

**THE IMPACT OF LABOUR LAWS ON SMALL FIRMS:
A STUDY OF EMPLOYER PERCEPTIONS OF THE LABOUR RELATIONS ACT
(66 OF 1995) AND THE BASIC CONDITIONS OF EMPLOYMENT ACT (75 OF
1997) IN GRAHAMSTOWN, PORT ALFRED AND PORT ELIZABETH**

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This thesis is dedicated to my mother. She raised me single-handedly, and made sure that I got the best education possible even though we could not afford it. This dissertation is the product of her long-term investment in my education. Although she is not formally educated, her persistence and optimism has encouraged me to always seek to do my best. She never got the opportunity to get tertiary education because all her efforts were concentrated on my education. So this dissertation is not only my product but also a product of my mother's efforts.

ABSTRACT

This study sought to explore and explain the impact of labour laws on small firms, focusing on employer perceptions of the Labour Relations Act of 1995 and the Basic Conditions of Employment Act of 1997 in three towns of the Eastern Cape. It is important to focus on this impact of labour laws on these firms because of the high unemployment that faces the country. In this regard, it must be emphasised, firstly, that small firms are central to job creation; therefore, they contribute to a reduction in the unemployment rate; hence, the strategies created by the government to reduce any burdens (including regulatory burdens) on small firms. It is therefore important to study the impact of labour law on small businesses in order to assess the regulatory burden on small firms.

The theoretical framework which underpins this study on the impact of labour law on small firms arises from the neo-corporatist critique of neo-liberalism. The two frameworks maintain the extent to which the government should intervene in the industrial relations system. Liberalism maintains that there should be a minimum role of the government, which involves only the facilitation of a framework for negotiations between employers and employees. Corporatism, however, maintains a social democratic approach, and holds that there should be an active role of the government in the industrial relations system with business, labour and the state working co-operatively (Klerck, 2009). This theoretical framework therefore shapes the extent to which employers perceive labour laws or state's regulatory role impacts small businesses.

The data was collected through the qualitative inquiry; using face-to-face, semi-structured interviews. The findings in this study included negative employer perceptions of labour laws. More specifically, many of the employers that were interviewed claimed that labour laws were burdensome on their businesses. They claimed that labour laws imposed financial and administrative costs to their firms, negatively affected the employer-employee relationships in these firms as well as the employing decisions of the employers. As a result, the employers saw labour laws as undermining flexibility and imposing unfair rigidities on small firms. Furthermore, employers perceived South African labour laws as not addressing the unique

circumstances of small firms. They maintained that labour laws treated small firms similarly to large firms. Even though the employers held these perceptions of labour laws, it was evident that these subjective perceptions did not reflect the objective impact of labour laws on small firms. This was firstly related to the fact that many of the employers that were interviewed had negative views of labour laws but these views were not substantiated by particular events in their firms. Secondly, it was revealed that the employers' perceptions of labour laws were based on their misconception or misunderstanding of labour law.

Thirdly, it was revealed in this thesis that small firms were not affected in the same way to big firms by labour regulation. This was related to the fact that many of the small firms' employers that were interviewed tended to be less concerned by regulation. Specifically, although many employers that were interviewed claimed that labour laws were burdensome on their firms it was evident that regulation was avoided because of the informality that characterised these firms. Consequently informality mediated the impact of labour laws on these firms, and labour laws imposed less 'costs' on these firms. However, it cannot be argued that small firms are isolated from the sphere of labour laws. Rather, although these firms were governed by regulation it was found that the extent to which employers complied with regulation depended on the extent to which organisational practice already reflected similarity with the legislative objective.

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ACRONYMS

AHI- Afrikaanse Handels Instituut

ANC- African National Congress

AsgiSA- Accelerated and Shared Growth Initiative in South Africa

BCEA- Basic Conditions of Employment Act

CCMA- Commission for Conciliation, Mediation and Arbitration

COFESA- Confederation of Employers of South Africa

COIDA- Compensation for Occupational Injuries and Disease Act

COSATU- Congress of South African Trade Unions

DTI- Department of Trade and Industry

EEA- Employment Equity Act

GDP- Gross Domestic Product

GEAR- Growth, Employment and Redistribution

ILO- International Labour Office

LRA: Labour Relations Act

NAFCOC- National African Federated Chambers of Commerce

NEDLAC- National Economic Development and Labour Council Act

OECD- Organization for Economic Co-operation and Development

OHSA- Occupational Health and Safety Act

SACOB- South African Chamber of Business

SBP- Strategic partnerships for business growth in Africa

SDA- Skills Development Act

SMMEs- Small, micro, medium enterprises

UIF- Unemployment Insurance Fund

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1

INTRODUCTION

1.1 INTRODUCTION

It is evident that South Africa faces exceedingly high levels of unemployment. As a result, many policy-makers (especially the government) have come up with strategies of employment creation in the country. In doing so, the government has recognised the importance of promoting or encouraging entrepreneurial growth in the country. Small firms demonstrate this entrepreneurship as many create their own independent, small firms. More importantly, these small firms have been known to have a great potential of creating jobs, and thus reducing the high unemployment in the country. It is for this employment creation role that the South African government attempts to develop the small business sector. One way of doing this is to eliminate or reduce any burdens this sector may bear, and one of these includes the regulatory burden. For the purposes outlined above, this thesis will therefore focus on the impact of labour laws on small firms. The focus of this study will be in the Eastern Cape, more precisely; Grahamstown, Port Elizabeth and Port Alfred.

The sections below will focus on the role of the small business sector in sustaining economic growth, provide an outline of the impact of labour laws on small firms, and *explain* the theoretical foundation that underlies this research. The final section will provide the layout of the thesis.

1.2 THE ROLE OF THE SMALL BUSINESS SECTOR IN SUSTAINING ECONOMIC GROWTH

Democracy in South Africa emerged in a context of high levels of structural unemployment (Seekings, 1994; Bhorat and Cheadle, 2007). The highest contributing factor to this unemployment is said to be the poor economic growth performance in the country. Thus, the post-apartheid government sought to reduce unemployment through economic growth (Cawker and Whiteford, 1993; Van Niekerk and Le Roux, 2001). The government identified the small business sector as an important variable in sustainable economic growth through

employment creation, as the sector is regarded as being central in the processes of employment creation (Matiso, 2008). The small business sector in South Africa involves all small, medium, and micro enterprises (SMMEs). Section one of the National Small Business Act of 1996, as amended in 2003 and 2004, defines these enterprises as a distinct business entity that is managed by one or more persons, including any branches it may have, that is carried out in any sector or subsector of the economy (Cawker and Whiteford, 1993). Small firms are considered to be independent firms with less than fifty employees (International Labour Office, 2006).

In 2004, it was revealed that small businesses made up about 95 per cent of all enterprises in South Africa (Annual Review of Small Business in South Africa, 2004). They accounted for 27-34 per cent of total GDP in 2006. In terms of officially registered SMMEs that are economically active, the sector expanded by 27 per cent between 2004 and 2007 (from 422 000 to 536 000 firms). Moreover, the literature indicates that these enterprises do not exist for long (on average, they exist for less than 3.5 years). The government regards small businesses as central to economic growth and has committed itself to developing this sector based on three strategic pillars. These include increasing the supply of financial and non-financial support, creating demand for SMME products/services, and reducing regulatory constraints (Annual Review of Small Business in South Africa, 2009).

