

**WORKPLACE FORUMS IN TERMS OF THE LABOUR  
RELATIONS ACT 66 OF 1995 AS AMENDED**

**BY**

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## EXECUTIVE SUMMARY

The promulgation into law of the concept of workplace forums has been beset with immense criticism and opposition from organized labour and some quarters of organized business. Last ditch efforts by the Ministerial Task Team had won the day for the inclusion of this controversial provision in the new Labour Relations Act.<sup>1</sup> Commentators on the Act tend to agree that the fallout with organized labour at the negotiations has probably set the scene as to whether the provisions would be widely used or not. History has shown that the establishment of such forums in workplaces has been low. In some situations where workplace forums had been established, their continuous sustainability was put into doubt. This has led to the de-establishment of some of these forums in some workplaces. Various reasons were provided, but the prime factors for its failure could be traced back to the negotiations at NEDLAC. The unions opposed the original proposal by government that minority unions and even non-union employees can trigger the establishment of a workplace forum and insisted that this be restricted to majority unions.

The voluntary nature regarding the establishment of a workplace forum and the trigger that only a majority union can invoke the provisions has still seen unions reluctant to utilize the provisions since it did not serve their purpose. The aims of the provisions, namely to increase workplace democracy, was therefore thwarted in favour of more informal procedures. Although the idea is a noble one, it is argued that the introduction of the provisions was ill-timed and inappropriate. The lesson that the legislature can take is that for any provision to be a success, buy-in from all stakeholders is paramount.

Research has shown that there was a steady decline in the establishment of workplace forums. Since December 2004 there was not a single application received by the

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<sup>1</sup> No. 66 of 1995 (hereinafter referred to as the Act).

Commission for Conciliation, mediation and Arbitration. There is also doubt as to whether any of the Forums that were previously established are still functional. What is certain is that statutory workplace forums is not at the forefront as a vehicle for change that was envisaged in the Explanatory Memorandum that accompanied the new Labour Relations Act. What is also certain is that employers and employees are utilizing other forums to ensure workplace participation. These forums, however, only provide a voice to unionized workers. The vast majority of non-union workers remain voiceless.

The proposed amendments in 2002 that intimated that the trigger be any union and not only majority unions failed to be passed into law. Perhaps it is that type of catalyst that is required to give life to the provisions. The future of workplace forums in South Africa is bleak and will continue to be if there is no intervention by the parties at NEDLAC to revive it. A complete revamp of the legislation would be required for such a revival. Some commentators have made meaningful suggestions on changes that can be made to the legislation to make workplace forums more attractive. Some have suggested it be scrapped altogether and future workplace participatory structures should be left to the parties to embrace voluntarily.

Workplace forums are a novel innovation with great potential to encourage workplace democracy. There is nothing wrong with the concept. The application of such forums in the South African context is what is concerning. Perhaps prior experience and experimentation with similar type forums have tarnished workplace participation. The strategies by the previous regime and some employers have caused such participation to equate to co-option. Perhaps not enough spade work was done to ensure that the climate and attitude of the parties was conducive for its introduction.

What is paramount no matter the form it takes is that workplace participation is crucial for economic growth and the introduction of new work methods to improve productivity.

Without the establishment of such forums, whether voluntary or statutory, the 'second channel principle' that promotes non-adversarial workplace joint decision-making would be lost and conflict based participation could spiral leading to economic disaster.

## **CHAPTER ONE**

### **INTRODUCTION**

The most important innovation introduced by the new LRA is undoubtedly the workplace forum system. The evident aim is to provide an alternative alongside the existing conflict-ridden model of labour relations in South Africa. While the introduction of such a system has to be welcomed, it has to be stressed that the envisaged system is characterized by a number of inconsistencies, apart from other deficiencies.

The introduction of workplace forums in terms of the Labour Relations Act<sup>2</sup> has been hailed as an important new innovation. The philosophy behind the establishment of workplace forums is that there are matters of mutual interest concerning the workplace which are not suited to be dealt with through normal collective bargaining channels. The purpose of workplace forums is to promote employee participation in the workplace and to provide employees with an institutionalized voice in managerial decision-making. Any employer employing 100 or more employees where the majority of the workplace is unionised, is likely to be faced with a demand for a compulsory workplace forum unless a workplace forum is established by agreement. It must be mentioned, however, that unions are not enthusiastic about workplace forums. Chapter two provides a brief overview of the concept of worker participation and how it operates in the South African context. It will be noted that worker participation and the struggle for collective bargaining rights have led very adversarial relationships between management and unions in many institutions. It will also be seen that the previous regime had caused black unions to be isolated through various legislation which had led mistrust in the use worker participative structures even when there were good intentions from management. Chapter Three provides some background, the rationale behind the introduction of workplace forums and the legislative

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<sup>2</sup> No. 66 of 1995.

overview of the provisions as enshrined in the Act. Where appropriate an expansion of the discussion on the provisions will be done to provide more insight on the issue. In Chapter Four an attempt will be made to ascertain what the major criticisms are from a management and union perspective as well as from commentators regarding the establishment of workplace forums. It will be observed that criticisms range from the legislature taking a protectionist stance towards unions to either doing too little or going too far to protect the interest of workers.

The Labour Relations Act provides for a definition of a workplace. This definition has come to be severely criticised.

A workplace is defined in the Act<sup>3</sup> as:

“The place or places where the employees of an employer work. If an employer carries on two or more operations that are independent of one another by reason of their size, function or organization, the place or places where employees work in connection with each independent operation, constitutes the workplace.”<sup>4</sup>

The above definition has been construed to be too wide and vague. Accordingly Cheadle<sup>5</sup> states that:

“It is evident from this definition that a workplace can be made up of one or more places of work. A dry cleaning business, for example, may have a central dry cleaning operation and several depots for the receipt and dispatch of clothing. The employer in this example conducts one operation in different places. Neither the

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<sup>3</sup> Act 66 of 1995.

<sup>4</sup> S 213 of Act 66 of 1995.

<sup>5</sup> Halton Cheadle “Workplace Forums” (1994) *Current Labour Law* 69.



depots nor the central operation are independent of one another either by reason of size, function or organization. Accordingly, the business will be considered to be a single workplace. Each case will depend on its own facts. If an employer is engaged in more than one operation in different places which by virtue of their size, function and organization are independent, the operations will be considered as separate workplaces.”

Whether the interpretation of the definition will be equally ‘evident’ to anyone but the drafters of the Act is doubtful. If it is left to the parties to decide how to interpret a workplace, it would lead to unnecessary conflict and create confusion.

The workplace forum as established in the Act<sup>6</sup> has been met with mixed feelings. Summers<sup>7</sup> criticizes the provisions for particularly the following reasons:

1. “There will remain two employee representation structures at the local level – the local union and the workplace forum.
2. Unless the bargaining council can limit supplementary bargaining by the local union (that is if distributive bargaining is done at centralized and not local level), the employer may be confronted with demands on both fronts.
3. The employee will have the incentive to place in the collective agreement as many subjects for joint determination. Then whenever a dispute arises on one of those subjects the employee will have an option to seek arbitration or to take a strike, whichever at that moment appears more advantageous.”

Summers<sup>8</sup> mentions two other important factors that are significant in developing a cooperative system at plant level:

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<sup>6</sup> Act 66 of 1995 *supra*.

<sup>7</sup> Clyde Summers “Workplace Forums from a comparative perspective” *Industrial Law Journal* (1995) 16 at 811.

“The first is the genuine acceptance by employers of the workers’ representatives and a recognition that not only is it right, but also advantageous to both parties, for employees to have a voice in the decisions of the workplace. Without that voice, it will be difficult for any system of participation to show much success. I remember a German employer saying: ‘I do not know how I could run my plant without the works council. When I have a problem, I discuss it with them; we agree on a solution and then they help persuade the other employees that it is a good solution.

A second and unrelated element in the German system is that the works council is not the union. The union is viewed as an outside force, while the works council is viewed as an inside group. As one German employer characterised the works council. ‘They are people!’. When the German Co-determination Act was amended in 1976 to increase employee representation on corporate boards, the primary objection of employers was that one of the members was to be a union representative.

It is true that in Germany 75% of the works council members are elected on the union slate, but they are not union officers and their primary loyalty is to the employees in the workplace. Because of that loyalty they do not feel rigidly bound by official union policies. This helps them to distance themselves from the confrontational relations between the union and the employers.”

It must be stressed that although there may be some similarity with the German works council system, workplace forums and works council are not the same. Neither are the

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<sup>8</sup> Summers (1995) *supra* at 818.

nature of the relationship between the union and employer the same between the two countries.

The institution of workplace forums as outlined in the Act is by no means perfect. The idea that workers will be more committed when they participate in decision-making is accepted by most progressive thinking managers. The problem however remains whether meaningful non-adversarial participation is possible in the current South African labour relations climate. In this respect there is only one option and that is to ensure that the process is effectively managed.

The prevalence of workplace forums has been surprisingly low with very few forums being established formally with the Commission for Conciliation, Mediation and Arbitration (CCMA). Surveys conducted in 1997, 1999 and 2002 show that the establishment of workplace forums is on the decline.<sup>9</sup> In Chapter Five we will discuss the contents of these surveys and compare them to recent statistics released by the CCMA in this regard.

The above surveys indicate that there may be major concerns by unions and management with regards to the efficacy of workplace forums. There is evidence to show that parties would rather opt for informal forums to discuss or negotiate issues of mutual interest.

