3.
[26] P S Nel *et al op cit* Chapter 3.
[27] *Ibid* Page 69.
[28] *Ibid* Page 69.
[29] *Ibid* Page 69.
[30] *Ibid* Page 69.
[31] *Ibid* Page 69.
[32] *Ibid* Page 69.

passed.[33][This Act was presumably the first piece of legislation which had a bearing on labour relations].

The Masters and Servants Act only related to bilateral individual relations, no mention was made of workers representation.[34] In 1856 a follow up Act was passed.[35] This Act contained regulations relating to single employer and worker relations.[36] It also introduced a set of penalties against offences by servants (workers).[37] Employment relations were absolutely individual (face to face) interaction between masters and servants.[38] It is recorded by various writers that the first trade unions were developed for sentiment.[39]

The rights of black servants or workers were unheard of and non-existent.[40] The country's labour relations climate started experiencing dramatic changes after the discovery of diamonds in 1870 and gold in 1872.[41] The discovery of minerals required skilled labour to mine and operate the mining activities necessary for the time.[42] This introduced the migrant labourers' phenomena.[43] Skilled workers were recruited from overseas to work in the mines.[44]

These skilled workers did not only bring their skills but they also brought their exposure to and knowledge of workers unionism.[45] In 1881, the first workers organization was formed as a branch of a British Union.[46] This union and those that came after it emphasized the racial discrimination against blacks and Afrikaners.[47] The latter group was seen as cheap labour and a threat to English

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[33] The Master and Servants Act 1841.
[34] P S Nel et al *op cit.*
[35] The Master and Servants Act of 1856.
[36] P S Nel et al *op cit.*
[37] Failure by a servant to commence work at the agreed time and date; unlawful absence from work; intoxication; negligence; improperly performed work; refusal to obey a command; fighting or abusive language, were all offences warranting imprisonment for a period of up to one month with or without hard labour.
[38] P S Nel et al *op cit.*
[39] Van Jaarsveld and Van Eck *op cit*; A C Basson *et al op cit*; P S Nel *et al ibid.*
[40] A C Basson *et al ibid* Chapter 1 Page5; P S Nel *et al ibid* Chapter 3 Page 69.
[41] Van Jaarsveld and Van Eck *op cit*; A C Basson *et al ibid*; P S Nel *et al ibid.*
[42] P S Nel *ibid* Page 70.
[43] *Ibid* Page 70.
[44] *Ibid Page 70.*
[45] *Ibid Page 70.*
[46] The Amalgamated Society of Carpenters and Joiners of Great Britain; Van Jaarsveld & Van Eck *ibid* page 205 Section III Chapter 20 Par 555.
[47] A C Basson *et al op cit* Chapter 1 Page5.

job security.[48] In 1886 white workers formed a union which later combined with similar unions and formed the first South African trade union known as the South African Typography Union.[49]

South African black employees were excluded from the scope of these unions.[50] The multi-racial composition of the country contributed to the manner in which labour relations evolved. People from different races and ethnic groups (whites who were generally skilled and black unskilled) were expected to work together.[51] [This situation logically and inevitably precipitated racial tensions in the country]. Blacks were also drawn towards places where industrialization took place.[52]

They did not have trade unions, nor were they allowed to form one, though, they realized the importance and purpose of forming one. It is understood that a series of industrial actions were embarked upon by both the organized white labour and the disorganised black labour, not as a collective though.[53] The country's first major recorded strike was in 1884 at the Kimberley mine.[54]

[It is important to note that even at this stage, workers already recognized 'the power of many', i.e., together they could have an impact]. As the Mining Industry grew, more and more black workers and immigrants, e.g. Chinese, were employed to address the labour shortage.[55] Some of these workers were placed in skilled jobs but were earning unskilled wages. As a result of pressure from white unions, Ordinance 17 of 1904 was introduced, mainly directed at discriminating non-whites, specifically the Chinese.[56]

The discrimination against black workers led to their cruel treatment by white workers.[57] Labour shortage pressure led to another major strike in 1907, when employers proposed to extend skilled work to black workers.[58] [It must be noted

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[48] *Ibid* Page 5.
[49] P S Nel *et al op cit* Page 70.
[50] *Ibid* Page 70.
[51] A C Basson *et al op cit* Chapter 1 Page 4.
[52] *Ibid* Page 4.
[53] P S Nel *et al op cit* page 71.
[54] *Ibid* Page 71.
[55] *Ibid* Page 71.
[56] *Ibid* Page 71.
[57] *Ibid* Page 71.
[58] *Ibid* Page 71.

that these strikes slowly but surely improved workers' groups strength mentality]. The unions during this last strike wanted the skilled jobs done by immigrants to be given to white Afrikaners.[59]

These workers and unions continued to exert pressure on the government to protect white workers more.[60] Even the Industrial Disputes Prevention Act 20 of 1909 could not curb or assist the situation.[61] Already, it should be noted from these pieces of legislation that a dual regulatory framework was being embarked upon by the government. Existing Legislation was discriminating against blacks and immigrants, while protecting the interest of whites and Afrikaners.

By then several labour legislation was in place, which needed consolidation. The Mine and Works Act 12 of 1911 was an attempt at this.[62] This Act entrenched the further discrimination disposition against blacks by the then government. Though blacks were generally prohibited from forming and joining trade unions, they engaged in strike actions following the passing of the above-mentioned Act, and this led to the promulgation of the Black Labour Regulations Act 15 of 1911.[63]

This Act formerly recognized the rights of black workers, but did not extend to them, the right to collective bargaining. In 1913 there was a major strike that resulted from the mine managements' refusal to negotiate with workers' representatives.[64] The Government then passed several Acts intended to curtail strikes.[65] As a result of these strikes Government and workers' unions agreed that workers should lay their grievances with Government.[66]

[The passing of these Acts demonstrated that Government no longer regarded employment relations as a private matter between an employer and employee but considered itself as inherently affected. It was no longer willing to fold arms and leave it to the parties, but recognized that intervention was of crucial

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[59] *Ibid* Page 71.
[60] A C Basson *et al* Chapter 1 page 4 *op cit.*
[61] P S Nel *et al* Chapter 3 Page 71 *op cit.*
[62] *Ibid* Page 71.
[63] *Ibid* Page 71.
[64] *Ibid* Page 72.
[65] Workman`s Compensation Act 25 of 1914; The Riotous Assemblies and Crirninal Law Amendment Act 27 of 1914.
[66] P S Nel *et al op cit* Chapter 3 Page 72.

importance]. Around 1915 negotiated labour agreements were becoming common between white trade unions and Mine owners (employers).[67]

It is around this time that the Transvaal Chamber of Mines gave official recognition to white trade unions.[68] Black political parties had been formed, e.g. African National Congress which was formed in 1912.[69] Around 1915-1917 the Government called a National Congress of Workers and Employers which came up with several resolutions[70], inter alia:

1. Free recognition of worker organization by employers and the Right to organize and bargain collectively;
2. Principle of equal pay for equal work, irrespective of sex; and
3. No victimization for union memberships or union activity.

[These rights are the most important to workers. It was important for workers to get Government expressing appreciation of these rights and recognizing them. It must not be forgotten that these were benefits only extended to white trade unions.[71] Politics of the time cruelly discriminated against blacks, the pass laws, high cost of living, abuse by employers, long hours of work, poor if not unstable wages]. All these culminated in more blacks joining worker organization and in a number of strikes around this period.[72] More trade unions were formed by black workers.

In order to meet the needs of black workers, one of the most successful trade unions was formed in the Cape by Clements Kadalie: Industrial and_Commercial Workers Union in 1919.[73] Employers around this time realized that they needed to cut labour costs.[74] They reckoned they could cut costs if they also employed

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[67] *Ibid* Page 72.
[68] *Ibid* Page 72.
[69] SA History Online http://www.sahistory.org [Date of Access: 01/07/2013].
[70] P S Nel *et al op cit.*
[71] *Ibid* Page 72.
[72] *Ibid* Page 72.
[73] A history of the National Party, NP Ascendancy and Apartheid (1939-1950`s) http://www.sahistory.org.za/np-ascendancy-and-apartheid-1939-1950s [Date of Access: 01/07/2013].
[74] P S Nel *et al op cit.*

blacks in positions previously reserved for whites.[75] The blacks would however be paid less than whites for the same job.[76]

The result was the Rand rebellion of 1922.[77] This rebellion was a turning point in South Africa's labour relations.[78] As a result of the rebellion in 1924 the Smuts Government passed the Industrial Conciliation Act 11 of 1924.[79] This Act repealed Act 20 of 1909.[80] Although continuing to entrench racial segregation and discrimination[81], the 1924 Act brought about important gains in as far as worker rights are concerned.[82]

This Act created collective bargaining forums in the form of industrial councils.[83] Regulation of collective bargaining and management of industrial conflict was

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[75] *Ibid* Page 72.
[76] *Ibid* Page 72.
[77] *Ibid* Page 72; James Myburgh 02/08/2011 "The origins of our unemployment crises" The Author states that the strike by White mine workers started in January 1922. Further that the strike was as a result of Chamber of Mines` unilateral decision to scrap the agreed ratios of white to black workers and the colour bar. The Smuts Government [fearing a red revolt] brutally crashed the strike, leaving 214 workers killed, so says the Author http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=248797&sn=Marketingweb+detail&pid=74709 [Date of Access: 03/10/2013] ; Andrew Kenny 26/10/2011 "Racism and the workers" says the capitalists and the white workers had opposing interests. Further that, capitalists wanted to get rid of racial discrimination because it was bad for profits. Further that allowing Blacks to do skilled jobs would lower labour costs and increase the labour pool. The White workers wanted racial discrimination because it kept their wages high at the expense of Black workers http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=263499&sn=Marketingweb+detail&pid=74709 [Date of Access: 04/10/2013].
[78] John Grogan *Work Place Law 9th ed* Juta Chapter 16 Page 316.
[79] Bhorat *et al* DPRU September 2007 *op cit* Chapter 2 ; *Ibid* Grogan 316 ; Vettori M.S. Chapter 4 Page 95 "Collective Bargaining", University of Pretoria 2005 http://upedt.up.ac.za/thesis/availlable/edt-11082005-142503/unrestricted/04chapter4.pdf [Date of Access: 25/04/2013].
[80] Industrial Disputes Prevention Act.
[81] James Myburgh 02/08/2011 *op cit* says "As pass bearers, Black Africans were excluded from trade union membership and from participation in the system".
[82] Grogan 9th ed *op cit* ; Van Jaarsveld & Van Eck *op cit* Page205; A C Basson et al *op sit* Chapter 1 Page 4 ; James Myburgh *Ibid.*
[83] Bhorat et al, Sept 2007 *op cit* Chapter 2 Page 5; Johann Maree UCT, Labour Law Conference 2011 : "Is there a future for Collective Bargaining in South Africa?" http://www.nexislexis.co.za/pdf/workshop-4-1-is-there-a-future-for-collective-bargaining-presented-by-Prof-Johann-Maree-pdf [Date of Access: 30/05/2013] ; James Myburgh *Ibid* says that the employers and the unions negotiate wage-rates, hours of labour and fringe benefits. Any agreement may then obtain approval of the Minister of Manpower [Labour]. It then has the force of law; the Minister may, at his discretion, order its provisions to apply to employers and employees in the same or cognate industries who have not been parties to the agreement. During the period of such

laid down.[84] An equal number from registered trade union(s) and an employer or employer organization/s could come together to agree on a Constitution for the council.[85] They could then register their council for its area of jurisdiction.[86] Once the industrial council was registered, it could apply to the Minister of Manpower to make public their agreements, by publishing same in a Government Gazette.[87]

These agreements, generally related to working conditions, wages, hours of work and social welfare funds.[88] On application by the industrial council, the Minister of Manpower could extend a specific industrial council agreement to all employers and employees within the jurisdiction of the industrial council.[89] Amongst requirements for such extension, the Minister had to be satisfied about the representativity (not a requirement in terms of enabling Legislation[90]) of the parties and the element of prejudice or unfair competition or advantage by non-members in the event of non-extension.[91]

If an agreement is extended as such, then, it was legally binding and non-compliance was a criminal offence.[92] This Act, through section 24, excluded blacks from the ambit of its operation.[93] It defined an employee as "excluding a person whose contract of service or labour was regulated by any black pass laws

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agreements, strikes or lock-outs about matters which the industrial councils have determined are illegal and for other matters, conciliation and arbitration system was established.

[84] Vettori M S *op cit* Page 96.

[85] Bhorat *et al* September 2007 *op cit* Page 5.

[86] This could be its Industrial scope, Geographical area, or Nature of Trade involved in.

[87] Bhorat et al September 2007 *op cit* [once the agreement is gazetted, it has a force of law].

[88] *Ibid*; Johann Maree LLC 2011 *op cit* Page 5.

[89] H Bhorat *et al* DPRU 09/135 *op cit* ;James Myburgh *op cit* [the Author says the essential consideration precipitating this system was that the White unions wanted to protect their members from having their jobs taken and wages undercut by Black Africans who could take any job for a lesser rate. Secondly, the so called 'civilised labour policy', in that unions at that time regarded employers with suspect, that they(capitalist employers) could happily replace White labour with cheaper Black labour, if they had their way, therefore systems had to be created to ensure white labour would always be preferred].

[90] H Bhorat *ibid* Page 3.

[91] [The system of Extension of collective agreements to non-members is not new or conceived by the LRA 1995]; Bhorat *et al* DPRU 09/135 Page 3 *ibid.*

[92] *Ibid* Page 4.