1.3 LABOUR LAW AND THE SMALL BUSINESS SECTOR

In regarding economic growth as an important factor to reduce unemployment, it becomes significant to study regulation. This is so because regulation shapes all economic activity (Kitching, 2006). Moreover, as can be seen from the South African policies on the development of the small business sector, labour regulation plays a significant role in the sector. Labour law is a framework that is concerned with regulating the employment relationship between employers and employees as well as the relations between trade unions and their members, unions and employers, and between unions, employers and the state (Creighton and Stewart, 2005). The post-apartheid government introduced a number of labour legislation programmes that apply to all races and sectors, and complied with international labour standards such as the fundamental rights to ‘associate, organize, bargain and strike’ (Clarke, 2004: 558; Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie,

1996: 20-1). These include the National Economic Development and Labour Council Act (35 of 1994), the Labour Relations Act (66 of 1995), the Basic Conditions of Employment Act (75 of 1997), the Employment Equity Act (55 of 1998) and the Skills Development Act (97 of 1998) (Bhorat, Lundall and Rospabe, 2002; Damant and Jithoo, 2003, Donnelly and Dunn, 2006). Thus, if the small business sector is regarded as being crucial in reducing unemployment in South Africa and can be developed through the reduction of regulatory burdens, it becomes significant to study the impact of labour law on small businesses.

Fundamental to the study of the impact of labour law on small businesses is the labour market flexibility debate, which focuses on the nature and extent of regulation within the South African labour market. On the one hand, is the view that the South African labour market is too rigid and that it should be 'deregulated' to promote the growth of small businesses. This view parallels the economic rationalism of the Free Market Foundation, which claims that labour legislation protects workers at the expense of the unemployed and hinders economic growth by undermining the competitiveness of small businesses (Van Niekerk, 2006; Bezuidenhout and Kenny, 2000; Davies, 2009; Bosch, 2003). In this sense, labour law in South Africa is perceived by employers as being too rigid because it provides a framework that forbids firms from competing through the exploitation of labour and compels them to compete on the basis of other costs and factors such as quality, reliability and service (Somavia, 1999; Davies and Freeland, 2004; Collins, 2003). Consequently, most employers adopt the low-road response to labour law through hiring casual workers (who lack job security and earn little or no training) as a way of reducing labour costs and increasing flexibility, rather than the high-road response which involves business competing on the basis of quality (through training of workers and high wages) (Palley, 2004; Theron 2005; Von Holdt and Webster, 2005, Bhorat, 2006; Theron and Godfrey, 2000). Some international studies, for example the World Competitive Report and the 2006 Doing Business Survey of the World Bank, refer to the South African labour market as among the most rigid in the world. This alleged rigidity is often related to the clauses governing dismissals, wage determination, working hours, and fixed-term contracts (Benjamin, Bhorat and Cheadle, 2010, Rankin, 2006). This is a view that is held by many employers in South African small firms. Employers in these firms view labour laws as a serious constraint on doing business. For example, they argue that provisions on dismissals have an indirect effect of restricting the exercise of managerial decision-making. For instance, unfair dismissal laws require

management to exercise decisions in a manner that is fair. The restraints may be of a procedural nature (requiring adherence to procedures before a decision is made) or of a substantive nature (requiring an evaluation of the content of the decision) (Benjamin, 2005).

On the other hand, an OECD study revealed that the alleged rigidity of South African labour legislation is a misconception (Benjamin *et al.*, 2010). More precisely, it is revealed that the provisions of South African labour laws, including the sectoral minimum wages, collective bargaining and the provisions on unfair dismissals are comparable with international norms. Thus, it has been argued that much of the debate on South African labour regulation deals with rhetoric or perception-based evidence, rather than empirical evidence (Benjamin *et al.*, 2010). It will be the objective of this paper to scrutinise this debate through studying the impact of labour laws on small businesses in order to reveal whether South African labour laws are really a burden on small businesses as many employers claim.

As illustrated above, there is a tendency for the debates to be portrayed as ideological battles between proponents and opponents of regulation (Sengenberger, 2001). This is a false dichotomy because there can never be a total absence of regulation. ‘Deregulation’ concerns the replacement of one set of regulations with another and is therefore more accurately described as re-regulation (Sengenberger, 2001). A fruitful avenue of analysis is to determine whether regulation is appropriate; that is, to ask the question whether the legislation reflects an appropriate balance between the needs for economic growth and social justice (Benjamin, 2005; Roskam, 2007). South African labour laws are premised on the notion of ‘regulated flexibility’, which involves a framework within which a balance is achieved between employers’ interest in flexibility and employees’ interest in security (Cheadle, 2006; Klare, 2000; Standing, Sender and Weeks, 1996). In this regard, high regulation is not viewed as being bad for business but as being good. For example, strict unfair dismissal provisions may create more incentives for employers to train workers (Benjamin, 2007). However, given this commitment to regulated flexibility, there has to be a continuous evaluation of the extent to which a balance between flexibility and security is struck, in other words, whether the mechanisms intended to promote regulated flexibility are appropriate.

This balance can be determined by (among others) assessing the burdens imposed by regulation on small firms (Van Niekerk, 2006). For example, employers in small businesses in South Africa view regulation as detrimental to their businesses because of the imposition of significant administrative and labour costs (Bezuidenhout and Kenny, 2000). These employers argue that a key reason for this is that small firms are treated like large firms. To be sure, it has been argued that the flexibility (for example, differences in treatment for small businesses and limitation of labour law rights) that is afforded by international standards is not reflected in South African labour law. As a result, many employers in small firms argue that South African labour laws do not adequately reflect the needs of small firms. This is because small firms are exempted from some provisions, but they are not exempted from unfair dismissal laws or unfair labour practices provisions; workers serving a qualifying period are not excluded from certain forms of protection; and labour legislation requires a formal hearing before effecting a dismissal (Cheadle, 2006; Van Niekerk, 2006). All of the above-mentioned are allegedly responsible for the high costs incurred by small businesses, which they can ill-afford because of limited resources (Van Niekerk, 2006).

It is also important to note that the impact of labour law on small firms is dependent on the context of the firm (Edwards, Ram and Black, 2003). That is, there is a linkage between the 'public justice' of the law and the 'private justice' of firms' own internal arrangements (Henry, 1983). When accounting for this context, it is important to study industrial relations in small firms. The research on industrial relations in small firms has revealed two contrasting perspectives. Firstly, the 'small is beautiful' view, which emphasises close employment relations and low levels of conflict in the workplace because of flatter hierarchies and close working relations (Bacon *et al.* 1996). This view emphasises the internal regulation of the employment relationship; that is, labour regulation originates from what the employer and employees in a particular small firm define as 'fair' (Edwards *et al.*, 2004; Harris, 2002). This view is also closely associated with the 'informality' that characterises industrial relations in small firms, which is fundamental in mediating the impact of labour law (Edwards *et al.*, 2003). Research has shown that the impact of labour law on small firms is often minimal given the flexibility offered by the informal organisation of the firm (Holliday, 1995; Bevan *et al.*, 1999; Marlow, 2002). Secondly, small businesses are seen as a 'bleak house'. In this view, employment conditions in small firms are harsh because the firms are exposed to intense competitive pressures and are dependent on large firms as

customers (Rainnie, 1989). This view accentuates the external determinants of regulation; that is, workplace rules originate largely from national and sectoral contexts, and from labour legislation (Deakin and Sarkar, 2008; Barrett and Rainnie, 1989). Research in England has shown that market conditions have a significant influence on how labour law affects small firms (Edwards *et al*, 2003).

In opposition to the stark contrast between the perspectives outlined above, it has been argued that the impact of labour legislation on small firms is not readily predictable in advance; statutory regulation is mediated not only by the different external environments in which the firms operate, but also by the often opaque and complex internal dynamics within an individual small firm (Ram and Edwards, 2003). Thus, in exploring the impact of labour law on small businesses, this research will explore these views to determine which approach to labour regulation (internal or external regulation) is most pertinent to small firms.

1.4 THEORETICAL FOUNDATION: NEO-CORPORATIST CRITIQUE OF NEO-LIBERALISM

The theoretical framework which underpins this study on the impact of labour law on small firms arises from the neo-corporatist critique of neo-liberalism. The two frameworks maintain the extent to which the government should intervene in the industrial relations system. Liberalism maintains that there should be a minimum role of the government, which involves only the facilitation of a framework for negotiations between employers and employees. Corporatism, however, maintains a social democratic approach, and holds that there should be an active role of the government in the industrial relations system with business, labour and the state working co-operatively (Klerck, 2009). Therefore, in order to grasp the impact of labour laws on small firms it becomes important to focus on the rules governing the South African labour market, through analysing how the neo-corporatist critique of neo-liberalism.