This treatise includes what writers are saying should be considered to ensure success. In Chapter Five we will also look at some of these proposals in detail. This leads us to the question of what is the future of workplace forums. There have been some commentators that have proposed certain amendments to the provisions with regard to which parties can trigger the formation of a forum. Others have proposed more drastic action be taken to

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<sup>9</sup> The Sociology of Work Unit based at the University of Witwatersrand has monitored the establishment of workplace forums since inception.

ensure that workplace forums continue to exist. This topic will also be looked at in detail in Chapter five. The treatise will end with some concluding remarks regarding the status of workplace forums as a form of worker participation.

## CHAPTER TWO

### WORKER PARTICIPATION, COLLECTIVE BARGAINING AND WORKPLACE FORUMS

The concept of worker participation is not a new one in South Africa. Although there was immense adversarial relationships there were some organizations that realized that workplace democracy was crucial for economic growth and economic stability. Workplace decision-making has started in many large companies way before the introduction of workplace forums. It is suggested that these participatory structures were more successful than workplace forums due to their voluntary nature.

Worker participation is not the same as collective bargaining. It requires that the parties engage on real productivity issues. Anstey<sup>10</sup> quotes Salamon who defines worker participation as:

“ a philosophy or style of organizational management which recognizes both the need and the rights of employees, individually or collectively, to be involved with management in areas of the organizations and decision-making beyond that normally covered by collective bargaining”

This definition supposes that there is a distinction between workplace issues and collective bargaining. It is seen as participation that extends beyond that of collective bargaining. Any form of participation whether voluntary or statutory needs to take into account the prevailing conditions and circumstances prior to its introduction. There cannot be a sudden shift or neat break from adversarial collective bargaining to worker participation. One

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<sup>10</sup> Mark Anstey *Worker Participation: South African Options and Experiences* (1997) 4.

needs to understand the context and nature of the relationship. Anstey<sup>11</sup> gives a brief historical perspective of the nature of the relationship between employers and unions prior the introduction of workplace forums. He expounds on the various strategies that was contemplated to undermine any progress that could be made towards worker participation. He makes mention of legislation such as the Native Labour Relations Act of 1953 which did not allow black workers to be represented in works committees. He also comments on other legislation that sought to contain the militancy of black workers. This legislation was clearly designed to bash black trade union activity. Against this back drop it would be evident why unions distrusted any initiative aimed at workers participation. Trust and trustworthiness need to be earned by management and employees. Management should not think that by introducing participation schemes alongside collective bargaining structures that the relationship would improve overnight. The correct attitude and the purpose for participation needs to be carefully considered. It must be noted that management's reasons for participation is different from that of the workers. It must also be understood that both parties come with preconceived ideas of what they will gain from this relationship. It therefore still remains a power relationship with trust as its core ingredient.

In order for decentralized structures to work effectively, management has to trust workers not to 'misuse their increased discretion', and workers need to trust management not to 'exclude them from the benefits of their effort'.<sup>12</sup> The willingness to compromise and to co-operate is a challenge that has to be overcome in order for participation to be effective. The South African labour relations system understands collective bargaining processes well. It is commonplace and has a history of hard fought battles to achieve the right to bargain. Collective bargaining is characterized by formal frameworks and procedural agreements which entrenched shop floor organization. Participative structures that function

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<sup>11</sup> Mark Anstey "Can South African industrial relations move beyond adversarialism? Some Comparative perspectives on the prospects of workplace forums in South Africa" *South African Journal of Labour Relations* 19 4 (1995) 5.

<sup>12</sup> Klerck "Mapping the terrain for participation" (2000) 24 1 *South African Journal for Labour Relations* 9.

subordinate to collective bargaining have been somewhat successful only when relationships had matured over a period of time. The supremacy that collective bargaining has over other participative schemes can only be attributed to the fact that the parties are so used to adversarial relations and mistrust that it would be difficult to engage in any other scheme. At least the union are able speak from a position of strength with the full backing of its members at the shop floor.

Klerck<sup>13</sup> describes the relationship as follows:

“The fact that participation schemes are only ever partially successful is noted in the contradictions underlying the employment relationship. It is not contended that participation is simply a matter of management subterfuge. Support for such schemes also emanate from workers...on the basis that participation offers an opportunity to expand union influence and control.

In order to understand the popularity of participation...we need to explore the conditions that allow unions to challenge management authority in a manner that (a) compels management to look to participation in order to satisfy its own interest, and (b) assures workers that they have a good chance of using participation for their own particular ends.”

A negotiated agreement conducted outside the statutory framework afforded by workplace forums, provides a greater incentive to workers. It would not be in the interest of trade unions to give up the right to strike, as it has to do in workplace forums, to pursue an issue that is in its interest to introduce in the workplace. The workplace forum option, as a method of worker participation, in this circumstance is not lucrative as a third party would have to decide the fate of the union relating to an issue of mutual interest. The provisions

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<sup>13</sup> Klerck (2000) *supra* 10.

required for the establishment of a workplace forum does not impose on the parties any particular form of participation. It provides a floor of rights that can be used for parties to decide on the form participation that it requires. Klerck<sup>14</sup> point out the option that will be used will be determined by the strength of union representation and the 'degree of compulsion' required should the parties fail to reach agreement on the constitution of the forum.

It should be further pointed out that since consultation differs from collective bargaining based on the issues that are dealt with, workplace forums will only deal with those issues that employers would rather not choose to take to the negotiation table.<sup>15</sup> Collective bargaining may be 'carried on under different circumstances and by different means, and even under certain restrictions, but it remains one of the few forms of worker participation which cuts across ideological and national boundaries and can be found anywhere in the world'.<sup>16</sup> The consultation process in workplace forums can therefore be manipulated by the employer who would steer clear of subjecting some of its workplace policies or procedures to negotiation at central level. It would be prudent for management to consult and attempt to reach consensus failing which they can implement their proposal any way. Since the union cannot strike on this issue they would have to relent. Trade unions in these circumstances would be better off to place such issues for negotiation rather than merely advising management about their concerns.

The participation of workers in workplace forums is stifled by the fact that since it has to be triggered by a majority trade union it would be beyond the reach of the majority of workers who remain non-unionised. This differs when it comes to collective bargaining structures. Collective bargaining is commensurate with strong shop floor organization which put the

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<sup>14</sup> Klerck (2000) *supra* 10.

<sup>15</sup> Klerck (2000) *supra* 10.

<sup>16</sup> Cordova in Anstey (1995) *supra* 6.



union at an advantage. Workplace forums dilute this strength by giving a voice to non – union workers, thus weakening the power of the union.

Minority unions also face major challenges when it comes to workplace forums. They will not have any leverage to muster support for their viewpoint as the provisions are designed to alienate them. It has already been said that they cannot trigger a workplace forum as this is reserved for majority unions

It is true that workplace forums take away the adversarial nature of the relationship away from the shop floor to a centralized level. However, proponents for the union indicate that this has led to the union being neutralized in the workplace. It is often said that an employer would not engage or offer any participation scheme if it sees itself as losing control. If participation is seen as being in competition with collective bargaining, then unions would oppose participation. The blurring of the role of workplace forums and other collective bargaining structures has led to immense confusion. It no surprise then that unions would see workplace participatory structures as a threat if they cannot control it. What has emerged instead is a plethora of alternate participatory structures that are less restrictive than the workplace forum provisions. This development is an acknowledgement that centralized bargaining cannot contribute meaningfully to workplace issues such as production, restructuring and investments. It serves a better role by restricting its purpose to conditions of work and other distributive bargaining issues.

It must be noted that unions are not opposed to a co-determined existence in the workplace. It was not management that has proposed such schemes as is commonly believed. Buhlungu<sup>17</sup> opines that co-determination mechanisms as espoused by the workplace forums allows trade unions to exercise methods such as consultation and joint-decision making

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<sup>17</sup> Buhlungu “A question of power: Co-determination and Trade Union Capacity” (1999) 31 *African Social Review* 111.

which unions had to fight for in the past. He sees the introduction of the provisions as a victory for the labour movement but warns that it presents both opportunities and challenges to trade unions. He says that:

“Although there is uncertainty about the sustainability of ... (workplace forums) it is possible to categorise them under the rubric of what is termed ... workplace participation because it suggests a shift towards... a modification of the orthodox authority structure...”

Buhlungu<sup>18</sup> warns that participative structures come with its own challenges. He cites examples of participative management schemes implemented at companies such as PG Bison and Nampak Polyfoil that led to co-option of shop-stewards. This made shop-steward committees weak and unions lost their focus and became ineffective.

As a result of the above situation some commentators proposed that in order to ensure that this problem is not repeated adversarial participation through a single collective bargaining mechanism be promoted.

Buhlungu<sup>19</sup> makes a noteworthy point that unions probably do not have the capacity to deal with participative management initiatives, including workplace forums. The issues for consultation and joint-decision making revolve around complex concepts which unions were not able to fully understand. Unions before this had to deal with distributive issues at the expense of understanding integrative issues. It would not be difficult to fathom that against this background, the parties that negotiated the workplace forums provisions in the Labour Relations Act had to consider the history and concerns that labour have had with participative schemes. It could be for that reason that unions had to be placated by promulgating that only majority unions can trigger the formation of a forum.

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<sup>18</sup> Buhlungu (1999) *supra* 115.

<sup>19</sup> Buhlungu (1999) *supra* 116.