[93] Vettori M.S. *op cit* Page 96 ; Bhorat *et al* DPRU 09/135 *op cit* Page 4; Bhorat et al September 2007 *op cit* Page 6 ; A.C. Basson *et al* 5th ed *op cit* Page4 ; P.S.Nel *et al* 5th ed *op cit* Page 74.

and regulations or by the Black Labour Relations Act 15 of 1911 or by any regulation or amendment of the latter".[94]

In 1925 the Wage Act was promulgated[95], it provided for; inter alia, minimum wages for all employees irrespective of race, in arrears where there were no collective bargaining structures.[96] The Industrial Conciliation Act of 1924 was later repealed by the Industrial Conciliation Act 36 of 1937.[97] The latter was not different from the former in its further entrenchment of discrimination against blacks, even though they were bound by agreements reached in the created industrial council which were extended and made binding within their respective industry or geographic area or trade.[98]

However, it introduced important self-regulation measures for white workers (unions) and their employers (employer organization) i.e. arbitration, conciliation and mediation.[99] The Act also excluded a great category of workers from its ambit e.g. domestic workers; farm workers; public servants; etc.[100] In

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[94] *Ibid* P.S.Nel *et al*: The Authors further indicate that this definition only applied to black males, since black females were not required to carry passes. Further that, thus, blacks were excluded from the collective bargaining system (this presupposes that black females could belong to a registered union. Probably it was an untenable position for that period's politics) ; Bhorat *et al* DPRU 09/135 *op cit.*

[95] This was the era of the Pact Government of the Afrikaner nationalist National Party and the socialist inclined South African Labour Party. This Government is said to have pushed hard for the so called civil labour policy in favour of white Afrikaners. [The 1925 Wage Act, the 1924 Industrial Conciliation Act together with other discriminatory legislation of the time, ensured that Black workers were permanently excluded from getting into skilled jobs and confined them to a wage regime they would otherwise never agree to.] See James Myburgh *op cit.*

[96] *Supra* Vettori M.S. 2005 Page 96; P.S.Nel *et al* 5th ed *op cit* ; Bhorat *et al* DPRU 09/135 *op cit.* The Authors indicate that, the Act created Wage Boards who were appointed by the Minister of Manpower. Their functions included making wage determinations in arrears not covered by industrial councils, and to advice the Minister on exemptions and extensions of Wage Determinations. [It must be borne in mind that the system of industrial councils was introduced by Industrial Conciliation Act 11 of 1924. The Act simultaneously created the system of applications for exemptions and extensions]. The Authors indicate that the initial intention with the passing of this Act was to protect the interests of workers not party to industrial councils. An Inspector was provided for to attend IC meetings in the interests of these non-parties.

[97] Bhorat *et al* DPRU 09/135 *ibid* Page 7.

[98] H Bhorat *Ibid* Page 4 & 6-7 says the extensions applied only to pass bearing black males who fell within the councils` jurisdiction. The extensions now also covered all areas of the collective agreement and not only those relating to hours of work and wages, like it was with its predecessor.

[99] P.S.Nel *et al* 5th ed *op cit* Page 74.

[100] *Ibid* Page 74.

1937, another Act[101] was passed which sought to regulate the affairs of blacks who were not included in the definition of employee under the 1937 Conciliation Act and un-unionized white employees.[102]

This Act made provision for an Inspector appointed by the Minister of Manpower, to attend and be a member of an industrial council so that, he can represent non-party employees to whom a collective agreement could be extended.[103] Since the Inspector could not have been black, such representation was weak and ineffective.[104] [Black employees correctly regarded him with profound and prudent suspicion].

### *2.3 Labour and Apartheid Regime*

In later years the National Party[105] became the Government[106] in South Africa. Their policy was very clear i.e. separate development and entrenching the supremacy of whites (Afrikaners) as a race.[107] They gladly embraced the existing Legislation which furthered their cause and created new Legislation to entrench the confused dualistic system of labour regulation.[108] The Native Building Workers Act 27 of 1951 was passed.[109] The purpose was to further reserve skilled jobs in the building industry to or for whites.[110] The idea was to ensure

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[101] Wage Act of 1937.
[102] The ambit of this Act was not different from that of 1925 Wage Act. It however provided for minimum wage rates for all employees irrespective of race. See Vettori 2005 *op cit* at Page 96.
[103] Bhorat *et al* DPRU 09/135 *op cit* Page 7.
[104] *Ibid* Page 8.
[105] A Party formed in 1912 by a Boer General, Hertzog. Immediately after assuming power, their Government became the champions of intolerance, racial segregation, tyranny and hardship for Blacks in South Africa.
[106] Andrew Kenny 26/10/2011 *op cit* sates that the National Party took the side of the White workers against the capitalists. It codified all the existing unofficial racial discrimination into the official laws of Apartheid. It re-introduced legal job reservation.
[107] "NP Ascendancy and Apartheid (1939 – 1950s)" South African History Online *op cit*; P.S Nel *et al* 5th ed *op cit* Page76.
[108] Black Labour Relations Regulations Act 48 of 1953 ; Industrial Conciliation Act 28 of 1956 ; The Wage Act 5 of 1957.
[109] The O` Malley Archives, Page 5: 1956 Industrial Conciliation Amendment Act No 28 http://www.nelsonmandela.org/omalley/index.php/site/q/031v01538/041v01828/051v0 [Date of Access: 02/09/2013].
[110] *Ibid*.

that whites will not be exploited by the lower standard of living by any other race.[111]

Bhorat[112] argues that, the introduction of the new Native Labour ( Settlement of Disputes ) Act 48 of 1953 was a deliberate action by the then Government to further entrench the restriction on trade union formation by African workers and to prohibit their strike action.[113] Section 77 of the Industrial Conciliation Act 28 of 1956[114] introduced the system of job reservation for whites.[115] The Act itself totally outlawed black trade unions and mixed race unions, and introduced discrimination on the basis of sex in bargaining council agreement.[116]

Section 5 of this Act defined an employee as:

> any person (other than a Bantu) employed by or working for any employer and receiving, or entitled to receive, any remuneration, and any other person whatsoever (other than a Bantu) who in any manner assists in the carrying on or conducting of the business of the employer.[117]

In terms of this Act, no further mixed race unions were allowed to register as unions.[118] Where such unions continued to exist, only white members could become members of executive committee.[119] This Act prohibited certain categories of employees, known as essential industry employees, from striking. It further banned unions from political affiliations.[120]

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[111] *Ibid.*
[112] DPRU 09/135 *op cit* Page 8.
[113] P.S.Nel *et al* op *cit* Page 75 [The Authors here, however, call this Act with a totally different name, viz, Black Labour Relations Regulation Act 48 of 1953].
[114] Industrial Conciliation Act 1956 Wikipedia https://enwikipedia.org/wiki/Industrial_Conciliation_Act_1956 [Date of Access: 07/05/2013].
[115] *Supra* Vettori 2005 Page 96-97.
[116] *Supra*, Note 99 Industrial Conciliation Act ; Bhorat et al September 2007 *op cit* Page 7.
[117] P.S.Nel *et al* 5th ed *op cit* Page 76.
[118] *Ibid* at Page 75.
[119] Bhorat *et al* September 2007 *op cit* Page 7.
[120] Apartheid State Legislation 1948-1990, The O`Malley Archives http://www.nelsonmandela.org/omalley/index.php/site/q/031v01538/041v01828/051v0 [Date of Access: 02/09/2013].

This Act provided in section 24 matters that may be dealt with by an industrial council.[121] As soon as an agreement had been reached at the industrial council on these matters, it had to be transmitted to the Minister of Manpower in terms of section 31.[122] Section 48 provided for putting into force of these agreements.[123] Generally it related to extension of these agreements to non-parties. Amongst others, a provisional notice inviting non-parties` comments was published in a Government Gazette and the Minister had a discretion whether or not to so extend an agreement.[124] Section 51 provided for applications for exemptions.[125]

Although blacks' trade unions were by law not recognised and were discouraged, they continued to exist and to draw membership.[126] Due to this situation and shortcomings of Act 48 of 1953[127] and continued strikes by black workers, two new Acts intended to further regulate blacks employment relations were passed.[128] By this time black employees were engaged in a parallel collective bargaining system of seeking recognition agreements with specific employers and concluding agreements.[129]

It is then that Government prudently decided to convene or set up a Commission of Enquiry to review existing labour relations field in the country and to make recommendations.[130] The Wiehan Commission was set up in 1977.[131] The recommended actions of this commission were later translated into Legislation.

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[121] De Kock`s "INDUSTRIAL LAWS OF SOUTH AFRICA" THOMPSON Juta Service 29/1993 Page A2-35.
[122] *Ibid* Page A2-41.
[123] *Ibid* Page A2-54.
[124] *Ibid* Page A2-55.
[125] *Ibid* Page A2-60.
[126] Vettori 2005 *op cit* Page 98 at Par 3.5.
[127] *Supra* Bhorat 09/135 at Page 8 says, "This Act provided for the representation of African workers by liaison committees to negotiate conditions of employment with employers; pass laws were amended to include women. They had to resign from registered unions and were no longer eligible to be represented on Industrial Councils"; Vettori 2005 *ibid* Page 97 at Par 3.4 says that the liaison committees system did not succeed since blacks did not support it and the committee members lacked sufficient knowledge to effectively represent blacks.
[128] Black Labour Regulations Amendment Act 70 of 1973; Black Labour Relations Amendment Act 84 of 1977.
[129] Vettori 2005 *op cit* Page 98 at Par 3.5.
[130] Bhorat September 2007 *op cit* Page 8; Bhorat 09/135 *op cit* Page 9.
[131] *Supra* Vettori 2005 Page 99.

Various Amendments were made to the Industrial Conciliation Act of 1956.[132] The definition of the term employee was extended to cover all races in the country.[133]

Interesting inclusions in the Act were introduced, e.g. registration of trade unions; restrictions of such unions from political activity; repealing job reservation; and closed shop agreements; etc.[134]It is clear that by this time Government was reacting to international pressure and incessant political and labour unrest in the country. Of importance is that, as a result of the Wiehahn Commissions' recommendations the proper framework for inclusive collective labour law was in place.

The only problem was by then the existence of the Native Labour (Settlement of Disputes) Act 48 of 1953 which, undoubtedly still regulated the affairs of black labour.[135] Realizing the need to realign further and harmonize existing labour laws, Government passed the Labour Relations Amendment Act 57 of 1981.[136] This Act repealed Act 28 of 1956 and Act 48 of 1953.[137] This new Act conformed to International Labour Organization[138] Conventions regarding the role of Governments vis-à-vis rights of employees.[139]

This Act promoted and encouraged collective labour relations in a regulated manner.[140] It extended the right to collective bargaining to black employees.[141]

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[132] *Supra* P.S.Nel *et al* 5th ed Page 78.
[133] Bhorat 09/135 *op cit* Page 9: the Act firstly recognised Africans who had permanent urban residency. It was later changed to include African contract workers and commuters.
[134] P.S.Nel et al 5th ed *op cit* Page 78.
[135] *Ibid* Page 78.
[136] *Ibid* Page 78.
[137] *Ibid* Page 78.
[138] About the ILO http://www.ilo.org/global/about-the-ilo/lang--eng/index.htm [Date of Access: 11/04/2013] ILO was founded in 1919, in the wake of a destructive war, to pursue the vision based on the premise that universal, lasting peace can be established only if it is based on social justice. It became the first specialized agency of the UN in 1946.
[139] *Ibid*; Bhorat September 2007 *op cit* Page 8 says mixed trade unions could now register without ministerial approval. They could now become members of IC. Black trade unions continued to view the system with suspicion and continued their plant level bargaining. They, however, realised the need for centralised bargaining system to provide for unorganised workers in addition to plant level bargaining".
[140] *Ibid* Page 79.

It gave new life to work councils which served a communication function in an enterprise.[142] In 1988 a follow up Labour Relations Act 83 of 1988 was passed.[143] From the 1990s' the Country geared itself on the road to rearranging its socio-economic and political spheres.[144]

[It must however be noted that, the Apartheid wage structure, compounded by the inferior education and resources provided to blacks in the country up to then, entrenched a deeply unequal society. This legacy is still being battled with to date, by successive democratic governments since 1994]. The Apartheid racial economic and wage structure is still firmly rooted and unshakeable.[145]

## 2.3 New Constitutional Dispensation

On the 2nd of February 1990 President F.W. de Klerk made sweeping announcements in Parliament.[146] Blacks Political Parties were unbanned. Nelson Mandela[147] and other political prisoners were to be released. Ultimately the country was transformed into a Constitutional Democracy.[148] In 1994 after the first general elections, the country got its first democratically elected President and a Government of National Unity.