1.5 THESIS OUTLINE

This thesis consists of eight chapters. The second chapter focuses on the theoretical framework which underpins this research. The third chapter includes the research design that

was adopted for this research. From the fourth to seventh chapter, is a discussion of the empirically-based chapters, in other words, these chapters will include an analysis of the data which was collected. The fourth chapter focuses on how the employers that were interviewed perceive regulation. In looking at these perceptions in this chapter, the labour market flexibility debate will be explored by assessing the extent to which South African labour laws have undermined flexibility and imposed unfair rigidities on small firms. The fifth chapter will look into the extent to which employers comply with labour laws. The sixth chapter involves or outlines the different strategies adopted by employers in responding to labour laws. The seventh chapter will address the extent to which there is a fit between labour laws and the unique circumstances of small firms. The eighth chapter is the final one, which will provide a conclusion to this paper through summarising it and finding connections between existing literature and the findings of the current research. This chapter will also highlight the importance of the current research and how it has contributed to new knowledge.

2

NEO-LIBERAL AND NEO-CORPORATIST FORMS OF LABOUR REGULATION

2.1 INTRODUCTION

Labour law is a framework that is concerned with regulating the employment relationship between employers and employees as well as the relations between trade unions and their members, unions and employers, and between unions, employers and the state (Creighton and Stewart, 2005). The post-Apartheid government in South Africa introduced a number of labour legislation programmes that apply to all races and sectors, and complied with international labour standards such as the fundamental rights to ‘associate, organize, bargain and strike’ (Clarke, 2004; Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie, 1996). These programmes include the National Economic Development and Labour Council Act (NEDLAC 35 of 1994), the Labour Relations Act (LRA 66 of 1995), the Basic Conditions of Employment Act (BCEA 75 of 1997), the Employment Equity Act (EEA 55 of 1998) and the Skills Development Act (SDA 97 of 1998) (Bhorat, Lundall and Rospabe, 2002; Damant and Jithoo, 2003; Donnelly and Dunn, 2006). These Acts provide the legal foundation for the South African labour market (Bhorat and Van der Westhuizen, 2008). When looking at these labour laws, it is important to recognise the fact that they cannot be looked at in isolation but depend on the national context of the country. More specifically, when studying labour laws in South Africa, one needs to grasp the political and economic realms that affect these laws.

In focusing on the political and economic spheres in the country, it is important to recognise that economically, South Africa represents a middle-income country whose wealth cannot be isolated or separated from the international economy over which it has little or no control (Bramble and Barchiesi, 2003). This has occurred through the phenomenon of globalisation, which coincided with the growth of capitalism. It has been argued that globalisation is the process of change, which increases interconnectedness and interdependence among countries

and economies, through better world-wide communication, transport and trade-links. Globalisation has created a link of national currencies through the interference of financial markets and currency markets worldwide. For example, the foreign currency exchange between South African and other countries through exports and imports creates the systematic co-ordination between the currencies of these countries. This link between currencies creates interdependence in monetary policies all over the world, thereby loosening the control each country has over its own economic policies. This is said to have occurred in many developing countries, including South Africa in the 1980s. Consequently, during this period South African economic policies were mostly influenced by international pressures or the international economy (Mills, Begg and Van Nieuwkerk, 1995).

This influence by international pressures is one of the reasons why South Africa underwent a transition to a globally integrated economy in an effort to increase the rate of economic growth (Standing, Sender and Weeks, 1996; Webster and Omar, 2003). The integration of the South African economy into the global economy occurred through the government embracing trade liberalization, fiscal conservatism and restructuring state enterprises through privatization (Von Holdt and Webster, 2005). More importantly, it can be recognised that the consequences of the integration of the local economy into the global economy, filtered down to South African businesses among other things. To explain this more it has been argued that because of this integration trade liberalization has generated increased competition. This is one of the reasons that South Africa is currently faced with a very competitive economic environment. This has, in turn, forced firms to focus on efficiencies and new markets. More precisely, firms are forced to cut costs to meet these global (competitive) standards (Theron, 2005). Labour is usually the only significant cost over which firms have some control, thus the main costs that are cut are labour costs (Theron, 2005). Many employers argue that labour legislation restricts how that control is exercised, and imposes costs that firms would not have in the absence of such legislation. This argument is also supported by some economic theories. For example, orthodox economic theorists have argued that any interference from regulation increases the cost of labour above market equilibrium and, as a result, there will be unemployment. These theorists have also argued that the level of profitability would decrease as a result of regulation, which would lead to some employers resorting to practices that are not in alignment with labour regulation (Arrowsmith, Gilman, Edwards and Ram, 2003).

These views of the employers are often informed by the neo-liberal ideology, which coincides with the global-integration of the economy. It has been argued that neo-liberalism involves the utilisation of programmes that enhance the full recovery of service costs from the users. In 1996, the post-apartheid government advocated a neo-liberal programme; namely, GEAR (Growth, Employment and Redistribution). This programme promoted the full recovery of service costs from the users. According to this neo-liberal programme, growth can only be attained through more freedom of the market, less regulation, more integration into the global economy, and restructuring of the state to facilitate these processes. In other words, it can be seen that the inherent results of neo-liberalism is the state not taking part or responsibility within labour relations in an attempt to fully recover any costs incurred from the labourers (Miraftab, 2004). Neoliberalism has also been reinforced by studies, such as the World Competitive Report and the 2006 Doing Business Survey of the World Bank, which have revealed that South African labour laws are inflexible or too rigid, and therefore impose unnecessary costs on business (Benjamin, Bhorat and Cheadle, 2010; Rankin, 2006). Employers have thus proposed that there should be deregulation in the labour market in an attempt to reduce such costs to businesses. Among other consequences, some studies have indicated that the adoption of neo-liberal framework, similarly to the global trend, has regenerated casual labour markets in the post-apartheid South Africa (Valodia, 2001). The casualisation of labour as a way of reducing labour costs and increasing flexibility is often referred to as the 'low-road' response to labour law and will be explored more in this chapter (Bhorat, 2006; Theron and Godfrey, 2000).

It has been shown above that the democratic South African government had the responsibility of increasing economic growth; however, it also had the responsibility of rectifying the injustices of the apartheid era. In other words although it is important to focus on the economic sphere, the political sphere is just as important to focus into. More precisely, the democratic government in South Africa has an obligation of providing South African citizens with security, which was not accorded to them during the apartheid period. When applying this in the labour market it becomes evident that while the increasingly globalised economy demands high levels of labour market flexibility, commitment to democracy from the South African government requires that this must be compatible with labour market security. Labour market security can be advocated through what is referred to as neo-corporatism. Neo-corporatism involves a type of political relationship in which the state involves other

interest groups in its decision-making bodies to enhance national development. Thus, when focusing on the labour market these interest groups involve employers as well as unions negotiating for the terms and conditions of the employment relationship (Kuhlman, 2000). In contrast to the low-road approach of neo-liberalism, neo-corporatism advocates the ‘high-road’ response to labour law; which encompasses the high-wage and high-productivity growth path, through high-wages and training of workers (Palley, 2004). This will also be explored in greater detail in this chapter. Moreover, neo-corporatist views are supported by studies such as OECD studies, which have revealed that such claims that South African labour laws are inflexible or too rigid when compared internationally are a misconception. On the contrary, these studies reveal that South African labour laws are not too rigid but compare well in terms of flexibility on the international stage (Benjamin *et al.*, 2010: 74; Davies, 2009; Bosch, 2003). Thus, the role played by different interest groups in the labour market (including employer representatives) may result in labour laws comparing well in terms of flexibility in the international stage.