The fact that there was confusion between the role between collective bargaining and worker participation schemes such as workplace forums has become clear. It is opined that collective bargaining does in fact provide a better basis for protecting workers interests than workplace forums ever could. Workers would not have to contend with issues that they are not familiar with. It is clear that since the representatives at a workplace forum does not necessarily have to be a shop steward, co-option would be easy. Whereas in a bargaining forum union officials who would possess better expertise and negotiating skills would articulate the union position much more clearly.

This confusion between workplace forums and collective bargaining is best summed up by Anstey:<sup>20</sup>

“South African workplace forums become an extension of collective bargaining to the enterprise rather than the complementary system envisaged by the drafters of the Act, which proposed mechanisms at the level of the enterprise to deal with matters for which traditional adversarial bargaining would be ill-suited. Despite the stated intentions to bring about a clear institutional separation between collective bargaining and consultation, they have been confirmed in South African labour law as been one and the same”

It can therefore be said that for any participative scheme to succeed to prevailing circumstances, the maturity of the relationship, the capacity of trade unions, the interaction with other participative schemes and enterprise and central level have to be considered.

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<sup>20</sup> Anstey (1997) *supra* 117.

## CHAPTER THREE

### LEGISLATIVE OVERVIEW

#### 3 1 BACKGROUND

Worker participation has not been a major part of the South African labour relations system although there have been some success stories around voluntary participation. Due to the past history of our country, the labour relations system remained an adversarial one. With South Africa's re-entry as a democracy to the world stage in 1994 emerged a new set dynamics. Not long thereafter South Africa rejoined the International Labour Organisation (ILO).

The ILO has passed many recommendations and guidelines in relation to consultation and co-operation in the workplace. Anstey<sup>21</sup> summarises these recommendations as follows:

“In essence these recommendations state that appropriate steps should be taken to promote consultation and cooperation at this level on matters of mutual interest *not within the scope of issues usually dealt with through collective bargaining.*”

The ILO suggests that voluntary agreements should be encouraged and promoted through the promulgation of national policy. Such national policy is to also encourage the introduction of appropriate structures to address workplace co-operation.<sup>22</sup> This was enshrined in Recommendation 94 of 1952. Recommendation 113 of 1960 extended the above recommendations to the public service, and to organizations at national and industrial levels.<sup>23</sup> Recommendation 129 of 1967 according to Anstey<sup>24</sup> :

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<sup>21</sup> Anstey (1997) *supra* 85.

<sup>22</sup> Anstey (1997) *supra* 85.

<sup>23</sup> Anstey (1997) *supra* 86.

“Includes an undertaking...that the parties should recognize the importance of a climate of mutual understanding ... (which) should be promoted through rapid dissemination of complete and objective information. ‘The recommendation qualifies the disclosure of information by limiting them to only certain workplace matters.’”<sup>25</sup>

The first inclination that the new order in South Africa was considering adopting the abovementioned ILO recommendations was in the form of the ANC’s Reconstruction and Development Programme (RDP)<sup>26</sup>. The RDP proposed that unions should be fully involved in the design and oversight of changes in the workplace.<sup>27</sup> It goes further to state that legislation must ‘facilitate worker participation and decision-making in the world of work.’<sup>28</sup>

The South African Constitution<sup>29</sup> however did not go as far as the RDP in enforcing worker participation in the workplace. The Constitution restricted itself solely to collective bargaining and goes no further than that on this issue.

The ideals as captured in the Reconstruction and Development Programme then became draft legislation in the form of the Labour Relations Bill.<sup>30</sup> It has to be stressed that the workplace forum provisions took the form of robust discussion at the negotiations at the negotiation chamber at the National Economic Development and Labour Council

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<sup>24</sup> Anstey (1997) *supra* 86.

<sup>24</sup> Anstey (1997) *supra* 86.

<sup>24</sup> Anstey (1997) *supra* 86.

<sup>25</sup> Anstey (1997) *supra* 86 *cf* Anstey “Can South African industrial relations move beyond adversarialism? Some comparative perspectives on the prospects of workplace forums in South Africa” *South African Journal of Labour Relations* 4 (1995) 3.

<sup>26</sup> ANC RDP *The Reconstruction and Development Programme* 1994 Umanyano 114(hereinafter referred to as the RDP).

<sup>27</sup> ANC RDP 114.

<sup>28</sup> ANC RDP 114

<sup>29</sup> *Constitution of the Republic of South Africa* Act 108 of 1996.

<sup>30</sup> Ministerial Task Team *Draft Negotiating Document in Bill Form* (The New Labour Relations Act) 1994.

(NEDLAC), which comprised of representatives from business, labour and government. It must be added that the concept of workplace forums in the form of works committees had been tried previously but failed during Apartheid. The industrial council system is another such system. It goes without saying that the final product was the culmination of immense debate and re- working. The Bill had to be amended before becoming law and not every viewpoint was included in the final draft. These amendments are commonly referred to as the 'NEDLAC Agreement' since no consensus could be reached on the content or the reasons for the provisions. It seems as if organized labour had adopted the attitude that if the legislature wishes to include the provisions into law, they would not go out of their way to invoke the provisions as they are not forced to do so. The provisions were therefore superfluous in that while being there to be used it would remain a white elephant.

In order to understand where the notion of a workplace forum is derived from one needs to look no further than similar provisions in foreign countries. The German works council system seems to closely resemble the South African model albeit with some differences. Anstey<sup>31</sup> has compared the two systems and found the following:

1. Works councils were introduced by employers to oppose independent unions. This system was robustly resisted by unions at first. Workplace forums were initially initiated during the period of Apartheid and was also resisted by trade unions and this still persists to this day.
2. A works council is compulsory if employees require it. This differs from a workplace forum where it is compulsory if require by a majority trade union.
3. A works council can be triggered by five (50) employees whereas workplace forums have to have a hundred employees in a workplace for it to be triggered by a majority union.
4. Both systems can have any employee, except senior managers as representatives

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<sup>31</sup> Anstey (1997) *supra* 108.

5. Union participation and control in a works council can only occur at the behest of employees. A workplace forum is initiated by a majority union. If the union has sole bargaining rights it can apply for a trade union based forum.
6. Meetings are held quarterly at a works council where management addresses meeting once a year whilst a workplace forum has regular meetings with each meeting requiring feedback from management
7. There is a clear distinction of what issues are to be discussed at sectoral and works council level. There is confusion in the workplace forum setup as there seems to be a blurring of issues to be discussed at various levels.
8. At the works councils issues for negotiation are decided jointly. If there is a deadlock then compulsory arbitration follows. Workplace forums operate somewhat similarly. However the issues for consultation, joint decision making and negotiation are legislated. This can however be varied by agreement.

As stated above workplace forums must not be equated to mean the same as works councils.

It seems that pressure from unions has led to a watering down of the provisions in the South African context. This has led to the original functions of a workplace forum been undermined by compromises been made to keep parties at the negotiating table.

### **3 2 RATIONALE**

The rationale for workplace forums in South Africa was motivated in detail in the explanatory memorandum<sup>32</sup> to the final Labour Relations Bill. The explanatory memorandum intimates that the prime focus to be served by the introduction of workplace forums in the workplace would be increased efficiency and productivity, workplace

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<sup>32</sup>Ministerial Task Team (1994) *supra* at 31.

democratization and a co-determined and co-operative decision-making. These principles operate in opposition to the adversarial relationship that has prevailed in this sphere. The bill emphasizes that its focus is on the regulation of relationships between business and labour. It aims to put an end to haphazard collective bargaining which had confused matters that could be resolved at plant level. There does not seem to be any statutory support for employee participation and decision-making<sup>33</sup>. South Africa is obliged to comply with the International Labour Organisation resolutions, especially with those dealing with collective bargaining. Special attention has to be placed on building social partnerships.

The Bill re-iterates that if our workplaces need to be restructured successfully then there should be mechanisms put in place to find new ways in dealing with each other. After having looked at countries such as Germany, Japan, and Sweden, it was decided that it would be prudent to introduce the concept of workplace forums as a solution in South Africa.

The rationale for workplace forums as motivated in the Bill is summarized by Finnemore<sup>34</sup> as follows:

“Workplace forums are designed to

- Provide a forum for the representation of all employees at the workplace with the exception of senior management already in positions of policy-making and decision-making over employee selection and dismissal
- Facilitate a shift from adversarial bargaining at the workplace to joint problem-solving by employees and employers.
- Promote employee participation at the workplace

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<sup>33</sup> Ministerial task Team (1994) *supra* at 7.

<sup>34</sup> Finnemore *Introduction to Labour Relations in South Africa* 5<sup>th</sup> ed (1997) 158.



- Provide employees with an institutionalized voice in managerial decision-making.
- Benefit employers by raising productivity and profitability; and
- Supplement collective bargaining and not undermine it, by relieving collective bargaining of functions to which the process is not well suited.”

Finnemore<sup>35</sup> quotes directly from the Bill to illustrate the last point as follows:

“The draft bill envisages a clear and strict institutional separation between workplace forums and collective bargaining. The rationale for this institutional separation is, in the first place, to keep collective bargaining and co-operative relations apart, so as to allow the latter an opportunity to develop. In South Africa, a co-operative effort is needed now as never before. As we enter new economic markets and face demands for restructuring, flexibility is crucial. To ensure that this flexibility is not achieved at the expense of workers’ rights or job security, structures are necessary to facilitate communication and co-operation between management and labour on production-related matters, more or less free of distributive conflicts over wages”<sup>36</sup>

Bendix<sup>37</sup> warns that the achievement of the abovementioned ideal would depend largely on

“The manner in which they are established, the attitude of unions, other non-unionised employees and management towards the forum; and the degree to which unions can separate their bargaining function from their co-operative function”.