The ANC[149] became the Government of the day. The 19 most influential employer organizations came together to form Business South Africa.[150] This

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[141] The Apartheid State legislation, The O`Malley Archives *op cit* ; A.C.Basson *et al* 5th ed *op cit* Page 5.
[142] P.S.Nel *et al* 5th ed *op cit* Page 79; Bhorat September 2007 *op cit* Page 8" it was at this time that the largest Trade Union Federation in the country agreed with other Unions to participate in ICs. Centralised bargaining was encouraged provided that it did not do away with plant level bargaining and that employees had a choice of which Union to join".
[143] Van Jaarsveld 3rd ed *op cit* Page207 Par 560.
[144] *Ibid* Par 561.
[145]Neil Coleman "Wall to Wall and mandatory sectoral bargaining needed" 08/ 03/ 2013 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639?oid=36331 [Date of Access: 17/04/2013].
[146] P.S.Nel 5th ed *op cit* at Page 79.
[147] Democratic South Africa`s first black President. He had spent close to 27 years in prison as a political prisoner under the National Party Government. He is hailed the World over as a true icon of democracy, humanity and peace.
[148] After overcoming immense obstacles, delays and frustrations, an Interim Constitution was completed in 1993 and adopted in 1994.
[149] *Supra* http://www.sahistory.org .
[150] P.S.Nel 5th ed *op cit* Page 80.

organization played an important role together with organised labour in negotiating with Government on matters impacting on their members and economic policy direction.[151] In June 1994 South Africa was readmitted into the ILO.

The Government soon ratified ILO Conventions, e.g. Convention on collective bargaining; trade union rights; and maternity.[152] National Economic Development and Labour Council [NEDLAC][153] was created by Act 35 of 1994.[154] It came into being in 1995. It replaced both the National Manpower Commission and the National Economic Forum.[155] It has legal personality and it is the responsibility of Department of Labour.

It composes of organized business, organized labour, community development organizations and the State. As a result of negotiations between all stakeholders in NEDLAC, the Labour Relations Act 66 of 1995 was passed.[156] Amongst others, it completely revamped and overhauled and codified some of the existing legislation on collective bargaining.[157]

With this Act, the stage was set for workplace democratisation.[158] By the time of the passing of this Act, most of the country's` workforce were covered by specific Statutes intended to regulate trade unionism and collective bargaining in their respective sectors, e.g. Education Labour Relations Act 146 of 1993; Public Service Labour Relations Act 102 of 1993; Agricultural Labour Act 147 of 1993; South African Police Service Labour Regulations Act of 1995, etc.[159]

In as far as collective bargaining is concerned, the LRA does not prescribe to parties who they should bargain with, on what, when or for how long, or if they

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[151] *Ibid* Page 80.
[152] *Ibid* Page 80.
[153] About NEDLAC http://www.nedlac.org.za/about-us/introduction.aspx [Date of Access: 20/03/2013]. NEDLAC is an Institution were Government, Organised Business, Organised Labour and community groupings come together at National Level to discuss and find consensus on social and economic policy issues.
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] P.S.Nel 5th ed *op cit* Page 80.
[158] *Ibid* Page 80.
[159] Bhorat September 2007 *op cit* 2.1 at Page 9 ; A.C.Basson 5th ed *op cit* Page 7.

should bargain at all.[160] It merely provides the rules and the 'boxing ring' and allows the parties to sweat it out themselves.[161] Where innocent parties get caught in the 'cross fire', the rules provide for their recourse. This is in the form of applications for exemptions and appeals and ultimately recourse to court.

[160] *Besaans Du Plessis (Pty) Ltd v NUSAW* 1990 ILJ 690 (LAC) where the Court decided that, the choice of bargaining forum should be left to be determined by the respective power of the parties. ; Vettori 2005 *op cit* Page 106 at Par 2.

[161] *National Police Services Union & others v National Negotiating Forum & others* (1999) 20 ILJ 1081 (LC) ; Vettori 2005 *ibid* Page 108 at 4.1.

## CHAPTER 3

## 3. THE NEW CONSTITUTIONAL SETTLEMENT

### 3.1 The 1993 Constitutional Arena

In the preceding chapters of this research study, efforts were exerted to highlight the plight of the African worker in a two tier labour system of both the colonial masters and the Apartheid Government. Collective labour rights were enjoyed by the minority to the fullest while the majority were excluded or allowed only minimal or token enjoyment. However towards the late 80s` Government realised they had to change policy positions.[162]

A paradigm shift was absolutely necessary in the face of rampant strikes in townships, work areas and subsisting International isolation and pressure.[163] No wonder in February 1990, President de Klerk unashamedly and unannounced, made the unexpected but overdue announcements in Parliament.[164] Logic dictates that after the unbanning of political parties, black trade unions were now free to organise and recruit to their capacity`s content. In the process they were strategically placed to garner support for the ANC.[165]

Unfortunately the existing labour laws were still those created by Apartheid and therefore continuously negatively affected the labour climate in the country. In any event, both business and Government recognised that they had to come to the party and negotiate a reform to these laws. The Congress of South African Trade Unions[166] played an important role in these negotiations.[167] As a result of these negotiations, several categories of employees who had been historically excluded from labour rights were included.[168]

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[162] A.C.Basson 5th ed *op cit* Page 8.
[163] Vettori 2005 *op cit* 3.7 Page 101 says government was under International pressure and sanctions adopted a more corporate stance towards labour relations.
[164] P.S.Nel 5th ed *op cit* Page 79.
[165] Vettori 2005 *op cit* Par 3.7 Page 101-102.
[166] Congress of South African Trade Unions 'A federation of South African Trade Unions, formed in 1985. About COSATU http://www.cosatu.org.za [Date of Access: 20/03/2013].
[167] *Ibid.*
[168] Bhorat September 2007 *op cit* 2.1 Page 9; A.C.Basson 5th ed 2009 Page 7.

There was a need to have an umbrella labour relations Statute to address the country`s work relations.[169] Negotiations for political reforms were on going by then, despite intense challenges. Through these negotiations an Interim Constitution was born and later adopted and passed.[170] Government convened a Ministerial Task Team to consider, inter alia, codifying existing labour Legislation, to bring it in line with the Constitution and International law obligations of the country.[171]

It is argued at various levels that the inclusion of labour rights, specifically the Right to bargain collectively, in this Constitution was a milestone appeasement to labour[172], for their role in assisting the ANC to assume power.[173] Whatever ones` perspective, the inclusion of the rights in section 27 of the Constitution elevated these rights to the standard of Human Rights. They were given specific deserving protection and respect.

Section 27 of the Constitution provided that workers and employers shall have the right to organize and bargain collectively. The stage was ripe then to have those responsible, to draw up a comprehensive labour regulatory regime in line with this constitutional prescript.[174] The preamble to the LRA 1995 reinforces this conclusion. By this time NEDLAC was in existence. (Consequently various interactions between employers, Government, trade unions and society pressure groups were taking place).

The totality of all the processes and consultations let to the promulgation of the Labour Relations Act 66 of 1995. This Act embodied a complete system for labour relations in the country. It simplified the collective bargaining processes. It outlined the process from registration of a trade union or employer

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[169] Bhorat 09/135 *op cit* Page 11.
[170] Act 200 of 1993.
[171] Van Jaarsveld 3rd ed *op cit* Page 204 par 551 and Page 208 par 564. Apparently the Task Team incorporated, in its recommendations, inputs by the Fact Finding and Conciliation Commission of the ILO ; Government Gazette 16292, 10 Feb 1995 referred to by Van Jaarsveld 2005.
[172] Goldberg LDD 6/1997 "Small enterprises, the Labour Relations Act and collective bargaining in South Africa" Page 84.
[173] P.S.Nel 5th ed *op cit* Page 80 at 3.6.
[174] By this time different Legislation was enacted in various sectors of the economy, e.g. Act 146 of 1993 for the Education sector; Act 102 of 1993 for the Public sector; Act 147 of 1993 for the Agricultural sector.

organization to formation or creation of a bargaining council. It outlined the essence of bargaining councils and the bargaining machinery.

The preamble to the LRA 1995 is very clear as to its noble objects. In 1996 the country adopted a new and permanent Constitution.[175] This Constitution continued to entrench labour rights in the Bill of Rights[176] and upholds the system of collective bargaining.[177]

### 3.2 The 1996 Constitutional Provisions

Section 2 of the Constitution of 1996 provides that, the Constitution is the supreme law of the country. Further that, any act or conduct inconsistent with it is invalid, to the extent of such inconsistency. This Constitution contains a Bill of Rights.[178] The Bill of Rights contains guarantees of rights and freedoms of all persons [natural and juristic] in the Republic.

Some of the sections in the Bill of Rights will be discussed here. Section 13 prohibits, inter alia, forced labour. In essence, there must be a meeting of minds between parties to an employment relationship. This section is further re-armed by section 22 which deals with freedom of trade, occupation and profession. Due to competing interests in our democratic State, sex workers[179] approached the Constitutional Court seeking a declaration of rights.[180]

Section 18 gives to everyone the right to freedom of association. This section, when read with section 23[2] of the LRA 1995, makes it clear that every employee has a right to choose to join or not, a union of their choice. The same applies to employers. Consequently it means that they have a right to choose to

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[175] Constitution of the Republic of South Africa 1996. For it to be adopted, it had to undergo a system of certification by the Constitutional Court. Refer to *Case* [1996] 17 ILJ 821 [CC] *Infra.* It repealed Act 200 of 1993.
[176] Chapter 2 of 1996 RSA Constitution.
[177] Section 23(5) & (6) RSA Constitution 1996.
[178] Chapter 2 of the Constitution of 1996.
[179] In *Kylie v CCMA* (2008) 9 BLLR 870 (LC) The Court agreed that sex workers are employees although, because of the illegality of their enterprise they cannot be protected by Courts.
[180] *S v Jordan and others* (SWEAT as Amici Curiae) (CCT31/01) [2002] ZACC 22; 2002 (1) SA 797 (T).

belong or otherwise, to a bargaining council. There are exceptions to this right in labour, e.g. closed shop agreement[181]; agency shop agreements[182] and section 32 and section 198 of LRA 1995;[183] etc.

It is argued by various writers that the limitation on the right not to associate is appropriate in order to give effect to the express purpose of promoting a stable and orderly collective bargaining.[184] It is further argued that this latter purpose carries more weight than may usually be the case.[185] Section 23 of the Constitution protects several important labour rights, e.g. fair labour practices; right to join and belong to a trade union or employers` organization and to participate in its activities; and the right to engage in collective bargaining[186]; etc.

This section gives to employees the right to strike and to employers, recourse to lock out. This is not the same as in the Interim Constitution[187] where in terms of section 27[5] employers were given a right to lock out. As a result of the non-inclusion of this right in the final Constitution, the Constitutional Court had

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[181] Section 26(1) of LRA provides that, ' A representative trade union and an employer or employers` organisation may conclude a collective agreement, to be known as a closed shop agreement, requiring all employees covered by the agreement to be members of the trade union'.

[182] Section 25(1) of LRA provides that, 'A representative trade union and an employer or an employers` organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof'.

[183] *Ncungama & others v Bargaining Council for the Liquor Catering & Accommodation Trades, South Coast, KZN & another* [2002] 8 BLLR 766 (LC) The Court in this case ( where a review of a refusal of application for exemption from a provident fund collective agreement was sought) ruled that the LRA recognises freedom of association but, not without limit. Further that the Constitution allows limiting this freedom by union security arrangements. ; in *NUMSA & others v Barder Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC) the Court noted that a majoritarian union system is not incompatible with freedom of association as long as minority unions are allowed to exist. [These two cases will be used with others in our later argument as to whether or not the framework of extension of collective agreements i.t.o. Section 32 LRA should be retained or is (UN) constitutional].

[184] *Certification of the Constitution of Republic of South Africa* case [1996] 17 ILJ 821 (CC) 794-797; Also see Note 7 above.

[185] *Ibid* Note 7 *supra.*

[186] *Ibid Certification of the Constitution of Republic of South Africa* case : The employers in this case won an argument that the New Text did not include the right of individual employers to bargain collectively directly with a trade union/s.

[187] Section 27(3) provided that workers and employers shall have the right to organise and bargain collectively.

occasion to pronounce on this aspect. In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*,[188]inter alia, the argument, was that, by omitting the right of employers to lock out meant that employers rights were less in status than those of employees.

The Constitutional Court dismissed this argument and reiterated that the parties` rights to bargain collectively were sufficiently pronounced in the Constitution, employers were sufficiently able to use their economic muscle against employees. Another argument in this case related to a principle based on right to equality.[189] It was argued that the right to strike and that of employers to lock out should be included in the Constitution. The court, in dismissing this argument, said that employers` rights are protected by implication through express provisions relating to collective bargaining.

Section 8 of the Constitution attends to the application of the Bill of Rights. Section 36 deals with limitation of rights and freedoms contained in the Constitution. A number of these sections were given effect to in several Legislation that directly impacts labour relations, e.g. LRA 66 of 1995 promotes collective bargaining (amongst others) [section 23 of Constitution], recognition and regulation of freedom of association [section 18 and 23 of Constitution], and also deals with the right of employees and employer unions, etc.

Employment Equity Act[190] gives effect to section 9 of the Constitution. It provides further for the creation of measures for the elimination of discrimination in the workplace and promotes affirmative action. The Basic Conditions of Employment Act 75 of 1997 gives effect to section 22 and 23 of the Constitution, amongst others.

There has been interesting case law over the years that impact on the practical implementation of all these laws. For instance, section 2 of the LRA 1995 excludes certain categories of employees from the application of the Act, e.g.

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[188] [1996] 17 ILJ 821 (CC).
[189] Section 9 of the 1996 Constitution.
[190] Act 55 of 1998.

SANDF[191]; SASS[192]; NIA[193]; etc. Members of the SANDF took their Minister to court arguing that despite their non-inclusion in the LRA, the Constitution created a duty on her to bargain collectively with them.[194]

The soldiers union relied directly on section 23[5] of the Constitution. The court dismissed this argument, concluding that, one cannot rely directly on a constitutional provision without attacking the constitutionality of Legislation created to give effect to that provision.[195] Some State employees have been held not to enjoy protection of the LRA, e.g. Magistrates; Judges; and members of statutory boards.[196] However in the case of *Adonis v Western Cape Education Department* [197] the Labour Court ruled that the list provided in Section 2 of the Act is exclusive and that the Act applied to all the other sectors.