From the above, it can be seen that the South African government is faced with a dilemma of meeting economic and political ideals; that is, it is faced with the problem of trying to achieve the ‘contradictory’ neo-liberal and neo-corporatist forms of regulation. This dilemma forms the policy debate over labour market reform. More precisely, the state, employers and trade unions are confronted with a choice between a low-wage, low-skill, deregulated and fragmented framework, which emphasises the need to attract foreign investment and reduce social spending, on the one hand. On the other hand, a high-wage, high-skill, centralised and co-determinist framework in which employee participation and training are seen as vital for increasing the productivity of the economy. This policy debate is routinely posed in stark “either/or” terms opposing regulation and rigidity to deregulation and flexibility. Central to this debate is the view that “the general trend has been towards deregulation, or what might be called market regulation rather than state regulation” (Hepple, 1993: 257). However, in practice, regulatory changes involve distinct trade-offs between the various forms of flexibility and security rather than a simple process of substituting one for the other (Regini, 2000). It is very rare that changes in a regulatory regime be understood as simply an extension or a restriction of the role of statutory or social regulation to the benefit or detriment of market mechanisms (Regini, 2000). Consequently, similarly to the case of Namibia, the South African government has attempted a contradictory fusion of neo-liberal

and neo-corporatist forms of labour regulation (Klerck, 1998). This notion is referred to as 'regulated flexibility' (Cheadle, 2006; Klare, 2000). It will also be explored in the discussion below.

The focus of this research is on small firms (those employing up to 50 employees). These firms have been selected because of their importance in the South African economy, especially taking into consideration the high unemployment rate in the country (Parsons, 1999; Roux, 2002). Many South Africans (who were unprotected during the apartheid era) are employed in this sector; therefore, small businesses provide a premise where there can be a comparison of the political and economic spheres, and more fundamentally, neo-liberalism and neo-corporatism. Moreover, small firms are of importance because labour laws are likely to affect them severely as they have fewer administrative resources as compared to large firms (Fenwick *et al.*, 2006). However, international studies have shown that the negative effects are often limited in small businesses. This may be attributed to the fact that most small firms operate informally (Edwards, Ram and Black, 2003). In this regard, it is significant to take into account the compliance of employers with labour laws; more precisely, one should consider whether small employers actually comply with the legislations or if they are governed by their own informal relations within their organizations. It is thus necessary to make a distinction between internal and external regulation. This will be explored more in more detail in the discussion to follow.

This chapter will outline the theoretical framework that underpins this study on the impact of labour laws on small firms. This framework will pay specific attention to the neo-liberal and neo-corporatist forms of regulation within the South African labour market, especially relating to small firms. This will be done through dividing the chapter into different sections that will capture the main themes of the existing literature on neo-liberal and neo-corporatist forms of regulation. The argument in this chapter will first seek to reveal the linkage between South African small firms and South African labour laws. Once this has been shown, the focus will then shift to a discussion on what labour market regulation entails in South Africa. The thrust of this chapter will be dealt with in the discussion of the neo-liberal and neo-corporatist forms of regulation. Stemming from this discussion, there will be a focus on how employers respond to labour law and their compliance to these labour laws based on the

above-mentioned forms of regulation. Following this will be a discussion on the combination of the neo-liberal and neo-corporatism forms of regulation, the process being referred to as regulated flexibility. After this there will be a conclusion to this chapter, summarising the main themes that were discussed throughout.

2.2 THE ROLE OF SMALL FIRMS IN THE SOUTH AFRICAN LABOUR MARKET

2.2.1 Defining Small Firms

There is no single definition of small firms. Several criteria are used to measure or define the size of these firms. These criteria involve the number of employees, volume of sales, value of assets, insurance in force, and volume of deposits. Thus, it can be noted that small firms are not solely defined in terms of the number of the employees. However, this criterion is the one that is widely used (Matiso, 2008). This number differs across countries. For example, in the European Union small firms are considered to be those that employ up to 250 employees, while in other countries the limit is 200. In the South African context, small firms are generally considered to be independent firms, which employ a maximum of 50 employees (International Labour Office, 2006). Small firms are part of the small business sector. The small business sector in South Africa involves all small, medium, and micro enterprises (SMMEs). Table 2.2 provides broad definitions of the small business sector according to the number of employees as outlined in the National Small Business Act.

Table 2.2: Broad Definitions of SMMEs in the National Small Business Act

Enterprise size	Number of employees
Medium	Fewer than 100 to 200, depending on industry
Small	Fewer than 50
Very small	Fewer than 10 to 20, depending on industry
Micro	Fewer than 5

It can therefore be seen from the table above that in looking at small businesses, one may also focus on very small and micro enterprises (as these enterprises are also composed of fewer than fifty employees). Moreover, in the South African business context a small firm is defined as an enterprise that is a separate and distinct business entity and not part of a group of companies. It must be managed by its owner or owners (Cawker and Whiteford, 1993; DTI, 2009). Thus, it is important to distinguish a small firm from small multiples. Small multiples are workplaces of the same size that are owned by larger firms (Edwards *et al.*, 2003). Thus, enterprises such as Pick 'n Pay or Shoprite/Checkers cannot be regarded as small firms because they are owned by larger firms. These are instead referred to as small multiples. Small firms operate in all industries, although their nature and importance differ widely from industry to industry.

2.2.2 The Role Played by Small Firms

The role played by small businesses is being increasingly recognised worldwide (Ntsika Enterprise Promotion Agency, 1998). More precisely, due to lack of sufficient growth in formal employment many governments (including the South African government) recognise the importance of small firms because they are regarded as playing a crucial role in job creation and poverty reduction. For example, in 1997, statistics revealed that the small business sector absorbed approximately 57 per cent of the people employed in the private sector, and contributed 42 per cent of formal total Gross Domestic Product (GDP) in South Africa. In 2001, the small business sector in South Africa accounted for over 50 per cent of total employment (Ntsika Enterprise Promotion Agency, 1998). A study by the Competition Commission estimated that this percentage increased in 2004; in particular, 99.3 per cent of South African businesses were small businesses. In 2010, they accounted for 53.9 per cent of total employment and contributed 53 per cent to GDP (Mahembe, 2011). Thus, this evidence reveals that small firms create a significant share of new jobs, which are needed by a growing population. In many instances, these firms are adding jobs while large firms are downsizing and laying off employees (Longenecker *et al.*, 1997). Thus, the small business sector plays an important role in terms of both the preservation and the creation of jobs. The fact that this sector creates a large share of jobs means that it is contributing greatly to the economy of the country. For example, it was revealed that small businesses accounted for 27-34 per cent of total GDP in 2006 (Annual Review of Small Business in South Africa, 2004).

In the context of the great unemployment and resultant crime in South Africa, the South African government aims to prosper the small business sector and through this create work for the unemployed and school leavers (Venter, 2002). More precisely, this sector of the economy has been targeted by the South African government for specific reasons. These include the fact that the small business sector is a means of stimulating economic growth; a vehicle for redistribution of wealth and attaining more equitable growth; and a means to address rising unemployment. Moreover, the small business sector allows for more competitive markets; they require little or no skills or training (workers learn skills on the job). It can thus be recognised that the role of this sector in technical and other innovation is vital for many of the challenges facing the South African economy (Hirschsohn, 2008).

Furthermore, it has been argued that to create jobs the policy framework should reflect the needs of small businesses. In some respects, smaller businesses have special needs. In particular, small businesses require a high degree of flexibility in the operation of their businesses in order to ensure their survival. Thus, the extent to which aspects of current labour legislation are perceived by business to be constraining this flexibility should be a subject of continuous investigation (Anderson, 1993).