The overlap of shop-steward functions is also an important consideration.

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<sup>35</sup> Finnemore (1997) *supra* 158-9.

<sup>36</sup> *Explanatory memorandum* (1994) 32.

<sup>37</sup> Bendix *Industrial Relations in the new South Africa* 3<sup>rd</sup> ed (1996) 343.

Summers<sup>38</sup> sums up by supporting the introduction of workplace forums and the rationale by stating that:

“No industrial society can compete and prosper in the markets unless there is co-operation and mutual problem-solving between management and workers.”

The rationale, it can be said was well intended and well-placed in light of South Africa’s re-entry into the world economy.

### **3 3 Purpose of workplace forums**

The main purpose of a workplace forum is to provide for a system where worker participation in the decision-making process in the workplace is ensured.

It accordingly aims at establishing a model of co-operation alongside the adversarial model of collective bargaining. Lehulere<sup>39</sup> identified two principles that support the introduction of workplace forums. The primary purpose is that South Africa should endeavour to be competitive globally in order to foster economic growth. The second is that in order to reach this level of competitiveness there has to be co-operation between business and labour.

Furthermore, such a system of co-operation is geared towards including all employees, and not only union members, in decisions at the workplace which affect them directly.<sup>40</sup>

This system constitutes a novelty in our law and can perhaps be described as the most drastic measure envisaged by the Act. Such systems are well known in particularly the

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<sup>38</sup> Summers (1995) *supra* 806.

<sup>39</sup> Lehulere “Workplace Forums: co-determination and workers struggle” *South African labour Bulletin* 19 2(1995) 41.

<sup>40</sup> S 79(a) of Act 66 of 1995.

European context (e.g. in Germany), where work councils have been implemented with a large measure of success.<sup>41</sup> A brief comparison of the works council system was done above. There does not seem to be any difference relating to the purpose of the forums, However it was observed that the issues for consultation between these two countries do differ.

### **3 4 Establishment**

A workplace forum could be established on the initiative only of a union, or unions acting jointly, with majority support. This means that the union, or the union(s) acting jointly, must represent a majority of the employees employed by the employer in the workplace.<sup>42</sup>

However, senior managerial employees are excluded from the workplace forum.<sup>43</sup> They are people who have the authority to:

- Employ and dismiss employees; or
- Represent the employer in dealings with the workplace forum; or
- Determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace

In any workplace in which the employer employs 100 or more employees, the majority union(s) may apply to the Commission for the establishment of a forum.<sup>44</sup> In the case where there are fewer than 100 employees, a workplace forum may still be established on a voluntary basis; it will, however, not enjoy any statutory recognition. It is suggested that the definition of a workplace is important to define. This will lead to the prevention of unnecessary disputes around what constitutes a workplace or around representation.

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<sup>41</sup> Anstey *Employee Participation and Workplace Forums* 103-118.

<sup>42</sup> S80(2), s78(b).

<sup>43</sup> S78(a).

<sup>44</sup> S80(1).

The commissioner must endeavour to have a collective agreement concluded between the employer, the majority union and any other registered unions for the establishment and governance of a forum. In the event that a collective agreement has been entered into, that agreement will regulate the workplace forum system in the workplace concerned; the provisions of the Act<sup>45</sup> in this regard will not apply.<sup>46</sup>

If no agreement is forthcoming, the commissioner must endeavour to facilitate agreement on the provisions of a constitution. If there is no agreement on the provisions of the constitution, the commission must establish the workplace forum and determine the provisions of its constitution, bearing in mind the guidelines in Schedules 2 of the Act.<sup>47</sup>

The Act grants a peculiar role to majority union(s).

- It provides for the establishment of a trade union based workplace forum. A majority union (or unions acting jointly) recognized in terms of a collective agreement by an employer for purposes of collective bargaining in respect of all employees in a workplace, may apply for the establishment of a workplace forum and may choose the members of the forum from among its elected representatives in the workplace.<sup>48</sup>
- The majority union(s) concerned may also through collective agreements with the employer regulate the matters over which the employer has to consult or enter into joint-decision-making with the forum.<sup>49</sup>
- Through agreement with the employer the majority union(s) may change the constitution of the forum.<sup>50</sup>
- Such union(s) may also request a ballot to dissolve a workplace forum.<sup>51</sup>

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<sup>45</sup> Act 66 of 1995 *supra*.

<sup>46</sup> S80(7),s80(8).

<sup>47</sup> Act 55 of 1996 *supra*,s80(9),s80(10).

<sup>48</sup> S 81.

<sup>49</sup> S 84(3),s 86(2).

<sup>50</sup> S 82(1)(v).

- The Act provides that only the office –bearers and officials of the majority union may attend meetings of the forum, including meetings with the employer or the employees.<sup>52</sup>

As mentioned above, only unions with majority support may request the formation of a workplace forum.

The Act requires that the constitution of a workplace forum must contain certain provisions in respect of<sup>53</sup>

- a formula for determining the number of seats in the workplace forum
- a formula for the distribution of seats in the workplace forum so as to reflect the occupational structure of the workplace.
- The holding of elections at least every 24 months
- The removal of workplace forum members and filling of vacancies
- Reasonable time off for workplace forum members in order to perform their official functions and to receive training.
- the provision of facilities to the forum by the employer
- Full-time members of the forum where there are more than 1000 employees in a workplace.
- attendance of forum meetings by experts and trade union office-bearers and officials

One of the first workplace forums to be established was between the Eastern Province Blood Transfusion Service and the Hospital Personnel Trade Union of South Africa (HOSPERSA).<sup>54</sup> The Constitution design included a section for definitions. The section

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<sup>51</sup> S 93(1).

<sup>52</sup> S 82(1)(u).

<sup>53</sup> S 82.

<sup>54</sup> Case No EC 557 (1995).

pertinently focused on the definition of a Commissioner, employees and specific mention is made with regard to which managerial staff are excluded, the employer, the union, workplace where was outlined which offices constitute the workplace. There is section which outlines the number of seats allocated to forum members based on a numerical formula to determine the number of seats that will be allocated to a constituency that reflects on the occupational structure of the workplace. In this case the workplace was divided into administrative and clerical workers, nursing, technical and a representative from each of ten offices that constitute the forum.

A section relating to the elections and by-elections of members is provided for and the provisions include the procedure for appointing an electoral officer, the powers of this officer together with the election procedure, including the nomination procedure. Further provisions deal with the frequency of elections, time off for the electoral officer, term of office, resignation and vacation of office of members. The provisions relating to meetings stipulate frequency of meetings of the workplace forum, between the forum and the employer, between the forum and employees. There are also provisions relating to time off for members and facilities that the employer will provide to the workplace forum. There are provisions that outline the process of acquiring the services of an expert should the Forum require expert advice, the attendance of meetings by the union and the procedure for amendments to the Constitution. One of the first private sector companies to establish a workplace forum was between Nestle (South Africa) PTY LTD and Food and Allied Workers Union (FAWU).<sup>55</sup> This constitution is much more comprehensive than that of the Blood Transfusion Service. In addition to the provisions alluded to above, Nestle includes provisions that deal with specific matters for consultation and those for joint decision making, review at the request of a newly established workplace forum in terms of s87 of the Act, matters that affect more than one workplace forum, disclosure of information,

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<sup>55</sup> Case No GA 100942 (2000).

inspection of copies of documents, breach of confidentiality, the procedure for the dissolution of the forum, dispute about the forum relating to interpretation of its provisions.

The Nestle Constitution was facilitated by the Commission and this could account for it being more comprehensive. Many Constitutions that followed thereafter used the Nestle Constitution as a yardstick.

### **3 5 Meetings**

The Act foresees the following meetings to be held<sup>56</sup>:

- Regular meetings of the workplace forum
- Regular meetings between the employer and the forum, at which the employer must:
  1. Present a report on its financial and employment situation, its performance since the last report and its anticipated performance in the short term and in the long term.
  2. consult the forum on any matter arising from report
- Regular meetings between the forum and the employees.
- An annual meeting where the employer must present an annual report of its financial and employment situation, its performance generally and its future prospects and plans.

The said meetings are to be held during working hours without any loss of pay at a time and place to be agreed upon with the employer.<sup>57</sup>

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<sup>56</sup> See s 83.

<sup>57</sup> S 83(3)(c).

## **3 6 Functions and Powers**

### **3 6 1 General**

Generally the forum<sup>58</sup>:

- Must seek to promote the interest of all employees in the workplace, whether or not they are union members.
- must seek to enhance efficiency in the workplace
- is entitled to be consulted and to participate in joint decision making

### **3 6 2 Forms of participation**

Three forms of participation are foreseen by the Act:

- the right to information-sharing (already discussed)
- the right to consultation in respect of certain issues
- the right to participate in joint decision-making in respect of other issues

An employer cannot implement any proposal relating to the above issues without consulting the forum, allowing the forum to make representations and to propose alternatives. The workplace forum has to provide reasons for disagreeing with the proposals. Likewise the employer has to also provide reasons for disagreeing with the counter proposals from the forum. If there is no agreement the agreed dispute resolution procedure has to be invoked to attempt to reach consensus. If no consensus is reached the employer may implement its proposal.

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<sup>58</sup> See s 79.