In the case of *MEC for Transport: KZN & others v Jele*[198] it was held that the excluded employees have a recourse to the High Court on the bases of damages for breach of contract and further that the excluded employees may have their labour rights provided for in their regulatory Act. This constitutional dispensation also led to the establishment of specialized tribunals to handle disputes emanating from the application of LRA.[199]

Similarly in the case of *SASBO v Standard Bank of SA Ltd*[200] it was held that since the right to collective bargaining was not absolute, any senior manager who participates in the negotiations on behalf of an employer should be excluded from employee benefits due to the union he negotiated with. The court noted

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[191] South African National Defence Force.
[192] South African Secret Service.
[193] National Intelligence Agency .
[194] *SANDU v Min of Defence and others* [2007] 9 BLLR 785 (CC).
[195] Contrast the SANDU case above with the decision in *Dlamini & others v Green Four Security* [2006] 11 BLLR 1074 (LC) par 10-12 where the court stated that, where a cause of action is based on Legislation giving effect to a constitutional right, it is impermissible for a Court to bypass the Legislation and to determine the matter solely on constitutional provision which is given effect to by the Legislation in question.
[196] *Khanyile v CCMA and others* [2004] 25 ILJ 2348 [LC]; *Hannah v Government of Namibia* 2000 [4] SA 940 [NMLC].
[197] [1998] 6 BLLR 564 (LC).
[198] [2004] 12 BLLR 1238 (LAC).
[199] Chapter VIII LRA 1995.
[200] 1988 ILJ 223 (SCA).

that a conflict of interest is inescapable should they be represented by the same union.

## CHAPTER 4

# 4. LEGISLATIVE FRAMEWORK OF COLLECTIVE BARGAINING AND INTERNATIONAL PERSPECTIVES

## 4.1 The Arena of Collective agreements

The Preamble to the LRA 1995 in section 1(a) is to the effect that, inter alia, the Act seeks to give effect to the constitutional rights contained in the Constitution, particularly, section 23.[201] Within this context, it also creates a mechanism through which the Republic complies with its International Law obligations. It creates a framework for collective bargaining and for resolution of labour disputes.

*ARTICLE 2 of the Collective Bargaining Convention No 154 of 1981*[202]explains collective bargaining as*:*

all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on the other hand and one or more workers' organizations, on the other, for:

a) Determining working conditions and terms of employment; and/or
b) Regulating relations between employers and workers; and/or
c) Regulating relations between employers and their organizations and a workers' organization or workers' organizations[203].

*ARTICLE 2(1) of Collective Agreement Recommendation 91 of 1951*[204] defines collective bargaining as all agreements in writing regarding working conditions

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[202]Collective Bargaining Convention No 154 of 1981 http://www.ilo.org/dyn/normalex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRU... [Date of Access: 11/04/2013].

[203] As on 11/04/2013, RSA did not appear on the list of Countries that had ratified this Convention. See in this regard: http://www.ilo.org/dyn/normalex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRU [Date of Access: 11/04/2013]. However, South Africa ratified the Right to Organise and Collective Bargaining Convention 98 of 1949 on 19/02/1996 See http://www.ilo.org/dyn/normalex/en/f?p=NORMALEXPUB:12100:0::NO:1200:P1210 [Date of Access: 11/04/2013].

and terms of employment concluded between an employer, a group of employers or one or more employers' organization, on the one hand, and one or more representative workers' organization, or, in the absence of such organizations, the representatives of the workers duly elected and authorized by them in accordance with national laws and regulations, on the other.

As mentioned elsewhere in this research, South Africa's Constitution guarantees every trade union, employer and employers' organization the right to engage in collective bargaining.[205]The Labour Relations Act 1995 creates a framework or structure for the exercise of the right to engage in collective bargaining in Chapter III.[206] This is both for the private sector and for the public sector. Only the former concerns this research.

The LRA has as its objectives, advancement of economic development, social justice, labour peace, and democratization of the workplace. Within these objectives lies the creation of the system of collective bargaining.[207] The system is voluntary in approach. The parties are given space to self -regulate. The purpose of LRA are also said to be, inter alia, to promote orderly collective bargaining, especially at sectoral level and the effective resolution of labour disputes.

The LRA defines a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more trade unions, on the one hand, and on the other hand, one or more employers, one or more registered employers' organizations, or one or more employers and one or more registered employers' organizations.[208]

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[204] Collective Agreement Recommendation 91 of 1951 http://www.ilo.org/dyn/normalex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRU [Date of Access: 11/04/2013].

[205] Section 23(5) provides that "Every trade union, employers` organization and employer has the right to engage in collective bargaining. National Legislation may be enacted to regulate collective bargaining...".

[206] For a discussion of the salient elements of a collective agreement, also see the case of *Eskom Holdings (Pty) Ltd v NUM and others* [2009] 1 BLLR 65 (LC).

[207] Section 1(c) of LRA 1995.

[208] *Ibid* Section 213.

Collective agreements can amend individual contracts of employment[209] of employees within its sector or scope.[210] However such agreement should be concluded within the ambits of the law and it should not lower the conditions of employment than what the Basic Conditions of Employment Act [211] dictates. The BCEA sets a minimum floor of rights for each and every employee in the country. Section 1 excludes an independent contractor from the definition of an employee.

Collective agreements must, within them, inter alia, prescribe for their enforcement; period of validity; dispute resolution mechanism; specify funds or schemes for employee social protection; and disciplinary and grievance procedures; etc. It is preferable that these agreements be in writing, even if it is a series of documents, as long as it is clear that there is an agreement that concerns itself with terms and conditions of employment or matters of mutual interest.[212] The agreement may be signed by the parties whose names and capacity appears *ex facie* the document.[213]

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[209] No employee may waive any rights in terms of an effective collective agreement in his or her individual contract on employment. Section 199 LRA 1995 ; the general rule in this regard is succinctly captured by the Latin maxim: *quilibet potest renuntiare juri pro se introducto* [ a person may renounce a right introduced for his own benefit]. In the Case of *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734-735, Innes ACJ, as he then was, in this regard said that the maxim that every man is able to renounce a right conferred by law for his own benefit, is subject to exceptions, one of which is that no one could renounce a right contrary to law, or a right introduced not only for his benefit but in the interest of the public as well. ; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD) at Par 8 were the Appellate Division adopted the decision in the *Ritch and Bhyat* Case.

[210] Section 23(3) LRA 1995.

[211] Basic Conditions of Employment Act 75 of 1997. This Act establishes, regulates and enforces the basic conditions of employment, e.g. working hours, leave, termination of employment, etc.

[212] This position was stated by the Labour Court in two cases, viz , *NUMSA & others v Hendor Mining Supplies* [2003] 10 BLLR 1057 (LC) at par 30 Jammy AJ said that there is nothing in the definition of collective agreement in the Act which requires its terms to be recorded in one memorial provided that they concern terms and conditions of employment or any other matter of mutual interest ; this was confirmed in the *Daimler Chrysler SA (Pty) Ltd* [2007] 3 BLLR 197 (LC) case.

[213] *Ceramic Industries Limited t/a Betta Sanitaryware v NCBAWU* [1998] 11 BLLR 1120 (LC) This case changed the requirement that collective agreement must be signed by parties to that, parties may sign ; *contrast CWU v Telkom SA Ltd* (1998) 19 ILJ 389 (CCMA).

There is no duty in terms of the LRA to bargain collectively,[214] neither does the Constitution of 1996 establish such a duty. Ministerial Task Team in explaining the Draft Bill to LRA 1995[215] stated that:

> While giving Legislative expression to a system in which bargaining is not compelled by Law, the draft Bill does not take a neutral stance. It unashamedly promotes collective bargaining. It does so by providing for a series of organizational rights to unions and by fully protecting the right to strike....

Courts have had occasion to deal with this subject matter on various occasions.[216] The courts seem to conclude that in line with ILO prescripts; Public International Law and interpretation of our Constitution, a freedom to bargain collectively is created rather than a positive right to bargain collectively. Further to that, an obligation to bargain may arise from construction of a collective agreement.[217] Cheadle in his article on collective bargaining and the LRA[218]provides a conclusion which is supported in this research.

He says, not in so many words though, that enforcement of the right to collective bargaining is possible through the mechanisms provided for by the LRA and available to unions to gain recognition and organizational rights. Unions can inter alia, strike to gain organizational rights.[219] Once this is the case employer(s) if they relent, will have to bargain collectively with them.[220] The binding nature of collective agreements concluded in a bargaining council is provided for in Section 31 of LRA.[221]

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[214] Section 23(5) of the 1996 Constitution must be contrasted with the 1993 Constitution, section 27(3) of which created a right to bargain collectively.
[215] Explanatory Memorandum 1995 ILJ 279.
[216] *SANDU v Min of Defence* 2003 (9) BCLR 1055; 2003 (3) SA 239; (2003) 24 ILJ 1495 (T)*; Certification of the Constitution of RSA* case [1996] 17 ILJ 821 [CC]; amongst others.
[217] *ECCAWU v Southern Sun* (2000) 21 ILJ 1090 (LC).
[218] Cheadle LDD 2005 Collective bargaining and the LRA http://www.saflii.org/za/journals/LDD/2005/io.pdf [Date of Access: 24/05/2013].
[219] Section 64(2) LRA 1995.
[220] *Technikon SA v Nutesa* [2001] 1 BLLR 58 (LAC) at page 68.
[221] A collective agreement binds signatories, their members and their members` members upon legal conclusion. This provision in LRA 1995 should be contrasted with the Act`s predecessor, where the agreement only became binding upon being published by the Minister.

This Act further provides for the regulation regarding registration of trade unions for purposes of enjoyment of organizational rights and consequently to bargain collectively. Collective bargaining is one of the most important instruments through which a trade union serves its constituency. The LRA prescribes a distinction between a sufficiently representative union and a majority trade union. While the former is given certain organizational rights[222], the latter is given even more rights and privileges.[223]

A collective agreement may set out thresholds for representativity. The LRA promotes collective bargaining at sectoral level. It also promotes the idea of democratization of the work place, hence the sanctioning of creation and regulation of workplace forums. These forums cannot however, undo a collective agreement.[224] Section 23(1) (d) provides that a collective agreement may bind employees who are not members of a trade union party to the collective agreement provided prerequisites are met.[225]

The effect of application of this section is similar to that relating to the extension of collective agreements concluded in bargaining council. This is so that non-parties are brought within application realm of an agreement they were not party to formulating[226], variables apply. Collective agreements must include a system detailing how non-parties can apply for exemption from collective

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[222] A union having 30% membership at a workplace is entitled to recruit members and communicate with them in the workplace and to have union subscriptions collected by the employer and paid over to it. This is in terms of sections 12, 13, and 15 LRA 1995.

[223] In terms of section 14 and 16 of LRA, in addition to the rights in sections 12, 13 and 15, these unions are entitled to elect union representatives who will represent the union at meetings with the employer and to represent union members in disciplinary hearings and grievance proceedings.

[224] Section 84 and 86 LRA 1995.

[225] The section provides that a collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if – (i) 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 ; see *Early Bird Farm (Pty) Ltd v FAWU and others* [2004] 7 BLLR 628 (LAC) ; *Sigwali and others v Libanon* [2000] 2 BLLR 216 (LC).

[226] *Ibid* ; see also *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [1999] 4 BLLR 404 (LC), in this case, the applicant argued that an agreement concluded by a trade union which he was not a member of, did not bind him. The Court dismissed this argument as without substance.

agreements, and clearly specify the appeal procedure regarding refused exemption applications or varied or partly granted ones.[227]

There must be specific mention in the agreement of the independent institution or body responsible for considering appeals. Time frames for such consideration until a decision is taken should appear in the agreement. The agreement can also differentiate in terms of levels of compliance by region. For instance, there can be specific differentiation in terms of hourly rates for cities and for rural areas covered by the bargaining council.

It is preferable that a collective agreement clearly states its lifespan. This is because it binds everyone who it legally should bind and those brought into its ambit, for the whole of its duration. It must also indicate a procedure for dispute resolution, be it about interpretation or enforcement or application. The LRA encourages that disputes be dealt with in good faith through a system of conciliation, then arbitration.

Collective agreements must concern themselves with issues of mutual interest to the parties. These are generally matters relating to the environment of work, e.g. hours of work, regulation of work, hourly rate of remuneration and remuneration generally, place of work, security safety and compliance issues, overtime work and weekends or public holiday work remuneration, promotion or demotion of employees, misconduct, disciplinary procedures, grievance procedure, dismissals, strike and lock out regulation, etc.

It is perhaps prudent to, at this stage, address the issue of what a bargaining council is. It is however reiterated that this research is concerned only with collective agreements in private sector.