2.2.3 The Promotion of the Small Firm Sector

The South African government has recognised the importance of supporting the development of small firms through creating a business environment that will be conducive to the growth of these firms (International Labour office, 2006). This is reflected in the White Paper on the National Strategy for the Development and Promotion of Small Businesses in South Africa (DTI, 1995). According to the Department of Trade and Industry (DTI), the strategy that was formulated to promote the small business sector included goals such as the creation of employment, the alleviation of poverty, income redistribution, economic growth and development, democratisation of economic participation, and the promotion of competition. Even though small firms are regarded as being essential in employment creation and economic growth, and regardless of the strategy that was put in place to promote the development of small firms in South Africa, the survival rate of the small business sector is relatively low. It has been estimated that less than half of newly established businesses

survive beyond the first five years. This is not only true for South Africa, but also a common phenomenon in the rest of the world (Visser and Sunter, 2002).

2.2.4 Small Firms and Labour Law

One of the reasons for the short lifespan of small firms is that these firms tend to be extremely negatively affected by regulation as they have fewer resources to overcome obstacles in the business environment. Moreover, a favourable business environment increases the potential for small firms to develop and create more and better employment opportunities (International Labour Office, 2006). This is the reason why there is another element of the strategy to promote the small business sector; namely, the National Small Business Regulatory Review (Annual Review of Small Business in South Africa Review, 1998). In general, the goals of this review include changing the general culture of regulations, making it easier for small businesses to comply with labour laws, providing proposals for the alteration of legislation (practices and other processes which may hinder the development of small businesses); and lastly, conducting research and reviewing legislations and regulation (Annual Review of Small Business in South Africa Review, 1998). This objective can also be seen in the latest economic policy in South Africa, termed the Accelerated and Shared Growth Initiative in South Africa (AsgiSA). This policy was born from the commitment of the post-apartheid government (ANC) to halve employment and poverty by 2014 during the 2004 elections. One of the reforms through this policy is to reduce the regulatory burden imposed on small and medium-sized enterprises (Dube, Hausmann and Rodrik, 2007). In other words, it can be seen that less onerous labour laws are required in order for the small business sector to develop. Moreover, it is crucial that investigation is continually conducted to reveal regulations that constrain the development of small firms.

In essence, it can therefore be argued that several relationships can be recognised in the context of developing small businesses. More precisely, firstly, small businesses are not only important for their contribution to the economy but also for the redistribution of wealth. In other words, small businesses are essential for both economic growth as well as rectifying injustices of the past through redistributing wealth. The second relationship that can be recognised is that between the development of small businesses and regulation. For example, above it has been argued that many small businesses do not exist for long because of the

negative effect of labour laws. Research has shown that on average, small firms exist for less than 3.5 years (Annual Review of Small Business in South Africa, 2004). It is thus important that these relationships be explored in more detail. The next section will explore regulation in South Africa.

2.3 WHAT DOES REGULATION OF THE LABOUR MARKET ENTAIL IN SOUTH AFRICA?

2.3.1 Why Governments Intervene in the Labour Market

Before discussing labour law in South Africa, it is important to realise that labour law involves intervention in the labour market by the state or government. The first question that may arise is why governments intervene in the labour market. The theory underlying most interventions is that free labour markets are imperfect, that consequently there are rents in the employment relationship, and that employers abuse workers to extract these rents, leading to both unfairness and inefficiency. For example, employers discriminate against disadvantaged groups, underpay workers who are immobile or invest in firm-specific capital, fire workers who then need to be supported by the state, force employees to work more than they wish under the threat of dismissal, fail to insure workers against the risk of death, illness or disability, and so on (Botero *et al*, 2004). In response to the perceived unfairness and inefficiency of the free market employment relationship, nearly every state intervenes in this employment relationship to protect the workers (Botero *et al*, 2004). This intervention takes place through what is referred to as labour law. Labour law directs the legal rights and obligations of employees as well as those of the employers (Basson, 2009). In so doing, it mediates the relationship between the employees, employers, trade unions and employers' organisations (Creighton and Stewart, 2005). The interests of these parties that are involved in the employment relationship may influence labour relations. More precisely, it has been argued that labour relations in South Africa have moved through a number of distinguishable phases as the state, employers and labour sought to promote their interests (Pons and Deale, 1998). For example, as employees and trade unions have sought to promote their interests of security in the workplace, there has been an incorporation of provisions (such as those contained in the Basic Conditions of Employment Act) that will increase this security.

2.3.2 Functions of Labour Law

Van Jaarsveld and Van Eck (1998: 482) argued that the function of labour law has been described as “creating or attempting to create labour harmony and sound labour relations through different legal instruments, between employee groups on the one hand and employer bodies on the other hand”. It can therefore be argued that the employment relationship in South Africa is shaped by a complex framework of rights that originate from law and agreements between employers and employees (Du Plessis *et al.*, 1996). In order to reveal the functions of labour, it is important to acknowledge that there are three major types of labour legislation in South Africa. Firstly, there is protective legislation such as the Basic Conditions of Employment Act, which establishes minimum rights on conditions of employment to protect employees against exploitation. Secondly, enabling legislation such as the Employment Equity Act establishes a broad range of equity rights and obligations for employers and workers and a framework for the conduct of collective labour relationships. Thirdly, there is constitutional legislation such as Skills Development Act, Occupational Health and Safety Act, Unemployment Insurance Fund and the Compensation for Occupational Injuries and Disease Act. This type of legislation creates universal rights for individuals and interest groups, which are applicable both in the wider society and in the workplace (Pons and Deale, 1998). Furthermore, labour regulation does not only relate to the protective and redistributive interventions. In other words, the functions of labour law are not exclusively related to protecting employees or rebalancing power in the favour of employees (Dibben, Klerck and Wood, 2011). Labour laws have other objectives which include enhancing productive efficiency, consolidating a sustainable distribution of the costs and benefits flowing from capitalist economic development, and encouraging specific behavioural patterns (that is, encouraging employers and employees to engage in certain behaviours) through the imposition of costs and rewards (Dibben *et al.*, 2011). In order to establish the impact of labour legislation (more precisely, the LRA of 1995 and BCEA of 1997) on small firms, it becomes necessary to analyse the purpose of each of the Acts as they directly or indirectly affect small firms. For the purposes of this research, the Labour Relations Act of 1995 and the Basic Conditions of Employment Act of 1997 will be discussed below.

2.3.3 Labour Relations Act (LRA 66 of 1995)

The Labour Relations Act (LRA 66 of 1995) was approved by the democratic government in 1995, after extensive negotiations in the National Economic Development and Labour Council (NEDLAC) between employers and unions. The LRA of 1995 signified a departure from past legislation but was consistent with the fundamental rights of the Interim Constitution and International Labour Organisation conventions (Finnemore and Van Der Merwe, 1996). Finnemore and Van Der Merwe (1996) further argued that it is necessary, firstly, to understand the first principles or building blocks of the LRA in order to understand the purpose and application of the Act. Bendix (1996: 120) states that the overall purpose of the Act is the advancement of “economic development, social justice, labour peace and the democratisation of the workplace”, and it intends to achieve this goal through several objectives. These include, firstly, giving effect to, and regulating the fundamental rights contained in Section 23 of the Constitution. Secondly, the Act aims to give effect to the duties of the Republic as a member state of the International Labour Organisation. Thirdly, providing a framework in which employees and their unions, employers and an employer association can bargain collectively to determine wages, terms and conditions of employment and other matters of mutual interest, and formulate industry policy. Furthermore, employees and their unions, as well as employers and their associations may promote orderly collective bargaining; collective bargaining at sectoral level; workers participation and decision making at the workplace and the effective resolution of disputes and labour peace.

The Labour Relations Act (Act 66 of 1995) not only provides for the registration and regulation of trade unions and employer organisations, but also addresses the freedom of association, organisational rights, unfair dismissal, unfair labour practice, strikes and lock-outs, collective agreements, bargaining councils, statutory councils, workplace forums, Commission for Conciliation, Mediation and Arbitration, The Labour Court and Labour Appeal Court, and lastly, the role of NEDLAC (Cooper *et al.*, 1997). These will be explained in more detail below.