### 3 6 3 Disclosure of information

The Act specifically provides for the disclosure of information to a workplace forum. In terms of the Act the employer must disclose to the workplace forum all relevant information that will allow the forum to engage effectively in consultation and joint decision-making.<sup>59</sup>

The employer need not disclose information<sup>60</sup>

- that is legally privileged (e.g. communications made in confidence between an employer and his/her attorney of the purpose of obtaining legal advice)
- that the employer is by law or order of court not allowed to disclose
- that is confidential and, if disclosed, may cause substantial harm to an employee or the employer
- That is private confidential information relating to an employee, unless that employee consents to the disclosure of that information.

In the event of a dispute concerning the disclosure of information, the dispute must be referred to the Commission for conciliation. Should conciliation prove to be unsuccessful; any party may request that it be resolved through arbitration.<sup>61</sup>

The commissioner must first decide whether the information is relevant. If it is found to be relevant, and if it is confidential information or private confidential information that relates to an employee, the commissioner must balance the harm that the disclosure is likely to cause.<sup>62</sup>

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<sup>59</sup> S 89(1).

<sup>60</sup> S 89(2).

<sup>61</sup> S 89(3)-(6).

<sup>62</sup> S 89(7)-(8).

A dispute concerning the alleged breach of confidentiality in respect of information disclosed is likewise referred to the Commission. If the Commissioner finds that such a breach has occurred, he /she may order the withdrawal of the right to disclosure of information in that workplace for a specified period.<sup>63</sup>

### **3 6 4 Consultation<sup>64</sup>**

In the event that the matters for consultation are not regulated in a collective agreement, a forum is entitled to be consulted by the employer about proposals relating to any of the following matters:

- restructuring the workplace,
- changes in the organization of work
- partial or total plant closures
- mergers and transfers of ownership in so far as they have an impact on the employees
- the dismissal of employees for reasons based on operational requirements
- exemptions from any collective agreement or any law
- job grading
- criteria for merit increases or the payment of discretionary bonuses
- education and training
- product development plans
- export promotion

Additional matters may be added by a bargaining council, by an agreement between the employer and the majority union(s) and/or by any law.<sup>65</sup>

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<sup>63</sup> S 84.

<sup>64</sup> S 84.

<sup>65</sup> S 84(2)-(4).

The majority union(s) and the employer may in particular agree that the forum and forum members exercise health and safety functions.<sup>66</sup>

Attention should be drawn to the peculiar notion of consultation applied by the Act.<sup>67</sup> In terms thereof the employer may not implement a proposal in relation to the matters mentioned above until it has consulted the forum and attempted to reach consensus thereon. The employer must allow the forum to make representations and to advance alternative proposals. If the employer disagrees, it must provide reasons for disagreeing.

Where no consensus has been reached, the employer has to invoke the agreed deadlock-breaking mechanisms before implementing its proposal.<sup>68</sup>

The implication is that in principle it remains possible to embark upon industrial action on these issues, unless the agreed procedure provides otherwise

### **3 6 5 Joint decision-making<sup>69</sup>**

Joint decision-making implies that the employer may not implement proposals concerning certain matters until it has consulted either the forum thereon and consensus has been reached.

- In the event that consensus is not reached, arbitration must follow. This can be done under the auspices of the Commission in terms of the process of conciliation and, failing that, arbitration.<sup>70</sup>

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<sup>66</sup> S 84(5).

<sup>67</sup> S 85.

<sup>68</sup> S 85(4).

<sup>69</sup> S 86.

<sup>70</sup> S 86(4)-(8).

The matters for joint decision –making, unless they have been regulated in a collective agreement, are the following<sup>71</sup> :

- disciplinary codes and procedures
- Rules relating to the proper regulation of the workplace (non-work performance related conduct).
- measures designed to protect and advance persons disadvantaged by unfair discrimination
- changes to the rules regulating social benefit schemes, to be brought about by the employer or employer-appointed representatives on trusts or boards of employer – controlled schemes

The majority union(s) and the employer may by agreement confer additional matters or remove any matter from the above list.<sup>72</sup>

### **3 6 6 Review on request of newly established workplace forum**

A newly established forum may request a meeting with the employer to review<sup>73</sup>:

- merit criteria and procedures discretionary bonuses
- disciplinary codes
- rules relating to the proper regulation of the workplace

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<sup>71</sup> S 86(1).

<sup>72</sup> S86(2).

<sup>73</sup> S87.

### **3 7 Dispute resolution**

A dispute not otherwise dealt with in terms of the Act or a collective agreement, may be referred to the Commission for conciliation and, failing which, arbitration.<sup>74</sup> The decision of the Commission will be final and binding.

The above mechanism is elaborate in its making. Despite this mechanism great criticism has been levelled against workplace forums. The major shortcoming was that the provisions are not enforceable if a trade union does not trigger it. It is not compulsory to utilize and parties could opt for other voluntary mechanisms. There has also been some criticism relating to the actual provisions itself. These are discussed in detail in the next chapter

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<sup>74</sup> S 94.

## **CHAPTER FOUR**

### **CRITICISMS LEVELLED AGAINST WORKER PARTICIPATIVE STRUCTURES AND WORKPLACE FORUMS**

The introduction of workplace forums into our labour law has brought with it many pertinent issues that require strong clarity. Although an innovation and a break from the past, the drafters had failed to consider the impact of the provisions in the workplace. Whether parties were ready for such an initiative is another question. The issue of worker participative structures were similarly met with suspicion by organized labour prior to the introduction of workplace forums. We would firstly look at workplace forums in detail and then consider whether its predecessors, namely other participatory initiatives, have fared better.

There are businesses and unions that support the notion of workplace forums. There are also businesses and unions that oppose it.

Those businesses that support the notion would probably believe that workplace forums would be able to alleviate industrial unrest and improve productivity.

Those trade unions who support the notion would probably argue that it encourages worker participation in decision-making which would encourage workers to play a pivotal role in shaping the terms and conditions of their working lives. Those employees who are against workplace forums, and who make up the majority, would probably have at the back of their minds the recent adversarial history of the labour relationships in South Africa. Ideological differences, namely capitalist bosses versus a socialist workforce could also be a contributory factor. It is not untrue that the past has been riddled with conflict and mistrust. Considering the bitter past that had to be endured by workers, it becomes understandable why unions have treated workplace forums with such apprehension.

Commentators, Academics and union leaders, have taken issue with various aspects of the provisions. Union leaders are divided on whether to support the establishment of workplace forums or not.

Union leaders have debated this issue at great length in numerous publications. Satgar<sup>75</sup> is of the view that the purposeful engagement by Unions in workplace forums could have benefits for worker control in the workplace. He however cautions that there would be no guarantees of success if there is autonomous worker self-management. Lehulere<sup>76</sup> opines that there were negative consequences in the past when workers were involved in attempts at participative structures. He contends that

- Worker solidarity is undermined due to competition between workers as a result of increased global competition.
- Unemployment remains a continuous problem due to reduction in jobs as a result of increased competitiveness.
- The withholding of labour through strike action is diluted by co-determinist engagement which limits the scope of strikes.
- The struggle for socialism is compromised as workers do not see themselves as a separate class due to them being co-opted.

A South African Municipal Workers Union member wrote in the COSATU magazine *The Shop-steward*<sup>77</sup> that workers are warned about the formation of workplace forums in the municipal sector. Workers were told that they should not fall into a management trap and they should get more information before engaging with management on the formation of

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<sup>75</sup> Satgar "The LRA and Workplace Forums: Legislative provisions, origins and transformative possibilities" in *Democracy and Development* 2 (1998) 60.

<sup>76</sup> Lehulere "Workplace Forums, Co-determination and Workers Struggle" *South African Labour Bulletin* 19 2 (1995) 42.

<sup>77</sup> *The Shopsteward* 1 February (1998).

forums. The official advises union members to retain existing bargaining structures. He iterates that management will neutralise them by allowing sweetheart unions to dominate. Members of these sweetheart unions, he claims are part of management and will thwart affirmative action initiatives. Union bashing will continue in the guise of workplace forums.

Many unions did not support independent workplace forums but insisted that if a forum is initiated it should be union –based.

Mapadimeng<sup>78</sup> confirms the above sentiments in his outline of attempts at worker participation during the apartheid era. He reminds us how works committees, liaison committees and works councils have all ended with the employer still in control. He cites examples from his research to demonstrate that workers lacked capacity to contribute to meaningful decision-making in response to the solutions proposed by management. His research has concluded that management has dominated the decision-making process leading to employees losing faith in the process.

Lehulere<sup>79</sup> suggests that unions oppose the establishment of workplace forums for the following reasons

- The forums will undermine the power base of unions by representing non-union members who do not pay a membership fee.
- Workers will opt to be represented at forum level, and would not see the need to belong to trade unions. This will see union membership declining leading to a decrease in the role played by trade unions in the economy.

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<sup>78</sup> Mapadimeng “ Workplace representation through the workplace forums in contemporary South Africa: Opportunities and constraints in *Society in transition* 9 (1998) 97.

<sup>79</sup> Lehulere (1997) *supra* 42.



- Unions role of keeping capitalism in check will be compromised leading to their inability to develop a strong organized working class.
- The weak relationship between the workplace forum and collective bargaining structures.
- The shift towards decentralized bargaining is encouraged by the formation of workplace forums leading to inconsistency in working standards and conditions in the same sector.
- There will be a tendency for business to flout national agreements which will be ignored in favour of workplace agreements.