### 4.2 The Nature of Bargaining Councils

A simplistic working definition of bargaining councils is that, they are registered institutions which comprise of sufficiently representative or majority trade unions and similarly representative employers' organizations empowered to negotiate and enforce collective agreements and to resolve certain disputes and to create

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[227] In the case of *Tao Ying Metal Industry (Pty) Ltd v Pooe NO & others* [2006] 5 BLLR 456 (LAC) the Court held that an exemption granted from extension of a collective agreement expires at the termination or replacement of such agreement. A party seeking further exemption should apply afresh.

employee social protection and advancement schemes within their area of business. This definition is in line with what various authors say bargaining councils are.[228]

Small and medium enterprises are also represented in bargaining councils.[229] The idea in collective bargaining remains negotiations of power, based on demand and concessions with the ultimate goal of reaching common ground or agreement. For purposes of this research study, there are three areas where collective bargaining can take place. These are 1.National level; 2. Sectoral or Centralized level; and 3.Plant or organizational level. The definition of collective agreements in the LRA[230] clearly affords credit to a contention that the three levels above are intended.

The fourth level might be collective bargaining at an international level, probably for multinational corporations. The core of the procedures and expected outcomes should not be different in this country. This is simply because for such agreements to be valid in the RSA, they have to conform to or with local Legislation and the Constitution. This research is squarely focused on collective bargaining in bargaining councils.

This inherently denotes bargaining at sectoral or centralized level. It entails one or more registered trade unions who enjoy majority membership or sufficient representation in a sector or industry and a group of employers who employ the majority of employees in that sector, coming together with the view of creating a collective agreement of binding consequences to their members in that sector or industry.

It must be borne in mind that a collective agreement so concluded binds signatories and parties to that agreement and their members.[231] That agreement

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[228]CCMA for The New Age "Bargaining council scope"27/03/2013 http://www.thenewage/co/za/mobi/Detail.aspx?NewsID=89386&CaltID=1025 [Date of Access: 17/04/2013] ; Transcript service "Usefulness of bargaining councils in question" 18/01/2013, http://www.bdlive.co.za/national/labour/2013/01/18/usefulness-of-bargaining-council [Date of Access: 17/04/2013] ; Grogan 9th ed *op cit* page 345 – 350 ; Van Jaarsveld *et al* 3rd ed *op cit* page 240 par 672.

[229] Before registration of a bargaining council, the Registrar must be satisfied that the Constitution of such a bargaining council makes provision for representation of SMEs, Section 30(1) (b).

[230] Section 213 LRA.

[231] Section 23 LRA.

remains in force for its lifespan, which should, preferably be clear from its wording.[232] The agreement can also bind employees who are not members of the trade union party to the collective agreement, provided the preliminary procedural issues are met.[233]

Procedural requirements for the establishment and registration of a bargaining council are specified in the LRA Chapter III Part C. Generally, one or more registered trade unions and one or more employers' organizations may come together and draft a Constitution. Their Constitution must comply with the requirements specified in Section 30. They must then lodge their name and constitution with the Registrar of Labour Relations in the prescribed form and apply for registration.

If all the requirements are met, the Registrar has no other discretion but to register the bargaining council as such. Amongst the pre-registration consideration by the Registrar is, whether there are any objections on listed grounds by any person or organization to the application. The procedure for handling them is specified in the Act. The Registrar also has to consider whether the parties` proposed Constitution conforms to the LRA prerequisites and whether provision is made for representation of small and medium enterprises.

The role of the National Economic Development and Labour Council [NEDLAC][234]and Minister of Labour are clearly enunciated in the Act. They are both given pre-registration sort-of consent task.[235] This task mainly relates to appropriateness of proposed scope or area of the councils' jurisdiction and issues of representativity. Once registered the bargaining council has powers stipulated in Section 28 of LRA.[236] The agreements thereafter concluded in this council will then be given legal effect in terms of Section 31.

A collective agreement concluded in a bargaining council which is intended to be extended to non-parties should also contain a procedure for non-parties to apply

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[232] Act 12 of 2002 introduced requirements relating to termination of collective agreements which were created to be valid for an indefinite period. Such agreements may be terminated by consent subject to section 5 of this Act.
[233] Section 23(1) (d) and (2) LRA.
[234] Created by section 2 of Act 75 of 1997.
[235] See section 7 – 11 of the Act 75 of 1997.
[236] Section 3 of Act 12 of 2002 extends services and functions of councils to informal sector and domestic workers.

for exemption from coverage. It must also include a procedure for appeal should an exemption application not be successful. A turn-around time for handling of application until judgement on appeal should be clearly specified. Independent person/s or body should be appointed to consider exemption application and another to consider appeals.

Decisions thereof may be reviewed on application by a High Court or Labour Court. The LRA has been further amended by Act 12 of 2002.[237] The relevant amendments relate to reinforcing the enforcement mechanisms of bargaining council agreements.[238] An Arbitrator[239] is provided for in instances of disputes relating to compliance and interpretation of collective agreements. The Arbitrator has the same powers as those of a Commissioner in CCMA. S/he can make any award against the defaulting or guilty party on top of the orders specified in Section 33A (8).

Interest is charged on any amount specified in the award unless the award states otherwise. An award made under this section is final and binding and subject to review by an empowered court. The Minister must consult NEDLAC and publish a table of fines permissible for transgressions. Section 28 further provides that a bargaining council has a power and function of dispute prevention; to promote and establish training and education schemes; to develop proposals for submission to NEDLAC or other institutions on policy or legislation which impacts their jurisdiction; and to determine matters which shall not be used to base a strike or lock-out.

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[237] Labour Relations Amendment Act 12 of 2002.
[238] Labour Protect "COLLECTIVE BARGAINING AND THE BARGAINING COUNCILS" http://labourprotect.co.za/labour_protect_home_pageRIC4.jpg [Date of Access: 17/04/2013].
[239] Section 33A (4) Act 12 of 2002.

## CHAPTER 5

## 5. EXTENSION OF BARGAINING COUNCIL COLLECTIVE AGREEMENTS TO NON-PARTIES

### *5.1 Procedural Requirements*

Section 32 of the LRA provides a mechanism for the extension of collective agreements concluded in the bargaining council to non-parties. In simple terms the procedure may be described as follows: firstly,[240] the application has to be in writing. The non-parties intended to be covered must belong to or be engaged in work or as employers within the councils' registered scope. They must be in the minority.

The non-parties must be specified and or identified in the application. The application must state that at a meeting of the bargaining council giving rise to the collective agreement in question, members[241] voted for the extension. The Minister has to consider specified facts and variables within specified time frames before publishing the extension in a government gazette.[242]

The Minister has to consider, inter alia, whether the non-parties to be covered by the extension are members of a trade union or employer organization party to the agreement. Further to be considered is whether the non-parties fall within the jurisdiction of the council. Further consideration as to whether the parties to the council are appropriately representative should be made. Non-parties can apply to the council for exemption from coverage from a collective agreement.

The application for extension must make provision for an independent body to hear refusal of exemptions disputes or withdrawal of an exemption already granted, by way of appeal. Procedure for exemption applications and for appeal must be very clear and the collective agreement in question should not discriminate in any way against non-parties. They should not be punished for not being members or parties.

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[240] A collective agreement must have been concluded in the bargaining council.
[241] The trade union or federation of trade unions party to the bargaining council must represent the majority of employees in that sector, while the employer or employer' organisation must be employing the majority of employees in that sector [ in simple terms].
[242] *NEASA v Min of Labour and others* [Unreported] JR3062/2011 (LC) Johannesburg. Delivered on 20/12/2012 At page 6, paragraph 10 – page 7 paragraph 12.

The Minister must be satisfied that parties to the bargaining council are sufficiently representative of all employers, or, and, employees within its registered area of jurisdiction. In essence the employers' party to this agreement have to represent the majority of the employers in that sector, same goes for trade unions party to the council. It all breaks down to a question of numbers. If statistics in this regard are made available, the Minister's job should not be cumbersome in this regard.

The Minister may extend such a collective agreement if in her opinion; not doing so would undermine the very essence of collective bargaining at sectoral level. It was mentioned elsewhere in this research that although collective bargaining is not a right per se, the Constitution, the LRA and BCEA vehemently promote it.

Within 60 days of receiving the application, the Minister has to publish the extension of the collective agreement to non-parties in a Government Gazette. This is provided all the prerequisites are met. Such an extended agreement will, for the specified period, bind those to whom it is also extended. Any subsequent alteration or amendment or extension of effective period of this agreement has to be published in a Government Gazette.

### *5.2 The Critique of the Extension Procedure*

Section 5(b) of the Labour Relations Amendment Act 12 of 2002 introduced subsection 10 in Section 32 of the main Act. It generally dictates to parties to an agreement extended under its ambit to notify the Minister in writing should they want to terminate that collective agreement. Section 11 of the amending Act introduced duties that the bargaining council has to fulfil on a yearly basis.

This clearly appears to be intended to ensure the Registrar and consequently the Minister is informed of the continued representativity and relevance of unions party to the agreement or, and appropriateness of continued coverage by the extended agreement to small and medium enterprises. It appears the information is also necessary for statistical purposes. This is in that the section requires information relating to the number of applications for exemptions, how many granted, and how many refused.

From the above explanation of the extension framework, it is clear that the Ministers' duty, in this regard, is mechanical. Once all the requirements are met

the application for extension has to be granted. The only area which appears to constitute discretion is with regard to a consideration of whether or not extending the agreement would undermine the inherent essence of good in collective bargaining at sectoral level.[243]

This consideration entails the exercise of discretion. Since this discretion is derived from national Legislation, it has to be exercised within the ambits of the law. A qualitative value and objective consideration has to be engaged in. The 1956 LRA provided the Minister of Manpower with discretion as to whether or not to generally extend a collective agreement. The Legislature in removing this discretion while keeping the framework and strengthening it up was making a policy choice in the LRA 1995.

It is possible that the exercise of the discretion in the old Act brought challenges the current legislature decided to avoid. In any event, those to whom the agreement is extended can still apply for exemption from coverage. Once they avail all the information detailing their indigence, their applications should be granted. The courts are available for further relief should their aggrievement continue.

[243] Section 32 (5) of LRA.

## CHAPTER 6

## 6. The Trojan Horses and Tensions in the Framework of Extension of Collective Agreements

It is clear from afore going that, since there is no specific duty to bargain collectively in terms of the Constitution, the LRA could not have created such a duty. Hence a contention that LRA only creates a framework for collective bargaining. A pedestrian or casual observation of the framework being researched here would easily conclude that, the framework compels non-parties to membership of bargaining councils.

Furthermore, another such observation would be that non-parties are forced to join unions or employer organizations party to the bargaining council. In the process, this may be seen as creating a negative or coerced exercise of non-parties' freedom to associate. This argument is probably part of the argument of the school of thought which opposes this framework.

The ILO recognizes this practice or framework. In Chapter IV Article 5 of Collective Agreements Recommendations 91 of 1951[244] the following is provided for in Sub-article 1. This reads thus:

> Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial or territorial scope of agreement.

ARTICLE 5(2)[245] provides for preconditions or pre-extension prerequisites. It provides as follows:

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[244] Collective agreements Recommendations 91 of 1951 http://www.ilo.org/dyn/normalex/en/f?p=1000:12100:12100:0::NO:12100:P12100_INSTRU [Date of Access: 11/04/2013].

[245] *Ibid.*

National legislation or regulations may make the extension of a collective agreement subject to the following, among other, conditions;

a) That the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;
b) That, as a general rule, the request for extension of the agreement shall be made by one or more organizations of workers and employers who are parties to the agreement;
c) That, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

The LRA is a law of general application capable to constitutionally limit rights in terms of Section 36 of the Constitution.[246] It seeks to, among others, promote orderly collective bargaining and encourages self-resolution of labour disputes in an orderly manner. It seems geared to want to encourage democratization of the workplace and labour peace. As a populace we are free in our country and have rights, the exercise of which should be within the laws of our country.

Already the profound nature and importance attached to collective bargaining have been shown in preceding chapters. The history of South Africa and the economic climate currently requires orderly engagement between employers and employees on matters they hold dear and are requisites for each to deliver on their part of the contract. South Africa does not need scenes like those in Marikana in August 2012.

The Congress of South African Trade Unions [COSATU][247] argues that collective bargaining goes much beyond protecting vulnerable workers – it actually benefits a broad spectrum of workers; it goes beyond wage negotiations to include aspects of working conditions, such as hours of work and quality of

[246] Ngcobo J`s remarks at paragraph 4 page 3 of the *CUSA v Tao Ying Metal Industries and others* [2008] ZACC 15.
[247] A federation of South African Trade Unions, formed in 1985. About COSATU http://www.cosatu.org.za [Date of Access: 20/03/2013].

employment.[248] It is practically impossible for an employer to negotiate on working conditions with individual employees, variables apply[249], and the reverse holds true.

If the latter situation were prevailing and sanctioned by legislation employees would be worse off since employers would just use their financial muscle to impose working conditions and other employer interests on them.[250] The above scenario is also not preferred given the country's history. The legacies of Apartheid still linger on and the majority of the South African populace still does not enjoy the benefits of economic freedom[251], inter alia.

The starting point regarding the sustainability or otherwise of this framework should be the Constitution.[252] Section 23 of this Constitution[253]provides that everyone has a right to fair labour practices. It gives to employees the right to form and join trade unions of their choice and to participate to their membership`s content. The same holds true for employers. These organisations can form federations. The right to collective bargaining is provided for in this section.

The section goes further to say that national legislation must be enacted to regulate collective bargaining. Such legislation can only limit these rights in terms of section 36. It must be borne in mind that the LRA 1995 provides in section 1 its purpose. The decision in the case of *Ceramic Industries Ltd t/a Betta Sanitaryware & another*[254] to the effect that the LRA should be interpreted first and applied in such a way that effect is given to its primary object and in conformity with the Constitution and South Africa`s International Law obligations, holds true, in this regard.