2.3.3.1 Key Provisions of the LRA of 1995

As mentioned above, the Labour Relations Act (LRA) of 1995 addresses several factors. These will now be explained. Firstly, freedom of association means that every employee and

job applicant seeking employment is protected from discrimination on the basis of union affiliation. Their rights to form, join and participate in union activities as well as the right of employers to join their organisations are also protected. Secondly, organisational rights allow or provide unions and their representatives with certain rights including access to workplace; deduction of trade union subscriptions; rights to elect their representatives; rights relating to the exercise of representatives duties; and disclosure of information by employers (Sections 11, 12, 13, 14, 15 and 16). Thirdly, every employee has the right not to be unfairly dismissed (Section 185). This will be explored more in the section 2.6 below. Fourthly, an unfair labour practice refers to any unfair act or omission that arises between an employer and an employee, involving the unfair discrimination against an employee (either directly or indirectly) on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility. It also involves the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee; the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee; the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement (Section 186). Fifthly, the right to strike is recognised by making provision for protected strikes. That is, employees have the right to strike and may not be dismissed. The employers' right of recourse to the lock-out is also recognised (Section 64).

Sixthly, a collective agreement is a written agreement entailing the terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions and one or more employers and/or registered organisations (Section 23). A collective agreement refers to bargaining council agreements and any workplace agreement between employers and employees that regulate terms and conditions of employment or their conduct. The LRA of 1995 also makes provision for bargaining councils to promote bargaining at a sectoral level in a specific industry or service (Section 27). A bargaining council agreement may cover aspects such as wages, benefits and working conditions specific to the sector. The agreement not only binds parties to the agreement but it may also be extended to non-parties under certain circumstances. Where there is no bargaining council in a sector, a representative union or employer, which meet the requirements of representativeness, may apply to the Minister to establish a statutory council in that sector. Agreements reached may

not include wage agreements unless both the employer and union agree to include such issues. Provision is also made for union-initiated workplace forums to promote employee participation at every workplace where there are more than 100 employees (Section 28).

Section 115 refers to the function of the CCMA as an attempt to settle by conciliation, any dispute referred to it in terms of the LRA, and in cases where conciliation has not achieved the desired agreement, the dispute should be referred to arbitration if the Act requires such or if any of the parties to a dispute within the jurisdiction of the Labour Court request that the Commission conduct such arbitration. It also provides assistance with the establishment of workplace forums; it compiles and publishes information and statistics regarding its activities. Du Toit *et al.* (1996) also argued that if requested, the CCMA may also, advise a party to a dispute on the procedures to be followed in terms of the Act; assist a party to a dispute in obtaining legal advice and/or representation; offer to settle a dispute which was not referred to it; accredit councils or private agencies; subsidise accredited councils and agencies; and may conduct, oversee or scrutinise an election by ballot for a registered union or employers association, or supervise or check said ballot if requested to do so by the union or employers association. The CCMA must also perform any other duties assigned to it, and may perform any other function assigned by any other law (section 115).

Sections 151 and 167 of the LRA respectively established the Labour Court and the Labour Appeal Court. These courts replaced the Industrial Court system. The Labour Court is a superior court, equal in status to that of a provincial division of the Supreme Court. Any decision, judgement or order of this court may be served and implemented as if it were a decision, judgement or order of the Supreme Court (Section 158). Lastly, NEDLAC has a direct role in terms of the Act in that it has responsibilities for aspects such as advising the President on the appointment of judges to the Labour Court, preparing codes of good practice relating to labour relations at the workplace and the demarcating of an appropriate sector and area in which a bargaining council should be registered (Section 203). In order for the LRA to be effective, it requires an investment in faith, time and money to acquire the right culture, structures and competencies amongst management, unions and employees to achieve the desired result, which is advancing economic growth while also advancing democratisation in the workplace. In this sense, labour relations will become a serious strategic consideration for

corporate South Africa and will have far-reaching consequences for the way in which business will be conducted in the future (Pons and Deale, 1998).

2.3.4 Basic Conditions of Employment Act (BCEA 75 of 1997)

In terms of Section 2 of the Basic Conditions of Employment Act (BCEA), the main purpose of the Act is to advance economic development and social justice by fulfilling the primary objectives of the Act. These objectives entail, firstly, giving effect to, and regulating the right to fair labour practices conferred by Section 23(1) of the Constitution. This can be done through establishing and enforcing basic conditions of employment and through regulating the variation of basic conditions of employment. The second objective entails giving effect to obligations incurred by South Africa as a member state of the International Labour Organisation (Du Plessis *et al.*, 1996). Section 4 of the Act states that a basic condition of employment constitutes a term of any contract of employment except to the extent that any other law provides a term that is more favourable to the employee; the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of the Act; or a term of contract of employment is more favourable to the employee than the basic condition of employment. In other words, it can be recognised from this that there is a degree of variation within the BCEA of 1997. Moreover, it is also important to recognise the significance of determining what rules apply in a given dispute. In any dispute, the starting point is the individual contract of service. However, Chapter 2 of the South African Constitution must be kept in mind with regard to certain factors. These involve the fact that everyone has the right to fair labour practice; and every worker has the right to form and join a trade union; and to participate in activities and programmes of a trade union and to strike (Grogan, 1999).

The BCEA is designed to give effect to the right to enjoy the benefit of fair labour practices. Among others, some of the important aspects covered in this Act include the regulation of working time; leave; particulars of employment and remuneration; termination of employment; and prohibition of employment of children and forced labour (Du Plessis *et al.*, 1996). It has been argued that with the election of the democratic Government of South Africa in 1994, there were extensive debates around the BCEA and, as a result, there were negotiations between the state, labour and business in NEDLAC for almost two years before

the Act was promulgated. One of the most serious disputes that arose between business and labour during negotiations was on the issue of working hours. Labour wanted to reduce the working week to 40 hours whilst employers felt that a 45-hour week was already too short and costly because employees would still be paid their current wages for less time worked (Du Plessis *et al.*, 1996).

The concerns of employers and workers reflected the changes between the old Act and new Act, which have a significant impact on business. This can be recognised in the fact that the basic rights of employees are now protected, and are indicated as such in the new Act. For example, section 43 of the BCEA highlights that child labour under the age of 15 is now prohibited and section 29 states that employers must now maintain and provide written particulars of employment. This was not compulsory in the old Act and this made matters very difficult for employees in disputes regarding their conditions of service. The Magistrate's Court is also no longer used to settle labour disputes and disputes must now be referred to the CCMA. Failing resolution at the CCMA level, labour matters are then referred to the Labour Court. The decrease in working hours and increase in overtime remuneration places an additional burden on employers, as they now have to incur additional costs for any time worked in excess of 45 hours per week (Long, 2000).

2.3.5 The Regulatory Environment

The context in which labour law mediates the relationship between the parties in the employment relationship is referred to as the regulatory environment. When focusing on key issues of the regulatory environment, it becomes significant to reflect on the wider legal context. This context involves the applicable international conventions, the South African Constitution and South African labour laws (Bhorat and Van der Westhuizen, 2008). As Van Niekerk (2006) points out, South Africa is a member of the International Labour Organization (ILO); consequently, it signed ILO conventions. In explaining this further, firstly, South African labour laws are to be aligned with the Constitution of the ILO. This includes maintaining the rights to freedom of association, engaging in collective bargaining, maintaining equality at work and removing forced and child labour. Moreover, South African labour laws must also be aligned with these agreements with the ILO conventions.

Secondly, South African labour regulations are to be drawn up and implemented in consideration of the Bill of Rights that is contained in the South African Constitution. These rights include those of equality, freedom of assembly, access to courts and administrative justice and labour rights. In particular, the South African Constitution includes a section that specifically focuses on labour relations. According to section 23, “everyone has the right to fair labour practices”. This section also states the rights that are accorded to the different parties (workers, trade unions, employers and employers’ organisations) in the labour relations arena (RSA, 1996). However, these laws may be constrained by a law of general application, but only if it is in accordance with certain standards of justification set by the Constitution (Cheadle, 2006).