Von Holdt<sup>80</sup> takes this debate even further and contends that the main problem with forums is the separation of collective bargaining issues from production issues. He opines that:

“Two elections and two elected power bases are a recipe for confusion, competition and conflict”

It is further argued that business could play these forums against each other in order to obtain their way in negotiations.

Baskin<sup>81</sup> commented that

“Many unionists ... see the forums as a threat. But this is, at least superficially, hard to sustain. A range of union safeguards have been built into the chapter on workplace forums. Employers cannot set up a forum, only a majority union can trigger one; and disestablishment is also provided for. Union officials are entitled to attend forum meetings and provide advice. Unions have preferential rights in nominating candidates for election. The agenda for forum- management interaction

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<sup>80</sup> Von Holdt “Workplace Forums: Undermining Unions” *South African Labour Bulletin* 19 6 (1995) 60.

<sup>81</sup> In Du Toit “Collective Bargaining and Worker Participation” *Industrial Law Journal* 15 (2000) 1552.

excludes items which are collectively bargained by the union...If anything the LRA can be accused of being contradictory in design. It wants to encourage co-operation whilst retaining extensive mechanisms that may simply perpetuate shop-floor adversarial (relationships).”

This view is supported by Brassey and Brand<sup>82</sup> when they contend that

“Though it has the trappings of corporatism, the workplace forum will in practice be no more than a sophisticated and more powerful version of the shop-stewards committee. As the majority union uses it to fight battles that they have lost elsewhere, it will become yet another bargaining forum whose proceedings are characterized by aggressive distributive bargaining across an adversarial divide in the plant itself.”

Both the above commentators make the point that workplace forums are biased towards the majority trade union that union commentators should not have any major gripe with it. Although their observations may be correct on certain aspects, there are obviously areas in the provisions that remain problematic.

Von Holdt<sup>83</sup> outlines three critical problematic areas with workplace forums. Firstly some of the issues for consultation and joint decision-making are restricted to soft Human Resources issues that would not have any real impact on workplace democracy and the majority of the issues for consultation deal with issues of production. The manner in which these issues are categorized ensures that real production issues cannot be meaningfully discussed and agreed as the legislature has stipulated in the provisions that it is not a subject for joint decision-making. The second point raised by Van Holdt is that the draft bill included provisions for the training of forum members which had disappeared

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<sup>82</sup> In Du Toit (2000) *supra* 1552.

<sup>83</sup> Von Holdt (1995) *supra* 59.

altogether from the final draft. This he claims is ‘a blow for the prospects of workplace democracy’. The third issue raised is that the rights for co-determination have been given to employees and not to trade unions.

Von Holdt<sup>84</sup> however, despite highlighting the flaws in the provisions admits that workplace forums could be a breakthrough for workplace democracy in that it could prevent unilateral restructuring in the workplace. His suspicion that the final draft would only contain watered down provision that would be useless to unions had in fact become reality.

Olivier<sup>85</sup> has neatly covers his concerns with workplace forums by suggesting that they fall into four basic categories.

### **1. Limited Sphere of Application**

Olivier quotes Finnemore<sup>86</sup> to accentuate his view that he finds it peculiar that workplace forums provide representation for all employees, but can only be triggered by a majority union. She questions the notion of a majority union triggering workplace forum; especially in workplaces where the majority of employees may be non-unionised or may belong not have union with a clear majority in a particular workplace. This argument can be taken to the absurd when one takes note that at the time only some 25% of workers were unionized out of a possible 15 million economically active workers.<sup>87</sup> The large majority of employees did not belong to unions and therefore could not act in concert to trigger a workplace forum. Commentators have estimated that the insistence that workplace forums can only be triggered by majority unions will exclude 74% of the workforce in South

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<sup>84</sup> Von Holdt “Workplace Forums: Can they tame Management “ *South African Labour Bulletin* 19 (1995).

<sup>85</sup> Olivier “Workplace Forums: Critical questions from a Labour Law Perspective” *Industrial Law Journal* 17(1996) 808.

<sup>86</sup> Finnemore (1995) *supra* 161.

<sup>87</sup> Bendix (1996) *supra* 211.

Africa.<sup>88</sup> The only reason that comes to mind for the application of the majority principle seems to be politically motivated.<sup>89</sup> It is a well known fact that the Congress of South African Unions is part of the ruling African National Congress alliance.

Another issue raised by Finnemore<sup>90</sup> relates to whether unions see such forums as enhancing their power. She questions what the incentive would be for unions to trigger forums over issues that they have already in most instances addressed through the collective bargaining process. In any event the limitation on the right to strike in favour of arbitration could serve as a dis-incentive for unions to trigger the formation of a workplace forum.

## 2. Majority Union Preference

Olivier<sup>91</sup> contends that the protection afforded to majority unions indicates that it places trade unions in a peculiar and privileged position in terms of the provisions of the Act. The provision of the trade union- based forum allows for the majority union or unions acting jointly forming a majority, to effectively elect all representatives at the forum from its elected shop-stewards. Olivier opines that this situation does not auger well for workplace democracy since the forum becomes just another union structure that excludes the rest of the workplace from the decision-making process. Du Toit concurs that union control will be the final outcome. Unions can decide when to initiate a forum and if the forum does not work to its favour can opt to dissolve the forum. Du Toit<sup>92</sup> sees the provisions as ‘creatures of trade unions and collective bargaining rather than creatures of statute. This Olivier

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<sup>88</sup> Olivier quoting Benjamin and Cooper “Innovation and Continuity: Responding to the Labour Relations Bill (1995) 16 ILJ 266.

<sup>89</sup> See Bendix (1996) *supra* 565.

<sup>90</sup> Finnemore (1995) *supra* 2.

<sup>91</sup> Olivier (1996) *supra* 811.

<sup>92</sup> Du Toit (2000) *supra* 547.

contends would stymie the establishment of workplace forums and defeats the intention of workplace forums to involve all workers in decision-making.<sup>93</sup>

The special status given to majority unions to establish the workplace forum, to change the constitution of the workplace forum, demand new elections of representatives, attend forum meetings and dissolve the forum blurs the distinction between collective bargaining and joint decision-making. The legislators originally intended to separate collective bargaining from workplace issues. The Explanatory Memorandum as cited above very eloquently makes this point. The actual provisions serve to negate these intentions as in practice it would be impossible to separate them. This would definitely lead to role conflict.

### **3. Tension between overlapping institution at plant level**

The fact that plant level bargaining as opposed to centralized bargaining is still prevalent in many establishments, the reasons for the formation of workplace forums becomes obsolete.<sup>94</sup> Even if workplace forums are established to run parallel to Plant level bargaining, the ‘adversarial’ nature of the relationship will still persist.<sup>95</sup> Foreign experience has shown that when workplace forum and Plant level bargaining structures are in competition with each other in the workplace labour peace will fail.<sup>96</sup>

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<sup>93</sup> Olivier (1996) *supra* 811.

<sup>94</sup> Olivier (1996) *supra* 12.

<sup>95</sup> Olivier (1996) *supra* 12.

<sup>96</sup> Olivier (1996) *supra* 13.

#### 4 Strike Action in workplace forum context

Olivier<sup>97</sup> sees it as rather unfortunate that the possibility of strike action is entirely excluded from the workplace forum in favour of alternate dispute resolution in the event of an impasse during consultation. The nature of co-operative decision- making would therefore be lost and adversarial relations perpetuated. It is suggested that a peace obligation clause would have allowed the parties to explore all avenues before embarking on the exercising of power.<sup>98</sup>

Du Toit<sup>99</sup> comments that when the legislation was drafted, government was aware of the fears of trade unions and the nature of the adversarial conflict that prevailed. The dilemma that it could not be easily appeased around this issue.<sup>100</sup>

Minority unions also face major challenges when it comes to workplace forums. They will not have any leverage to muster support for their viewpoint as the provisions are designed to alienate them. It has already been said that they cannot trigger a workplace forum as this is reserved for majority unions. Further the voting system for workplace forum members is heavily weighted against minority unions, more pertinently when it comes to trade union based workplace forums. These unions will therefore still be in favour of utilizing the collective bargaining structures which may provide a voice for them. If they are sufficiently representative or act in alliance with other minority unions to become the majority they may have better leverage. It would be interesting to see how a dispute between minority unions acting in consort would fare around issues that they are prevented from raising at a workplace forum but can be tabled at a collective bargaining forum. Minority unions would therefore still be restricted to contend with adversarial relationships.

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<sup>97</sup> Olivier (1996) *supra* 13.

<sup>98</sup> Olivier (1996) *supra* 13.

<sup>99</sup> Du Toit (2000) *supra* 1544.

<sup>100</sup> Du Toit (2000) *supra* 1545.

It would be quite apparent, after surveying what commentators say on workplace forums, that a major overall or re-think on the provisions as stipulated in the Act needs to be considered if parties are required to utilize the provisions. If the intention of the legislature is to really break from past adversarial practises and build co-operative participatory structures then it is suggested that the proposed 2002 amendments be reconsidered allowing for minority unions or non-union employees to trigger the establishment of the forums. Du Toit<sup>101</sup> divides critics of workplace forums into two schools of thought. The first school is made up of researchers who believe that the Labour Relations Act does not go far enough to differentiate between workplace forums and trade unions. The second school made up of trade unionists who believe it has gone too far. The first school contends that the basic tenets of worker participation have been ignored by compromises made to accommodate trade union concerns. The effect is that genuine worker participation does not take place since there is a blurring of the role of trade unions into one that still maintains control over issues in the workplace. The second school supposes that having two parallel structures in the workplace, namely workplace forums and collective bargaining structures creates inevitable conflict. They feel that workplace forums are given too much independence from trade unions.