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[248] COSATU CEC 2012 *Op cit* http://www.cosatu.org.za/C6A53CF2-A659 [Date of Access: 25/04/2013]

[249] For Senior Management and special skills employees, one on one negotiation is possible.

[250] Ngcobo J, writing for the majority in the *CUSA v Tao Ying Metal Industries* case *Op cit* at page 27 paragraph 56 said that the right to engage in collective bargaining and to enforce collective agreements is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment.

[251] LDD 14/2010 *op cit.*

[252] *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA) the Court confirms this position not only for interpreting the LRA but also the common law.

[253] RSA Constitution of 1996 this section amended section 27 of Interim Constitution 200 of 1993.

[254] [1998] 11 BLLR 1120 (LC).

Generally, a purposive interpretation is preferred and correctly so.[255]The court in the above case erred, however, in deciding that provisions of the LRA which seek to limit fundamental rights should be given a restrictive interpretation. The substance of purposive interpretation was explained in the case of *Equity Aviation Services (Pty) Ltd v SATAWU & others*[256] where it was held that where adherence to the literal meaning of the statutory provision would not give effect to or promote the purpose or object of the statutory provision and there is another interpretation that can be given to the statutory provision which does promote or gives effect to the purpose or object of the provision, then the latter must be preferred.

This stance is supported here. At the same time it must be acknowledged that the LRA itself sufficiently provides for its interpretation. It is then important to consider the purpose of the LRA and thereafter the system of extension of collective agreements to non-members. This should be done with the background that the right to collective bargaining does not entail an *ius contrahendi,* but merely entails an *ius negotiandi.*[257]

Regard must also be had to the fact that, a collective agreement is not a contract in the strict sense of the definition of a contract.[258] The Labour Appeal Court had an occasion to pronounce on this aspect already in the case of *North East Cape Forests v SAAPAWU & others.*[259] The Court per Froneman DJP said that a collective agreement under the LRA 1995 is not an ordinary contract. Further that the context within which a collective agreement operates is vastly different from an ordinary commercial contract.

No person can be forced by legislation to be a party to an agreement with any other person. The structure and content of the framework of collective bargaining, under the LRA 1995, at first glance, sanctions such practice within the provisions relating to attainment of organisational rights[260]and in section 32 and 198. Further section 19 confers certain organisational rights to unions that

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[255] *Ibid.*
[256] [2009] 10 BLLR 933 (LAC).
[257] Vettori 2005 *op cit* at page 104 par 3.
[258] Christie 5th ed *THE LAW OF CONTRACT IN SOUTH AFRICA* Page 8-12 "The modern South African concept of contract".
[259] [1997] 6 BLLR 711 (LAC) at 718.
[260] For example see Section 21; consider also section 25 [Agency shop agreements] and 26 [Closed shop agreements].

are parties to a bargaining council. They automatically acquire these rights. There is no need for the employers affected to consent. All these limitations to constitutional rights by the LRA have to be within the ambit of section 36 of the Constitution.

It does not appear that those who are against the application of Section 32 LRA are against collective bargaining per se. In fact, it appears they are attacking only the system of extensions. They argue that the system or frameworks' consequences are destructive to both economic viability of small business and much needed job creation. Focus mainly being in as far as minimum wages and payments of contributions or fees are concerned. Unemployment is mentioned as a shock absorber.

A study by SBP[261] released in October 2005[262]concluded that sector-specific regulations have very little impact on the behaviours and costs of SMEs in agri-processing and in the clothing and textile sectors, and that ICT and financial services SMEs also often ignore, evade, or are simply unaware of sector-specific regulations. Regulatory problems were however identified for the mining sector SMEs. It must be borne in mind that, labour regulation is not the only area requiring compliance in the general regulation of businesses in the Country.

The words echoed in the Labour Court case of *FEDCRAW v Edgars Consolidated Stores Ltd*[263] holds true, that one must remember that good labour relations is not solely an issue of relevance to employers and employees, society as a whole has an interest in good labour relations and its contribution to the economic well-being of the country.

Sometimes a few should be sacrificed for greater good or benefit of the society. This is stated without prejudice to the conclusion which is still come. The Labour Appeal Court stated in the *Kenn-Linn Fashions* case[264] that a situation where a minority dictates to a majority is, quite obviously, untenable. Further that the

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[261] SBP [Not an abbreviation] is said to be an independent private sector development and research company specialising in improving the environment for doing business. www.sbp.org.za/ [Date of Access: 23/07/2013]

[262] SBP 10/2005 "The impact of sector-specific policies and regulations on the growth of SMEs in 8 sectors of the South African economy" http://www.thepresidency.gov.za/docs/pcsa/economic/sbp.pdf [Date of access 08/05/2013].

[263] [2002] 11 BLLR 1069 (LC) 1070.

[264] [2001] 1 BLLR 25 [LAC].

principle of majoritarianism contained in the LRA is a policy choice that emphasizes a democratic principle that, the will of the majority prevails.

The workers, led by COSATU, see the attack on Section 32 as an attack on workers' hard earned rights. Their affiliates have stated in various platforms and media that this attack is a declaration of war [figuratively speaking].[265] The challenge to the framework of extension of collective agreements is not new.[266] It is not conceived and born by the FMF[267]'s constitutional challenge.[268]

It is admitted, though that, the points specifically raised in the FMFs' Court challenge[269], are new before the High Court.[270] However, the applicants in the *Valuline CC* case[271] argued similarly in the alternative. Pierre de Vos in his article dated 07 March 2013[272] believes that the FMF is wasting its resources by engaging in this court case. To an extent, the leaned writes' sentiments are shared. This is more so given what collective bargaining system entails.[273]

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[265]David Gleason "Unions dig in on bargaining councils" http://www.bdlive.co.za/opinion/columnists/2013/03/08/unions-dig-in-on-bargaining [Date of Access: 16/04/2013].

[266] Most of the available case law on this aspect relates to irregularities in the Ministers` exercise of her powers and irregularities with regard to exemption application consideration by industrial council or bargaining council. E.g. *Industrial Council for the Furniture Manufacturing Industry, Natal v Minister of Manpower and Another* 1984 (2) SA 238 (D); *National Union of Textile Workers v President of the Industrial Court and Others* 1985 (3) SA 251 (C); *Motor Industry Bargaining Council v Mac-Rites Panel Beaters and Spray Painters (PTY) Ltd* (2001) 22 ILJ 1077 (N); *Motor Industry Bargaining Council v Wolseley Panel Beaters and another* (2000) 21 ILJ 2132 (BCA); *etc.*

[267]FMF http://www.freemarketfoundation.com [Date of Access: 11/04/2013] FMF is said to be an independent, non-profit, public benefit organisation, created in 1975 by pro-free market business and civil society national bodies to work for a non-racial, free and prosperous South Africa ; See also feature by Herman Mashaba *FMF v Min of Labour* Herman Mashaba`s founding affidavit dated 14/03/2013 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=36410 [Date of Access: 11/04/2013].

[268]Pierre De Vos "The Free Market Foundation`s quixotic venture" http://constitutionallyspeaking.co.za/2013/03/07/ [Date of Access: 17/04/ 2013].

[269] FMF v Minister of Labour: Notice of Motion Case No. 13762/2013 North Gauteng High Court, dated 14/03/2013 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=36410 [Date of Access:11/04/2013].

[270] Still to be heard and unreported, North Gauteng High Court case number 13762/2013

[271] KZN High Court, Pietermaritzburg Case number 5642/2011. Delivered on 13 March 2013

[272] Pierre De Vos 07/03/2013 http://www.constitutionallyspeaking.co.za/2013/03/07/ *Op cit* [Date of Access: 17/04/2013].

[273] See Chapter on collective agreements, above.

The Constitution of 1996 specifically protects this right in Section 23(5). This section is in the Bill of Rights. It means it was considered that important by the drafters of the Constitution to be included here. Section 32 LRA merely forms part of a framework within which the right in section 23(5)[274] may be exercised. Within the content of this right, it can only be limited to the extent permissible under section 36 of the constitution.

With great respect to FMF as an institution, their court action is too excited than substantive.[275] They are even saying the outcome of their case will not directly affect them. It is assumed then that, they are bringing this application on the bases of the Constitution's Right of access to court or a related right.[276] They Might still have to prove to the court that they have sufficient interest in the matter to qualify as litigants.

They do not even in their Notice of Motion specify the sections of the Constitution that are specifically infringed by sections 32 of LRA 1995.[277] It is left to the court to figure that out. The Department of Labour in its website stated as on the 10th of April 2013 that they intended to oppose this application and that the Minister remains committed to the framework of extensions of collective agreements.[278]

A casual reading of the FMFs` Notice of Motion might lead one to concluding that, they are suggesting that an industry wide ballot be conducted to find out the numbers of those employers and employees actually in favour of or against extension. With due respect, this approach is short sighted and defeatist, within

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[274] RSA Constitution 1996.

[275] FMF, per Eustace Davie published an article on Politicsweb on the 10/11/2011 "Repeating the mistakes of the past" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=266031&sn=Marketingweb+detail&pid=90389 [Date of Access: 04/10/2013] Already in this article their displeasure with the operation of section 32 LRA was expressed. It is not therefore surprising that immediately after the *NEASA* decision then an application is launched in this regard by them. Whether it is a question of staying relevant or publicity stunt is a question for another time.

[276] Sections 34 and 38 of the Constitution 1996; paragraph 7 – 8 of Herman Mashaba`s founding affidavit in the case of *FMF v Min of Labour and others op cit* Note 238.

[277] Paragraph 11 of founding affidavit *op cit* Note 261, although towards the end of the founding affidavit particular rights and sections of the Constitution are mentioned with scholarly precision; Contrast the *Valueline CC* case.

[278] Department of Labour 15/03/2013 "Judgement affecting the extension of the Clothing Bargaining Council collective agreement" https://www.labour.gov.za/media-desk/media-statements/2013/judgement-affecting-the [Date of Access: 10/04/2013].

the context of the profundity of the actual constitutional right; the provisions of LRA 1995; its intension and the history of South Africa.

FMF furthers argues that it is a right of every citizen to choose where to work, how to work and at what salary. This is absolutely ideal, given South Africa's known unemployment levels, said to the around 25.2% as on 23 July 2013.[279] Freedom envisaged in FMF'S argument is not practically achievable, at least not now. Bhorat et al[280], conclude in their research[281], that as a result of minimum wage requirements, there is a significant increase in reduction in employment associated with marked increase in non-wage compliance.[282]

Without a doubt small business is an employer by far[283], to many a South African who otherwise stood to be unemployed. This sector employs your average Joe and Jane, who have no formal qualification or training, who, in all likelihood will fail to come to work after their first pay and who are most probably ignorant. These are mostly not workers interested in exercise of their rights, but on the limited focus of finding food for the day. Survival is primary to these folk than smart, politically correct talk of rights and entitlement.

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[279]Unemployment statistics http://www.statssa.gov.za/default.asp [Date of Access: 23/07/2013].

[280] DPRU 12/149 *op cit.*

[281] *Ibid* "Estimating The Impact of Minimum Wages on Employment, Wages and Non-wage Benefits: The Case of Agriculture in South Africa" 07/2012.

[282] In essence every time the Minister sets minimum wages in sectors not governed by bargaining council etc. employers creatively find ways to circumvent and not conform. It`s like they punish and take advantage of workers for not being organised into a labour union or for being ignorant of their rights.

[283] The ILO Recommendation 189 of 1998 amongst others, notes in its preamble that: Noting that small and medium-sized enterprises, as a critical factor in economic growth and development, are increasingly responsible for the creation of majority of jobs throughout the world, and can help create an environment for innovation and entrepreneurship.....it further notes that: recognizing the need for the pursuit of the economic, social, and spiritual well-being and development of individuals, families, communities and nations. http://www.ilo.org/dyn/normalex/en/f?=1000:12100:0::NO12100:P12100_INSTRU [Date of Access: 11/04/2013]. This group is also not homogenous. You have those who are formal SMEs and those who are perpetually informal [those very small businesses established solely for survival. E.g. the car wash at the street corner; the chisa nyama (braai facilities) next to it; the tavern and hair saloon behind them or next door] or and your street traders [formal (municipality sanctioned)] and informal (squatter traders) operating near taxi or bus ranks and on pavements in towns and cities ]. The perpetually informal employ at the most less than 10 employees including the owner.

With this in mind, it is doubtful if the employees mentioned immediately above will be in any position to negotiate on any working condition or matter of mutual interest with their employer. It is by now trite that the employment relationship is skewed in favour of those who own the workplace or enterprise. The desperate nature of the unemployed may occasion them to sign their rights away. Something which the Appellate Division already, years before the current constitutional jurisprudence came into being, in the *Bhyat v Union Government*[284] case ruled to be against public policy.

Government acknowledges the dire climate of deprivation and ill treatment that the unemployed and those employed in SMME's are subjected to.[285] South Africa's work place is generally labour intensive. The Minimum wage legislation in the form of sectoral determinations; the LRA;BCEA;EEA etc. are considered here as a response to address these challenges. Various studies conclude that the labour regulations in South Africa are too restrictive and stifling to economic growth.[286] The country's history[287] and discriminative experiences of blacks in particular, are a justification for this regulation.

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[284] 1912 AD 719 at 734-735 *ibid*.