Another important aspect in relation to labour market regulation in South Africa is the national context. In South Africa, when looking at this national context, the apartheid era becomes significant. This is so because this era led the democratic government that was elected in 1994 to adopt an economic as well as a political ideology that would distinguish democracy from the apartheid regime. More precisely, it was essential that the ANC redeem economic development as well as rectify the injustices or discrimination of the apartheid regime. Some argue that these two objectives may be of a conflicting nature. For example, economic growth may be attained through the race to the bottom in the labour market and this may (re)create divisions within the labour market (which may amount to a perpetuation of the apartheid regime). This exploitation of workers, through providing them with minimal protection, can be reflected in the liberalism framework (which has been adopted in South Africa). However, neo-corporatists argue that economic growth in South Africa may be attained through developing workers instead of exploiting them (Ginsburg, and Webster, 1995). That is, economic growth would be attained but injustices of the past would also be rectified. This strategy to economic growth may be related to neo-corporatism. Section 2.4 will provide a discussion of these frameworks, namely neo-liberalism and neo-corporatism, and their role in labour market regulation.

2.4 NEO-LIBERALISM AND NEO-CORPORATISM

2.4.1 The Rise of Neo-Liberalism in South Africa

The role played by the government in industrial relations reveals the political and ideological orientation of the ruling party (the African National Congress in the case of South Africa), in the context of specific social and economic challenges (Klerck, 2009). In overcoming these challenges, the South African government intervenes in the economic sphere in an attempt to strike a balance between the demands for consumption and production. This balance allows for economic growth through increased accumulation as well as social stability. In seeking to find this balance, the government plays a role in industrial relations, which ranges from a neo-liberal abstentionism to a social-democratic corporatism. Neo-liberalism and corporatism constitute two poles between which policy-makers decide. On the one hand, neo-liberalism involves a minimum role of the government, which involves only the facilitation of a framework for negotiations between employers and employees. On the other hand, corporatism involves an active role of the government in industrial relations (Klerck, 2009). Therefore, the rules governing the South African labour market revolve around, firstly, the capacity of government regulation (corporatism), and secondly, market regulation (liberalism). These two ideological perspectives namely, neo-liberalism and corporatism, will be discussed below.

According to the neo-liberal ideological perspective, greater levels of savings in the economy lead to greater levels of investable capital to society. This society is made up of individuals or employees who trade their labour power for wages, and the labour market co-ordinates or manages this trade-off (Adelzadeh, 1996). Thus, the neo-liberal perspective holds that investing in the economy will result in the investment to employees (whose trade-off is coordinated by the labour market). Firstly, to achieve economic growth and development neo-liberals assert that there should be a free-market approach (Klerck, 2009). In other words, this claim highlighted that economic growth could only be attained through the market regulating itself with minimal intervention from the state. For neo-liberals who encourage the notion of a free-market, the labour market has the ability to solve itself. For example, economics associated with neo-liberalism holds that the absence of an extra economic interference will result in prices naturally generating where there is maximum employment at

the highest possible wage level. Neo-liberals also maintain that interference by the state in the labour markets will lead to a wage instability, which will ultimately result in unemployment (Sychoit and Klerck, 1997). Secondly, it can be seen from the above argument that neo-liberals stress that economic growth is essential for there to be a natural distribution of the wealth created by this growth of the economy. This perspective is therefore associated with or results in the ‘trickle-down effect’.

Neoliberalism and corporatism are not only related to specific economic theories and political ideologies, but also with the policies adopted by particular Governments. This section will deal with the policies associated with neo-liberalism while in the next subsection there will be an outline of the policies linked to corporatism. Policies informed by the neo-liberal perspective (with the assumptions of economic growth as outlined above) typically involve reducing company taxes; deregulating the economy in terms of financial and labour markets; and reducing Government’s ability to intervene in the economy (Adelzadeh 1996). The South African government adopted this neo-liberal, largely non-interventionist policy paradigm in an attempt to address stalled economic growth in the early stages of democracy. Particularly, in 1996 the democratic Government advocated a neo-liberal programme referred to as GEAR (Growth, Employment and Redistribution). This program promoted the full recovery of service costs from the users and, more specifically of relevance to this research, it promoted the full recovery of labour costs. For example, GEAR provided a basis for employment growth through making the labour market more flexible to facilitate the expansion of lower-wage employment. Thus, GEAR promotes employment creation through a reduction or recovery of labour costs (Nattrass, 1996). According to this neo-liberal programme, growth can only be attained through greater freedom of the market, less regulation, more integration into the global economy, and restructuring of the state to facilitate these processes (Miraftab, 2004). This programme was an explicitly market-driven macroeconomic strategy (Bond, 2005). It focused on rapid trade liberalisation and fiscal deficit reduction, and replaced national development goals with export-led growth and global market participation (Abramovitz and Zelnick, 2010). In a nutshell, the adoption of GEAR showed that neo-liberalism sought to promote economic growth and upward redistribution of wealth and income, a greater reliance on the ‘free’ market, and a downsizing of the state.

Within the South African labour market, among other things, neo-liberalism functioned through the lowering of labour costs, limiting the domestic role of the national government within the labour market, and weakening the influence of social movements (Abramovitz and Zelnick, 2010). Neo-liberalism is based on faith in market forces and opposition to government intervention (Abramovitz and Zelnick, 2010). Therefore, with the adoption of GEAR, the African National Congress (ANC) Government signalled to domestic and international business that its interests were safe. Similarly, however, it also signalled less strictness to the employers (which would be detrimental to the South African labourers) (Bramble and Barchiesi, 2003). This is the reason why it has been argued that neo-liberal policies undermine social goals or prompt an attack on the well-being of the citizens (Abramovitz and Zelnick, 2010).

Hence, the perspective associated with the corporatist ideology holds that free-markets will not solve the problem of poverty and unemployment. This perspective maintains that the government has to intervene in an attempt to solve the insufficiencies of the markets. Corporatists assert that the Government must intervene in situations where there is no demand and, hence, economic growth (Kuhlman, 2000). It is therefore obvious from the discussion above that neo-liberals view the role of the state in the labour market as interference, while corporatism holds this role as an intervention. While this role is associated disturbance in the neo-liberal perspective, it is associated with assistance in the corporatism perspective. The next sub-section will outline the corporatist ideological perspective as well as the policies informed by this perspective.

2.4.2 The Emergence of Neo-Corporatism in South Africa

When discussing neo-corporatism it is important to recognise the fact that during the 1990s when the international trend towards neo-liberalism gathered pace, democratisation was also taking place in South Africa (Bramble and Barchiesi, 2003). In other words, while neo-liberalism took place, the ANC government also faced the further challenge of extreme social and racial divisions between the major social classes. Thus, the struggle against apartheid created a dilemma. On the one hand, the liberation struggle had generated pressure from the ANC voting base for immediate and systematic improvements in the living standards of black workers and the poor (Ginsburg and Webster, 1995). On the other hand, the white minority as

well as employers had enjoyed substantial material benefits and this class would fight for any threats to its material interests (Lipton and Lorsch, 1992). From the perspective of the ANC, some form of political intermediation between representatives of labour and capital was therefore essential (Bond, 2000). From its very beginning, therefore, the ANC government dedicated enormous energies to the construction of a ‘democratic corporatist’ labour relations regime primarily by seeking to incorporate the representatives of organized labour in the functioning of the state and, to some extent, in the determination of wages and employment conditions at industry level (Baskin, 1996).