Steadman<sup>102</sup> has eloquently summarised the reasons why non-statutory workplace participation is preferred over statutory participatory structures from research that was conducted on workplace participation structures as follows:

- Parties develop participatory structures that meet their particular needs
- All stakeholders are involved in designing the participatory structures

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<sup>101</sup> Du Toit (2000) *supra* 1552.

<sup>102</sup> Steadman "Workplace Forums in South Africa: A critical Analysis" *Industrial Law Journal* 25 (2004) 1193.

- All interest groups are included in the participatory structures, as far as reasonably possible, the principle being that any party who may undermine the implementation of decisions taken in the participatory structures should participate.
- All stakeholders are equipped to participate effectively
- Participants have opportunities to prepare for consensus seeking. For example, preparation in joint task groups, which develop a common understanding of issues and common proposals for discussions, enhances decision-making and builds capacity to participate.
- The relationship between parties is characterized by trust and mutual respect. Each party feels secure that the other party will not attempt to appropriate the gains resulting from their common effort.
- There is clarity and agreement on the issues that the forums may deal with .This is typically defined in a jointly developed constitution .In some cases the constitution specifies the exact issues over which discussions may take place
- There is clarity and agreement on the manner in which the issues are dealt with i.e. unilateral decision making, information sharing, consultation, and negotiations or joint decision making.
- High levels of disclosure of information exist and in some cases guidelines are agreed to manage this process
- Collective bargaining structures and procedures are well established
- The relationship between participatory structures and collective bargaining structures is clear and functional.
- It is agreed that power will not be used within the participatory structures although it may well be agreed that unresolved matters may be referred to collective bargaining with its associated dispute –resolution mechanism



- There is clarity and agreement on the conflict and /or dispute resolution processes available in the event of deadlock in the participatory structures and the collective bargaining structures
- The structure delivers as intended
- A credible, highly skilled, experienced and mutually acceptable individual champions the system.
- The participatory systems as a whole is actively monitored, maintained and managed.
- The process of participation is managed through times of change in the organization, for example changes in management, ownership and leadership, to ensure ongoing commitment and continuity.
- The system provides for both direct and indirect participation (i.e. workplace and head office levels).
- Representatives in the system are accountable to their constituencies.
- Communication is continuous, effective and, ideally, done jointly. In addition, there is extensive communication concerning the activities and achievements of the structure.
- The logistics (venues, secretarial assistance, transport arrangements, etc) intended to serve the system are effective and efficient.
- An agreed code of conduct regulates behaviour in the forum
- Where appropriate, external technical and process experts are used to enhance the quality and efficiency of decision-making.
- Members of both executive and line management participate in the forum , greatly enhancing the credibility of the system and decision-making and the implementation processes

- The participation process is adaptive and responsive to the environment in which it operates instead of relying on the constitution, rules and procedures.

It is quite intriguing to note that non-statutory forums have gained more credence amongst the role-players. Perhaps there are lessons that need to be learnt from those experiences. The fears that parties display in invoking the statutory provisions may be real and mechanisms should be put in place to ensure that a conducive climate is created and proper understanding is communicated that will allow parties to feel comfortable in establishing such forums in terms of the Act. The maturity and trustworthiness of parties, readiness, nature of the workplace, existing structures with their inter-relatedness to the workplace, the impact of centralized collective bargaining, strength of unions, attitude towards genuine disclosure of information, dispelling suspicion and the socio-politico-economic circumstances in an enterprise has to be carefully considered to ensure that all possible impediments are eradicated leading to a conducive environment.

It is opined that should the above conditions not yield the required increase in the utilisation and establishment of forums, it would be abundantly clear that the system is destined for failure. The legislature should then allow for parties to set up non-statutory forums according to their own negotiated rules. It would be no use dictating to the parties how to manage their relationship through legislation when their own systems seem to have the same effect.

## CHAPTER FIVE

### TRENDS ANALYSES AND RESEARCH RESULTS

#### 5.1 TREND ANALYSIS

Research results conducted by various sources have concluded that the initiation rate for the establishment of workplace forums was extremely low since its inception. Much of the research was conducted by the Sociology of Work Unit (SWOP) attached to the University of Witwatersrand. The Unit has monitored workplace forums since 1997.

A trend analysis has been conducted since 1997 to demonstrate the prevalence of such forums.

In 1997, SWOP observed that there were only thirty four (34) applications for the establishment of workplace forums.<sup>103</sup> It further observed that only twenty (20) of such applications were successful. They further stated that reasons for the low number of applications could be related to:

- The inflexibility of the application process
- Inadequate training of workplace forum members
- Limited scope of issues covered by the workplace forums

In 1998 there were forty six (46) applications with very few workplace forums actually being established.<sup>104</sup> The Unit had then decided to interview organizations to ascertain reasons why the workplace forums had not been established. In 1999 of the fifty six (56) applications received by the CCMA only six (6) workplace forums were eventually

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<sup>103</sup> Psoulis and Macun *Monitoring Workplace Forums, Report 1* (1997) Sociology of Work Unit.

<sup>104</sup> Psoulis, Moleme, Spratt, Ryan *Workplace Forums: What is their Future* Sociology of Work Unit Report 9 (1999) 3.

established, but three (3) were then dissolved.<sup>105</sup> The findings of both the 1998 and 1999 surveys have concluded that workplace forums have not been established for the following reasons<sup>106</sup>

- Unions lost interest opting to support the COSATU position to oppose Workplace Forums (50% of respondents)
- The failure of the Applicants to meet the CCMA application criteria (27% of respondents)
- Organizations were too small or too dispersed to form a workplace forum (11% of respondents)
- Management opposition to the formation of a workplace forum. They felt that the bargaining chamber was adequate to deal with workplace issues and traditional bargaining would suffice (8% of respondents)
- Undisclosed reasons (4% of respondents)

In 2002 there were only fourteen (14) applications made to establish workplace forums and only one (1) workplace forum was actually established.<sup>107</sup>

By the end of 2004 a total of sixty seven (67) referrals were made for the establishment of workplace forums since the inception of the provisions in 1996.<sup>108</sup> It is important to note that were not a single forum established in the Public Service although there were approximately five applications made in 1997.<sup>109</sup> The five departments that attempted to establish workplace forums were the Departments of Justice, Health (2 Applications), Agriculture and the South African Police Services.<sup>110</sup> The reason for the non-establishment

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<sup>105</sup> Psoulis et al (1999) *supra* 4.

<sup>106</sup> Psoulis (1997) *supra* 6.

<sup>107</sup> CCMA *Report on Workplace Forums* November (2004) 3.

<sup>108</sup> CCMA *Workplace Forums Update* November(2004).

<sup>109</sup> CCMA *Report on Workplace Forum Research on Public Sector* (2002) 1.

<sup>110</sup> CCMA (2002) *supra* 3.

ranged from jurisdictional issues to applications been withdrawn.<sup>111</sup> The unions involved in these applications were two COSATU affiliates namely the NEHAWU (3 applications) and POPCRU. DENOSA was the fifth applicant union.<sup>112</sup>

It must be noted that there exists various departmental bargaining chambers established under the Public Service Co-ordinating Bargaining Council<sup>113</sup> that deliberates on workplace issues in the different departments. This system is widely used with regular reports forwarded to the Council on progress made on issues deliberated on. The writer is involved in the Justice Bargaining Chamber and can confirm that issues discussed and negotiated at the Chamber ranged from transformation in the Department, Job Evaluations, implementation of new Policies and Procedures, redeployment, Performance Management Systems and rationalization. The informal route taken by the parties in the public sector seem to be working well if not better than where workplace forums operate. It has been found that the CCMA does not encourage parties in the public sector to establish workplace forums.<sup>114</sup> This has led to disinterest. Unions in the public sector referred to workplace forums as ‘born dead’ or ‘white elephants’<sup>115</sup> Similar sentiments as those espoused by Unions in the private sector have also been echoed by public sector unions. In addition both parties felt that workplace forums are not properly regulated by the CCMA.<sup>116</sup>

It is interesting to note that from November 2004 up to December 2006 there has been not a single new application for the establishment of a workplace forum<sup>117</sup> this information was obtained by the writer by contacting the CCMA to update the statistics received since the last update in 2004. The decline in the establishment and eventually applications for

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<sup>111</sup> CCMA *supra* 3.

<sup>112</sup> CCMA *supra* 3.

<sup>113</sup> The PSCBC is the bargaining Council accredited by the CCMA. It comprises of various sectoral councils and Departmental Chambers.

<sup>114</sup> CCMA(2000) *supra* 5.

<sup>115</sup> CCMA *supra* 5.

<sup>116</sup> CCMA *supra* 5.

<sup>117</sup> CCMA Operations and Information Dept Jan 2007.

establishment is concerning. The legislature should take note of the fact that whilst there is a clear decline in the formation of statutory forums there seems to be an increase in the formation of voluntary forums, despite the initial problems with such forums. Unions have become more sophisticated in dealing with workplace issues to such an extent that the earlier fears relating to management initiated participatory structures have subsided. Steadman<sup>118</sup> argues that

“...the fact that non- statutory participative structures have flourished and workplace forums have not is an indication of the party’s preference for a voluntarist approach to labour relations. Making workplace forums mandatory would certainly be rejected by employers and considering the objections the unions have to workplace forums, would...be resisted by unions”

## **5 2 THE FUTURE OF WORKPLACE FORUMS**

The future of workplace forums has been debated by many commentators. All commentators suggest proposed changes to the legislation to attract utilisation of the provisions.