[285] Hence continuous research is solicited and undertaken at different Government levels to seek ways to better understand and effectively deal with the resultant poverty that the majority in the Country seem eternally trapped in. The Small Enterprise Development Agency which is created by National Small Business Amendment Act 29 of 2004 is tasked with research development and promotion of all spheres of small business. The Integrated Small Business Development Strategy in South Africa 2004 – 2014 http://www.dwaf.gov.za/WAR/documents/IntegratedSmallBusinessStrategyOct03.pdf [Date of Access: 30/09/2013] is one of the Government interventions aimed at ultimately uplifting and giving hope to the poor by investing in SMEs and creating enabling environment for them ; the Extended Public Works Program and the Draft Employment Tax Incentive Bill http://www.treasury.gov.za/comm_media/press/2013/Draft%20Employment%20Tax%20Incentive%20Bill%20for%20comment.pdf [Date of Access: 15/10/2013] are all Government`s direct intervention aimed at alleviating poverty; giving hope to the unemployed or and unemployable and assisting the poor.

[286] Bhorat et al, June/2007 *op cit*, does not agree with this argument. In fact the learned Professors says that South Africa`s measures of labour regulation compare quite favourably with those found in the rest of the World. Further that in South Africa part-time work and contract employment are least regulated than in other countries. [this is the reason why SME`s and some big companies are employing mostly casual or part-time employees].

[287] Which continue to dictate the economic landscape in the Country.

Unfortunately FMF' s challenge does not seem to take into account the historical economic deprivation of the majority of workers covered by most of these extensions, who happen to mostly be black, mostly female, uneducated, ignorant, marginalised and extremely vulnerable.[288] It is interesting to note that those objecting to the extension framework are mostly not start-up businesses. The objecting businesses have been in operation for quite some time. It appears theirs is just an attempt by employers wanting to continue to want to make huge profits at the expense of vulnerable and desperate employees.

Indeed if threatened about job losses, unsuspecting, ignorant and illiterate employees are bound to choose lesser rights than what the law entitles them to, just so they can be seen to be employed [a societal burden/ class yardstick]. Within this context, the judgement of the Honourable Justice Koen, in the *Valuline CC* case[289] should be understood to relate to, inter alia, Minister's failure to comply with or to satisfy herself as to compliance with representativity thresholds in terms of sections 32(3)(c).[290] The Minister had relied on the representativity certificate issued by the Registrar in terms of section 49 LRA.

Commentators have stepped over each other saying the judgement signals the beginning of the end for bargaining council collective agreement or for the framework of extensions of these agreements.[291]It is already known to what

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[288]SBP 22/07/2013 "Developing a new path for SMEs in South Africa" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=39331 [Date of Access 23/07/2013] this study, amongst others, found a strong bias in SMEs` hiring patterns towards unskilled employees, further that unemployment is most severe amongst Africans, women and those with educational qualifications below Matric. The latter are far most likely to be employed in SMEs` than those holding further qualifications.

[289] KZN High Court, Pietermaritzburg Case Number 5642/2011 [Unreported].

[290] At paragraph 55 of the Judgement, the following is said-:" the requirement is not whether the requisite majority was in fact employed by members of the party employers` organizations, but whether the Minister was `satisfied` objectively of this at the time of exercising her power".

[291]Graham Giles 14 March 2013 "Minister`s invalid extension of private agreement to non-parties" [ www.gilesfiles.co.za ] [Date of Access: 14/03/2013] ; Graham Giles" Anachronistic and undemocratic labour relations system" http://www.gilesfiles.co.za/collective-bargaining-2/anachronic-and-undemocratic-la dated 26 November 2012 [Date of Access: 11/04/2013] ; [ Related more to the NEASA judgement] ; Graham Giles "For whom the bell tolls" http://www.gilesfiles.co.za/collective-bargaining-2/for-whom-the-bell-tolls/ dated 06 March 2013 [Date of Access: 11/04/2013] ; Niki Moore "S. Africa Court Exempts Chinese-Owned Plants From Rules" http://www.bloomberg.com/news/print/2013-03-13/s-africa-court-says-chinese-owned dated 13 March 2013 [Date of Access: 13/03/2013] ; etc.

extent unscrupulous employers can go in inducing employees to appear to be in support of their applications for exemption. The case of *Trafford Trading (Pty) Ltd*[292] and the case of *Building Bargaining Council North and West Boland v Sarah H Chrisrie & another*[293] are all too familiar.

The amount of resources that employers can expend in court actions simply to avoid affording decent wages and working conditions in terms of collective agreement to their employees was demonstrated in the *CUSA v Tao Ming Metal Industries and others.*[294] The framework of extension of bargaining council collective agreements is generously insulated against abuse and general or perceived unfairness. As earlier mentioned there are sufficient appropriate pre extension considerations. Courts do not shy away from setting aside extensions that are granted in non-compliance with the framework. The recent judgement in *NEASA v Minister of Labour*[295] bears testimony to this.

One should also note what The Honourable Justice Van Niekerk J said at paragraph 29(a)-(c) of this judgement.[296] The Judge said, inter alia, that it is in the general public interest that sound collective bargaining and harmonious and peaceful labour relations should prevail. The Learned Judge further said recent events, particularly on the platinum and gold mines as well as in the agricultural sector, have shown the serious prejudicial consequences of a failure to ensure smooth and orderly collective bargaining through recognised structures.

It is acknowledged that structurally no single industry is homogenous and that a workforce, at any given time is not without variables. It is with this in mind that, perhaps, the framework of extension should be radicalised, but, with differentiation in mind. More so given the audacity of certain employers to refuse to comply, even those employers who are actual bargaining council members.[297] It is these employers who cry about or raise the level of unemployment issue

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[292] Unreported (LC) Durban Case Number: D598/07 before Cele J.
[293] Unreported (LC) Cape Town Case Number: C201/2000 before Waglay J.
[294] [2008] ZACC 15 *op cit.*
[295] *NEASA v Minister of Labour* JR3062/11 (LC) [Unreported].
[296] *Ibid* Posted by Graham Giles on 03/01/2013 www.gilesfiles.co.za/resources [Date of Access: 20/03/2013].
[297] CDE FOCUS January 2013 *op cit*.

when compliance is enforced against them.[298] They are abusing the actual genuine predicament of the majority of the South Africans.[299]

The issue of unemployment is raised abusively by employers, so that their non-conformity can be viewed sympathetically by the unsuspecting and ignorant public. It must be remembered that extensions in terms of section 32 only cover a small portion of the total industry players.[300] In essence those to whom the collective agreements are extended to will always be in the minority. It is not impossible for individual enterprises to apply for exemption in terms of that specific collective agreement. In the process the said enterprise can show that they have a comparative system in place at their workplace which has similar benefits for employees and it is that workplace specific, given its size, turnover, etc.[301]

Some employers go to great trouble to create schemes intended to hide their non-compliance. Some companies operate by establishing themselves in the 'black market'. This is in that they establish piece meal enterprises all over rural areas or informal sector with a deliberate purpose of avoiding compliance[302], even with tax laws of the country. They have the power to hire and fire and change working conditions at will without consequences. Employees have no benefits at all.

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[298]Alice li "National Minimum wage disputes: Is it worth the fight in New Castle?" *supra.*

[299] At paragraph 56 of the *CUSA v Tao Ying Metal Industries* case *op cit* the Court said that the enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched.

[300] Maree 2011 *op cit* , the learned Professor indicates that in 2004 bargaining councils covered only 20,3% of employed labour force while the proportion of employees covered by the extension of agreements was 2,9%.

[301] This is because collective agreement sets the floor beneath which wages and other conditions of employment should not drop. So, if an enterprise exhibits sufficient compliance in its own way, exemption should be granted.

[302]CDE FOCUS *op cit* Page 15 [ The CDE FOCUS study is valuable in highlighting the level of non-compliance with bargaining council agreements, even those that are extended and statutory minimum wage legislation. The study is however biased in favour of Chinese/Japanese operated factories. The study seems to want to suggest that because the Chinese/Japanese nationals came to this Country to help, Laws should be bended to accommodate them. This is, with great respect, short-sighted. The employees, who happen to be engaged in these factories, are the most deserving of protection. In any event, other studies have concluded that sector specific regulatory costs in this sector are the lowest compared to other sectors. In fact a study by SBP in 2005 *op cit* indicated at page 16, that SMEs in this sector seem to be almost completely unaffected by sector specific regulations and are able to ignore and evade bargaining council agreements].

All these employers do so they can maximise profit. To the extent that they want to do this, they employ undocumented foreigners[303] at slave tariffs and under unbearable working conditions.[304] Long work hour's day is the norm. Complaints are met with threats of dismissal and threats of possible involvement of police. It is with this in mind that the announcement by the Department of Labour that they are engaging in a national blitz inspection in the hospitality sector is most applauded.[305]

The employer-employee relationship is inherently skewed in favour of employers, be it in big factories; companies or in very small operations. From the beginning Chapters in this Research, it was shown how an attempt at exercising some rights flowing from this relationship would be meaningless for a single ordinary employee. The power of employees is in their grouping themselves together. The employer inherently has enough ammunition just by virtue of being such.

If these two powerful groups, i.e. employer/s, on the one hand, and employees/trade unions, on the other, were left without rules to control and regulate their engagement, chaos would result. There would be uncertainty in labour relations engagement and labour instability. This in consequence might affect political and economic stability of a country. This situation is exactly what the Constitution and the labour Laws in the country are geared to avoid.

It cannot, therefore be that the majority of employees and employers in an industry, agree what the worth of labour`s value and under what circumstances is, then you have a minority saying, 'not for those in my employ' or 'not for me'. The plight of the poor, uneducated and marginalised should not be used for selfish reasons. The argument that, as long as they work somewhere for something, never mind under what circumstances, no matter what is legally

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[303] *Dube v Classique Panelbeaters* [1997] 7 BLLR 868 (LC). The result being that illegal foreigners cannot get protection from Courts since their employment was or is in violation of Laws.

[304] CDE FOCUS *op cit* at Page 15 makes a painful example where in 2001 employees in a factory were locked inside a factory while working night shift and one went into premature labour of twins, both of who did not survive.

[305] Citizen Reporter 20/07/2013 "Labour lays down the law for hospitality industry" http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=450135&sn=Detail [Date of Access: 22/07/2013] it is hoped that similar efforts will be mounted in the remaining sectors.

required, is better, cannot be sustained. At least, not while there is constitutional democracy, human and labour rights in the country.

It will be in, probably extremely exceptional, circumstances where it will be employees saying their enterprise be exempted from extension or they should not be covered by an extended collective agreement. It is not inconceivable though![306] LRA and the Constitution do not envisage a two tier system. One system for big firms visited by compliance, human and labour rights. Another system for so called small firms where there is general abuse of employees and non-compliance with the country`s labour regulation system. The Constitution envisages that national Law be passed to regulate collective bargaining. LRA 1995 is without a doubt such legislation.

The LRA 1995 and the BCEA also anticipated a situation where employees in a sector would be unable, for whatever reason, to organise themselves for union formation or collective bargaining purposes. In this regard, to give life to the constitutional rights guaranteed for every worker/employee, minimum wage structure and basic conditions of employment takes effect. Enterprises then turn to engaging labour brokers and casualizing their staff component. When compliance is enforced they become melodramatic and use the plight of the unemployed/unemployable poor to want to be given free ride to do as they please in the name of helping the poor and marginalised.[307]

It has to be appreciated that the continued existence of the perpetually poor, uneducated, vulnerable and marginalised stems from or has its roots in the policies of successive white regimes up to the end of Apartheid. The 1913 Land Act robbed people of their land overnight.[308] African people were changed from being independent producers to wage labourers and domestic workers at no pay

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[306] A similar application was made in the *Tsetsana v Blyvooruitzicht Gold Mining Co Ltd* [1999] 4 BLLR 404 (LC) Case *op cit* , where an employee argued that he was not bound by a collective agreement concluded by a trade union of which he was not a member was found to be without substance or foundation.

[307] LDD VOLUME 14(2010) *op cit* The Learned Author at Page 108-109 states what is believed to be structural foundations of continued poverty and economic bondage of the poor, migrant labourers and rural arrear residents.

[308] *Ibid* Page 109-110 ; Bheki Ntshalintshali [COSATU DGS] Politicsweb 23/09/2013 "Business has tried to undermine collective bargaining" http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=406612&sn=marketingweb+detail&pid=90389 [Date Access: 25/09/2013] ; FMF`s Eustace Davie 10/11/2011 Politicsweb article *op cit.*

or at slave wages.[309] The creation of Bantustans and the spatial development policy[310] and the structure of the economy and education system were all engineered such that racial inequality in all spheres is made profound.

Without a doubt these inequalities still linger on.[311] Quality education is still a luxury for most black families. Medical aid and other forms of self-provided social protection plans are still a faraway dream for most black families. These folks also deserve protection by the country`s laws.[312] Those amongst them who get employed should not be treated as, 'they should be eternally grateful for some form of employment'. Yes, they are lucky, but, if they qualify as employees within the meaning of the labour laws of the country, they should be treated as such.

Parties to a bargaining council are not private parties. The assertion that they are, as stated by FMF in their pending court challenge, is regrettable. This in that, for these organisations to exist, they have to comply with the LRA and the Constitution.[313] The LRA creates a framework within which the rights contained in section 23 of the Constitution may be attained or exercised. It further puts in place a scheme for concluding, enforcing and resolving labour disputes.

Labour peace is central, inter alia, amongst objectives of LRA. Employees and employers had to have a place where they could fiercely argue, compete and negotiate with each other. That system had to be regulated. Parliament has legislated in compliance with its constitutional mandate. Creation of a bargaining council, membership, administration and procedures are all clearly encompassed in the LRA. Those who become members are such because they constitutionally qualify.

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[309] *Ibid.*

[310] *Ibid;* LDD 14[2010] *op cit* The Black population were subjected to the Bantustan reserves and only allowed into South Africa for work purposes and for a regulated time. Where townships were created, they were created away from the economic hub although the inhabitants were required there and at white`s houses to work.

[311] Sam Shilowa COSATU SG, at COSATU 10th anniversary, http://www.cosatu.org.za/show.php?ID=716 [Date of Access: 30/09/2013]. The observations mentioned by the then SG of COSATU were as appropriate then as they are today.

[312] At least this is acknowledged in the pending Court action by FMF. Paragraph 58 of the founding affidavit of Herman Mashaba, *op cit.*

[313] Section 23(5) RSA Constitution of 1996.

Consequently the fruits of their labour in bargaining councils are not contracts between private individuals. It has already been mentioned that collective agreements have been found by a court not be the same as contracts in the commercial sense. Their extension therefore should not be equated to making third parties, bound to private contracts by force. It must be borne in mind that, if the system of extension is done away with or declared unconstitutional within the ambit of FMF' s challenge, there might be consequences the country does not wish to be visited by. The above observation is not intended to sound alarmist.

If, only those parties to a bargaining council would be bound by agreements concluded therein, a free for all situation might ensue. What then would be the benefit of membership of a bargaining council? Employers would then negotiate directly with employees with an unfortunate result of history repeating itself. It is well known that employers are in a better financial position than employees. Exploitation in the name of employment would be the norm. Incessant industrial actions would be the order of the day. As it is, employers are casualizing labour and using labour brokers, simply so they can circumvent provisions of LRA. It should be imagined now if this extension framework did not exist.

Surely this cannot be good for the country. Orderly collective bargaining is encouraged both by local legally binding enactments and international instruments. The totality of regulation of labour issues, in South Africa, is to the effect that a safe, happy and secure employee is much desirable than an underpaid, overworked, unsafe, no job security and consistently complaining employee. In fact it is opined that, that the former is more productive than the latter. These are some of the issues that motivates the position adopted here that sectoral bargaining and the framework of extension of bargain council collective agreements should be retained. At the same time enforcement mechanisms must be aggressively beefed up. What the framework has as a shortfall is not sufficient enough to justify its total destruction.

This is because union activity in this area of the economy is non-visible or non-existent. Policing compliance therefore should be left to government agencies. NEDLAC, SEDA and all progressive research institutions should continue to

develop, grow and adapt the framework, depending on the prevailing economic and socio political climate in the country.

## CHAPTER 7

## 7. Findings and Recommendations

Collective agreements are not about salary increments alone. They cover issues most basic and profoundly important for workers; employers and the society at large. Decent work may translate into human worth and dignity.[314] There are several issues that are identified in this research study that may be adjusted to capacitate the framework of extension of bargaining council agreements to non-parties, and to bring it more in line with this Country`s Constitution. The following is not an exhaustive list, but it is intended to stimulate debate around these issues.

The following findings and outcomes are premised in this research study:

7.1 Findings

- A bargaining council is both a player and a referee in as far as the primary consideration of applications for exemptions are concerned.
- Lack of a body of independent persons or institutions for purposes of considering appeals for exemptions.
- Non observation of rules of natural justice sufficiently by the Minister in considering extension.
- Lack of recognition of existence of similar benefits structure in certain enterprises.
- Lack of clear identifiable benefits for belonging to a bargaining council for SMEs
- Lack of concerted enforcement drives.

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[314] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) at 274H – 275B Nqobo J, as he then was, said that ones` work is part of ones` identity. Every individual has a right to take up any activity which he or she believes himself or she prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person`s existence. [underlined phrases are for emphasis only].

7.2 Recommendations and Possible Solutions

- A bargaining council is required to conclude a collective agreement and thereafter to consider applications for exemptions by non-parties. The majority in the bargaining council would, in all fairness, have already concluded, after intense negotiations, an agreement regulating matters of mutual interest. Having concluded that agreement they may not honestly and rationally consider whether it should or not bind specific applicants. It is opined that, from the beginning, such an application for exemption be considered by a completely independent body or institution. This institution or body should preferably be funded by the Department of Labour.
- NEDLAC and SEDA should propose formation of a structure or institution to be accredited under clear rules, specifically for consideration of exemption applications. It is hoped that the body will comprise of business specialists and labour specialists. Its work might be seasonal though, since negotiations for salary and benefits increments takes place annually, more or less around the same period.

Perhaps the considerations by this body or institution may include, but not limited to: the size of individual non-party employer subject of extension application; their immediate past and current balance sheet projections; their location and the applicant or objectors' previous compliance history. A question of whether a non-extension to a particular enterprise will be in the immediate interests of the enterprise and whether the required extension may be delayed for a specific enterprise to afford an adaption of that specific enterprise' business model, may be another point of consideration.

It`s unfortunate though that non-parties may abuse the system and have a particular extension application dragging out for a long time, with the result that if it`s eventually decided against them, then employees are owed a lot. In this regard then, specific time frames for application until decision on appeal should be clearly provided for. This body should keep statistics of their work and file them biannually with the Department of Labour and various bargaining councils.

- In as far as the exercise by the Minister of her powers in terms of section 32(2) r/w subsections (1) and (3) of the LRA 1995 are concerned, those who would be affected should be given an opportunity to address the Minister. A specific period should be mentioned in the Government Gazette within which they must make submissions regarding objections. A further specific period should be provided for, for consideration of such objections. Members of the public should or may be given an opportunity to comment on the desirability or otherwise of a particular proposed extension.

The bargaining council in applying for extension must provide motivation to the Minister as to why an extension is sought. Together with their application for extension, they must file details of exemptions granted by the independent body, details of refused or those partly granted applications for exemption. It should not just be a question of numbers. It has been noted in the foregoing chapters that the Ministers' considerations regarding whether or not to extend a bargaining council collective agreement, is too mechanical. In her decision to extend or not a particular bargaining council agreement, the Minister must provide reasons for her decision.

It must be clear that thought went into determining whether or not to extend. The Minister`s consideration in as far as subsection (5) LRA are concerned should be made similar to those for exemption applications for minimum wage determinations.

- Businesses or enterprises are not homogenous. There are some who are able to create an enterprise specific benefit and wages system that, even if less than what bargaining council agreement provides, works for and sustains it. In that regard, a bargaining council agreement that is sought to be extended to it may temper with such a system only in as far as other parts of the agreement, which are not covered by such a unique system in an enterprise, are concerned.

The bargaining council agreement must clearly differentiate between enterprises, given their size and location. Not only must there be mentioned difference between hourly rates of employees for urban and rural arrears, but there must be a difference also in as far as rural arrears are concerned. This is probably

where most small companies or enterprises are concentrated. This will show that indeed the interests of SMEs are taken cognizance of. Incremental compliance might also be specified for specific enterprises that would have had their applications for exemptions partially rejected.

It probably is difficult for start-up small enterprises in a sector to, upon entry, comply with the totality of already existing collective agreements. Such businesses can be encouraged to apply for exemption for a particular period, whilst they are incubated and have their business models capacitated. BCEA provides for standard of quantifying non-wage benefits. Employees should not be paid with food and alcohol.

- The capacity of bargaining councils to research and provide guidance to enterprises and employees must be beefed up. There must be constant supply of information regarding new business techniques and models. Big business members of a bargaining council should readily incubate those SMEs which are compliant with bargaining council agreements. They must be biased towards sourcing their raw materials or other supplies from these compliant SMEs.

These SMEs should feel the worth of and benefit of being members of bargaining councils. Government should only procure from enterprises that are bargaining council members and compliant with council agreements. To this end a report form entities like SEDA should be compiled encompassing suggestions on business structure or model adaptation or conversion for synergy with specific industry players requirements [success and competition wise] and better output.

Employers employing about ten (10) or less people should be generally exempted but they should be able to prove compliance with some basic dictates of BCEA upon inspection by the Dept. of Labour. Shop stewards and union representatives, who represent union members in disciplinary proceedings and generally on union issues at an enterprise level, should be appropriately continuously trained. This is so that there is effective union representation and ventilation of issues on behalf of members.

- In dealing with issues of non-compliance with bargaining council agreements; employment of undocumented foreign nationals; non-

compliance with tax laws of the country; and ill-treatment and abuse of employees, law enforcement agencies should combine forces and at intervals, target the errant enterprises and their owners. To cater for alarm by members of the public in affected arrears, educating the public about illegal or illegality of operations would be an appropriate contingency. It remains the responsibility of trade unions to ensure that their members and prospective members are clued up about their rights and entitlements in the world of work.

The enforcement agencies should argue in court proceedings for stiffer fines calculated at projected profit or turnover percentage in similar registered businesses. This will encourage legal and honest business environment and probably encourage innovation and entrepreneurship. Very useful reliable data will consequently be readily available for the exercise by authorities of their powers in terms of the framework under consideration.

## CHAPTER 8

## 8. CONCLUSION

It is evident from the preceding chapters that the practical implementation of the framework of extension of bargaining council collective agreements is problematic and conflicted. A concept paper delivered during Cosatu' s CEC on 28 May 2012[315] at page 60 argues that, the collective bargaining system in its current form has failed to meet its objectives, and that a substantially restructured collective bargaining architecture is required. They further argue in the same document that the new strategies should not be defensive lest they become amenable to short termism and consequently defeatists to the workers gains.

This, further argues Cosatu, will not help in reconfiguring Apartheid wage structure that is still in place throughout the country. While the inherent sentiment of Cosatu's submission above is appreciated, sight must not be lost that, it was made in view of arguing convincingly for a minimum wage framework. Case law has been referred to in preceding chapters to illustrate that orderly collective bargaining is preferred. Shop floor or company to company bargaining does not appear to be viable method compared to bargaining collectively at sectoral level. It is evident that he strength of employees is in numbers. It is clear that his is not the same for an employer.

It cannot be believed that anyone can open a factory and employ people just for the fun of it. The primary intention is to financially exploit the loophole of demand for that commodity the factory will produce. In this context, the employer cannot contend that they take home insufficient profit and may want to reduce wages and reduce non-wage benefits only to increase their profit margins. Employers cannot be heard to be saying they want to employ as many people as unnecessarily possible, so that they pay them as little as possible, in the name of creating employment, and thereafter go compete in the same market with companies that comply with labour legislation.

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[315] COSATU Concept Paper "Towards new collective bargaining, wage and social protection strategies: learning from the Brazilian experience" [Draft for irternal discussion] http://www.cosatu.org.za/C6A53CF2-A659 [Date of Access: 25/04/2013].

Some say little work of no value is better than no work at all. This is clear precipitation of exploitation and justification of inhuman and cruel treatment of employed person in those circumstances. Consequently, the framework of extension of bargaining council collective agreements should be retained. This is, of course, with some alteration as suggested above. The nature of this framework should not be done away with.

It has been demonstrated that this framework is internationally recognized. Reference has been made to ILO conventions and recommendations that promote this framework. There are enough checks and balances to this framework in the form of pre-extension prerequisites that the Minister must consider and exemptions applications. The courts are sufficiently equipped to restore status *quo ante*, on application, should an injustice be alleged and proved. These are enough to ensure that the framework is not abused and continues to be relevant and such extensions are justifiable in our constitutional democracy State.

The Amendments to the LRA currently in place are also sufficient safeguards to this framework. The notification requirements regarding continued representativity levels of parties and number of SMME's affected and notifications regarding amendments or withdrawal of or from, and termination of extended agreements notifications, are a further amplification to a contention that the LRA continues to grow. It adapts and reacts to challenges. The Registrar of Labour has to be informed annually about involvement of small business in the bargaining council and about the extent to which their interests are taken cognizance of. This is a further sign of democratization of the RSA labour relations.

The spirit is not to destroy people's livelihoods, but to regulate the environment of work in a constitutionally acceptable way and further to give clear indication of compliance by the country to its international obligations. The judgement of the Constitutional Court in the *Bader Bop (Pty) Ltd case*[316] expresses the sentiment above. In this case the court said that the LRA sought to provide a framework whereby employers, employees and their unions could partake in collective bargaining and formulation of industrial policy and in the process,

[316] *NUMSA and others v Bader Bop (Pty) Ltd and another* [2003] 2 BLLR 103 (CC)

promote orderly collective bargaining, with emphasis at sectoral bargaining, and democratization of the work place and resolution of disputes.

The history of development of collective bargaining in South Africa appearing in the maiden chapters of this research study illustrate where the African majority come from in terms of attaining worker rights. The Apartheid ideology and unjustifiably and criminal discrimination they endured, cannot be justification now, that because of their numbers and the limited resources at states' hands, employers can cleverly return them to the colonial and Apartheid era employment practices. The scrapping of the framework of extensions of bargaining council agreements to non-members has that potential.

It is also appreciated that small business employs those the formal economy has permanently shut their doors to. The contention that the inflexible labour regulatory environment in the RSA is an impediment to entrepreneurship and innovation is noted, however with reservations. It is acknowledged that a one size fits all approach to the unemployment, job creation and sustainable business development dynamics in RSA might not be appropriate at the moment. Hence it is submitted here that, continued engagement and research is essential. This must not be done, however, at the expense of the employee's hard earned, constitutionally protected rights.

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