Steadman proposes various amendments be made to the provisions in order for the parties to see value in establishing workplace forums.<sup>119</sup> Although all the suggestions are not supported at least it is the beginning of the debate around what is necessary to save the notion of workplace forums in the South African workplace.

The first of these proposals revolves around definitions. She suggests that the deletion of the definition of ‘a representative trade union’. Her reasoning for such deletion seems to be flawed and would lead to a chaotic state of affairs as any group of workers could trigger a

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<sup>118</sup> Steadman “Workplace Forums in South Africa: A critical Analysis”(2004) 1195.

<sup>119</sup> Steadman *supra* 1197.

forum. What would be more appropriate is not to restrict the trigger for the establishment of workplace forums to a majority union but also to sufficiently representative unions or group of unions. Employees that do not belong to a union can trigger the formation of a forum by petitioning the employer to form a union. This would be a more inclusive method.

The suggestion that the issues for consultation and joint-decision –making be deleted and be an issue that parties agree to in the constitution is a novel idea. The major flaw in the provisions is to dictate to the parties on these issues. The deletion of these provisions would have the support of unions and most employers who are genuine about effective workplace participation. The parties need to see themselves as partners. To this end hiding behind some restrictions regarding what and when information should be disclosed prevents meaningful inputs. Transparency and openness from all parties is the hallmark of a relationship built on mutual trust and understanding.

The suggestions relating to the role of the Commission is also a good one.<sup>120</sup> A forum cannot just be imposed on a party who does not want to participate. There should be consensus that all stakeholders are interested in wanting such a forum. The suggestion that management be a party to the forum would negate the reason for the formation of a forum. This notion would not gain the support of both parties. Further it is agreed that the Commission should be provided with more resources to promote, facilitate and train forum members.

What is however apparent is that the Act is silent on the status of an agreement that is signed at a workplace forum. Steadman suggests that the constitution of the workplace forum should be regarded as a collective agreement. This provision should be extended to included any agreement that is reached at the workplace forum also be regarded as a collective agreement. Both these suggestions, however, would entail amendments to the

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<sup>120</sup> Steadman (2004) *supra* 1197.

definition of a collective agreement so that it is not restricted to representative trade unions only but extended to included registered workplace forums.

The suggestion that the right to strike be included for dispute of interest disputes is inconsistent with international norms and guidelines. In the South African context, however, it may be appropriate. It is suggested that the parties agree on what type of specific issues would be arbitrated on. Those issues which are agreed to that would not be subject to arbitration could have options such as mediation, facilitation, or other alternate dispute resolution methods. Should this fail then the union can decide whether it be referred to conciliation and opt for arbitration or a strike. This would, it is suggested, be more tenable as all avenues to resolve the dispute would be exhausted. There also seems to be support for the notion that by failing to provide the right to strike it would alienate unions. Unions would rather use other collective bargaining structures which would allow the option to strike in certain circumstances. The above amendments would remedy this problem.

Steadman suggests that issues not agreed to at a forum be referred to the bargaining chamber for negotiation.<sup>121</sup> It is opined the confusion between collective bargaining and participation would be exacerbated. It is best that the processes do not cross paths.

The proposal that there should be no specific differentiation between the public and private sectors is supported. The rules should not be different as the process should be the same.

It is opined that the definition of a workplace is extremely confusing and should be reworked. It seems as if the definition is ambiguous and misleading. It is also opined that the absence of bargaining units could be construed to mean that in the workplace forum situation any employee can participate irrespective of their level in organization. This

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<sup>121</sup> Steadman *supra* 1199.



would leave the majority of employees, who are normally at the lower levels vulnerable to be manipulated by management. It has been said that the capacity of trade unions to understand and deal with forum issues is one of the barriers to participation. One has to also include lower level employees into this same category.

Psoulis and Macun<sup>122</sup> state that in order to secure the future of workplace forums the Labour Relations Act should reflect 'the reality of existing forms workplace representation.' Rather than forming new structures they proposed that existing structures that deal with worker participation be made permanent. If this means registration with Commission it would not be supported. What seems to be forgotten in this proposal is that many small enterprises do not have such structures and would be excluded from participation.

Their second proposal is that the Commission should adopt a strategy to facilitate the establishment of workplace forums by providing assistance, guidelines, and role clarification to forum members. This is a good suggestion as the Commission could play a more active and meaningful role in ensuring that once established forums succeed. The third proposal relates to the integrity of data. They suggest a central registry be established to provide valid and constructive information on workplace forums. This is valid point. It is difficult to obtain valid tested information from the Commission. There does not even exist a database of all active workplace forums. Although the Commission possesses a list of workplace forums, it cannot be determined which of these forums are still operational.

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<sup>122</sup> Poulis and Macun (1999) *supra* 15.

Du Toit<sup>123</sup> makes mention that the Minister of Labour was perturbed that only twenty (20) workplace forums was set up in terms of the Labour Relation Act and intimated that there may be certain amendments to the legislation to:

“...review the requirement that trade unions must trigger the establishment of such forums...as (it is believed that workplace forums) can constitute meaningful avenues of engagement ...on issues such as restructuring and affirmative action”<sup>124</sup>

Many commentators have echoed the above averments and added some of their own. For the sake of the South African economy to effectively compete in global markets, the above suggestions have to be taken seriously or else other mechanisms should be utilised.

It is opined that although there is validity in the suggestions made by the commentators cited above, it is best left to the parties to determine their own fate. It is fruitless having legislation that is not properly utilized for benefit of the parties. It is suggested that the legislature repeal the provisions as stated in the Act and allow for voluntary the promotion of voluntary structures that is crafted by the parties themselves.

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<sup>123</sup> Du Toit (2000) *supra* 1547.

<sup>124</sup> Du Toit (2000) *supra* 1547.

## CHAPTER SIX

### CONCLUSION

Worker participation at all levels is important in any industry. Worker participation at enterprise level is paramount. There are many flaws in the statutory framework as espoused in the current provisions in South African legislation. A realisation by the legislators with regard to past union experience has led to provisions that were one sided in favour of majority trade unions. The legislator may have been short-sighted into thinking that such protection would be the saving grace for institutionalised workplace participation.

The submissions made by Olivier<sup>125</sup> that the workplace forum system is in need of comprehensive rethinking and re-evaluation is supported. We should consider the experience that other countries provide, especially with regard to the shortcomings in the system. Such experiences will guide us into conducting a proper review of the workplace forum provisions in South Africa. Although the introduction of the system is commendable adequate attention should be paid to any duplication with other participative structures such as collective bargaining structures. The capacity of unions to understand what workplace forums can do to enhance workplace democracy has can never be over emphasised. So too should the notion that employers can still ride roughshod over unions as it had done in the past be eradicated. It should be stressed that the State which includes COSATU as its alliance partner, would not tolerate any attempt by management to co-opt, overpower or

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<sup>125</sup> Olivier *supra* 814.

undermine workers rights in the workplace. Workplace participation has to benefit both parties who would operate with the full understanding that the aim of such participation is to ensure the survival of both the enterprise and workers. It is clear that the workplace forum system as it is envisaged by the Act has not developed in the way the drafters thought it would. The future success of workplace forums will depend on the changing of attitudes of the parties involved and whether the legislature has succeeds in creating a new framework worthy of existing alongside the adversarial relationship to which the social partners have become so accustomed.<sup>126</sup>

However, the reality is that voluntary structures are growing at an alarming rate.<sup>127</sup> It is clear that there is currently no difference between voluntary worker participatory structures and workplace forums as it stands now. Nothing stops parties from registering the existing structures with the Commission. Perhaps the parties do not feel obliged to do so since they will then be monitored with no real benefits coming from following the registration process.

It is obvious that trade unions are reluctant to establish workplace forums. Any review or amendments to the provisions have to take into account the existing social reality and historical context within which the parties operate.

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<sup>126</sup> Olivier *supra* 814.

<sup>127</sup> See Steadman (2004) *supra* 1189. The Rand Water experiment according to Steadman has made significant strides.

It is crucial that for South African labour relations that worker participation moves away from the adversarial mindset to one that is based on co-determination. Anstey<sup>128</sup> comments that

“ South Africa has evolved an intensely adversarial system of labour relations over the past twenty years – tough bargaining, a high level of strike action, and litigation in the courts have been its salient features...The new industrial relations in the developed countries have demanded a shift from ...adversarial bargaining to futurist- oriented, wealth-creative processes; a shift from power based bargaining to information driven problem-solving; and from the distance of centralized collective bargaining forums to the enterprise and workstations.”

If South Africa wishes to become a player in the global economy it has to embrace the notion of workplace structures such as workplace forums. The Explanatory Memorandum to the new Labour Relations Bill<sup>129</sup> has emphasized the reasoning and rationale for the introduction of workplace forums. Many flaws have been identified and suggestions for improvements and review made. It is in the hands of the State to analyse the suggestions made and come up with solutions that is supported by all parties. Should the review of the legislation fail to improve worker participation in the workplace, South Africa is sure to lose ground as a global player.

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<sup>128</sup> Anstey (1995) *supra*. 6

<sup>129</sup> Ministerial Task Team (1994) *supra*.

From research conducted in the sphere, it is apparent the other voluntary structures are operational in some quarters. If all else fails, perhaps such forums may be the only saving grace for worker participation in South Africa.

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