The most notable innovation was the establishment of NEDLAC in February 1995. The main purpose of NEDLAC was to formalise and expand the practice of social dialogue, or seeking to reach consensus and conclude agreements pertaining to social and economic policy over labour market regulation that had emerged in the late apartheid era from 1988 onwards before legislation can be tabled in parliament. While there was no consensus on all aspects of labour market regulation, the fact that the legislation emerged from a tripartite process means that its core principles enjoy a high degree of legitimacy among the key stakeholders within the economy (Benjamin and Theron, 2007). NEDLAC comprises four chambers, the most important for purposes of this study being the Labour Market Chamber, which played an important role in overseeing the drafting of key pieces of labour legislation – the LRA of 1995 and the BCEA of 1997 among others. Industrial partnership is a dominant theme in all these acts, with the LRA making provision for workplace forums, bargaining councils and the CCMA. These developments led the International Labour Office (ILO) to declare tripartism in South Africa as ‘truly dynamic’ (ILO, 1997).

From the above, corporatism can be summed up or defined as a particular type of political relationship or ideology in which the state includes interest groups directly in its decision-making bodies to promote class harmony and the common pursuit of national development and other goals (Wood and Harcourt, 2001). In a corporatist society, pressure groups discuss relevant topics with their counterparts. In the labour market, unions and employers’ organisations negotiate about the wage rate and discuss employment policies. Moreover, the government participates in this discussion and the negotiations are highly centralised. Wages and working conditions are not set by governments in an authoritarian manner, or “sacrificed

to the cycle of markets;” rather they are regulated and stipulated by a sequence of deals and agreements (Kuhlman, 2000: 55). From this definition, it can be seen that corporatism is characterised by tripartism. In this case, the government discusses major economic problems and how to solve them with the representatives of employers and employees. Interests are represented by collective groups who engage in joint policy formulation. In short, economics associated with corporatism is characterised as a centralised form of economic policy implementation, where co-ordination takes place neither through market forces nor through central command (Arestis and Marshall, 1995).

The negotiated agreement between the main actors in the industrial domain is referred to as a social or labour accord (Maree and Godfrey, 1995). This accord is generally characterised by a package of measures based on trade-offs between the parties involved. Often, it involves a set of measures or issues which the parties agree to in order to achieve the ends of the contract (Wood and Harcourt, 2001). Normally, these agreements are characterised by the high-wage and high-productivity growth path suggested by the proponents of neo-corporatism (Klerck, 1998).

As mentioned in the preceding sub-section, neo-corporatism is also associated with the policies adopted by particular Governments. In developing South Africa’s corporatist institutions, it was important for the government to introduce a policy that would facilitate ‘bargained liberalisation’ where efficiency on the shopfloor by labour is matched by redistributive mechanisms at the national level to offset the effects of any economic adjustments (Carmody, 2002). Such a policy is the Accelerated and Shared Growth Initiative for South Africa (AsgiSA) which was launched by the South African Government in 2006. AsgiSA was launched as a coordinating framework as an attempt to achieve the goals of the government to halve unemployment and poverty between 2004 and 2014. It was recognised, through this framework, that these goals could be achieved through economic growth. In seeking to develop the economy, the framework identified six binding constraints. These included the volatility and level of the currency; the cost, efficiency and capacity of the national logistics system shortages of suitably skilled labour; barriers to entry, limits to competition and limited new investment opportunities; the regulatory environment and the burden of small and medium businesses; and deficiencies in state organisation, capacity and

leadership. In seeking to address these constraints, strategies were set in place through AsgiSA. These include Infrastructure programmes, sector investment (or industrial) strategies, skills and education initiatives, second economy interventions, macro-economic issues such as the volatility of the exchange rate, and public administration issues such as improved service delivery. Therefore, the main purpose behind the AsgiSA policy was the recognition that the economic growth that has been achieved since 1994 benefitted a few at the expense of the majority (Kearney and Odusola, 2011).

2.4.3 The Debate on the Role of the State on the Rules Governing the Labour Market

As mentioned above, the adoption of neo-liberal policies in South Africa indicated support for the domestic and international business interests, while marginalising those of the workers by the democratic government (Bramble and Barchiesi, 2003). Moreover, the government's commitment to liberalism and the emphasis in industrial strategies on creating an investor-friendly climate have all significantly weakened the trend towards corporatist regulation of the labour market or the industrial relations system (Klerck, 1998). Consequently, there emerged a debate between neo-liberalism and neo-corporatism, which revolved around (among others) the extent to which the government should intervene in industrial relations. With regard to the labour market, this debate was based on labour market reform which is routinely posed in “either/or” terms opposing regulation and rigidity to deregulation and flexibility (Hepple, 1993). This is often referred to as the labour market ‘flexibility’ debate, and will now be discussed.

The labour market is structured by three dimensions. These are, firstly, the demand or production dimension, secondly, the supply or reproduction dimension, and thirdly, the regulatory dimension (Peck, 1996). State regulation involves labour regulation, welfare provisioning, industrial relations systems, education and training systems, etc. Thus, it can be argued that, among other things, labour markets can also be explained by the nature and extent of regulation of employment contracts (Peck, 1996). The fact that labour markets can be explained by the nature and extent of regulation is the reason why the labour market flexibility debate is fundamental to the study of the impact of labour law on small businesses. The labour market flexibility debate focuses on the nature and extent of regulation within the South African labour market (Bezuidenhout and Kenny, 2000). More precisely, it is about the

scope and level of employment flexibility that exists for both employers and employees (Bhorat and Cassim, 2004). This debate highlights the different views on whether and how to regulate small firms. These views can be divided into those who claim that there is overly rigid regulation in the South African labour market (which is mostly expressed by neo-liberals) and those who claim that South African regulation is not inflexible. The neo-liberal view that South African regulation is too rigid or inflexible will now be discussed in relation to studies that have been previously conducted.

2.4.3.1 An indication of the South African labour market as being too rigid: restrictions of the employers' freedom in the labour market

International studies have revealed data that supports the claims that the nature and extent of regulation in the South African labour market is too rigid. Two sets of studies will be utilised in this section to provide an overview of the evidence relating to the degree of actual and perceived rigidity within the South African labour market (Benjamin *et al.*, 2010). These are the World Competitive Report and the 2006 Doing Business Survey of the World Bank. The World Bank's Cost of Doing Business Survey for 2006 covered about 175 countries, with the main purpose of providing objective measures of the costs of business regulation within an economy. Moreover, the methodology and approach utilised in the Cost of Doing Business Survey was adopted from the study that was conducted by Botero *et al* (2004). The broad areas of labour regulation covered in the survey included those related to legislative provisions for hiring, firing and hours of work in the employment relationship. The World Competitive report was undertaken in the late-1990s and focused on 85 countries (Bhorat and Cheadle, 2007). In the 1997 data from the World Competitive Report, it was revealed that South Africa yielded low levels of regulation with regard to individual employment relations and higher levels of regulation in terms of collective rights in the international stage. As a result, for an overall regulation index, South Africa was placed in the bottom one-third of the global distribution of labour market regulation. Moreover, South Africa was shown to yield higher levels of worker protection relative to labour regulation, which resulted in South Africa being placed in a composite regulatory index that positioned the economy in the fourth decile of the global distribution of worker protection and labour regulation (Bhorat and Cheadle, 2007).

It is also important to take note of and explore data from the World Bank's Cost of Doing Business Survey. This study is regarded as the most widely used measure of labour regulation and worker protection within an international context (Benjamin *et al.*, 2010). Results from this study indicate that the highest measures for any area of rigidity relating to regulation in hiring, firing and hours of work are found in low-income economies. It was shown in this study that, while firing and hiring costs as well as the hours rigidity index were below the global average, hiring and firing rigidity measures in South Africa were above the world mean. In numerical terms, therefore, the South African economy was placed at the 65th percentile for hiring rigidity and at the 60th percentile for the difficulty of firing index (Van Niekerk, 2006). Moreover, in comparison with the upper-middle country sample, South Africa was positioned at the 73rd percentile for difficulty in hiring and at the 63rd for firing rigidity. Briefly, the data from the studies presented above, reveal that in the current environment, and based on estimating legislative provisions primarily; any notion of lack of flexibility within the South African labour market can be attributed specifically to the legislation that governs hiring and firing provisions. This is so because South Africa possesses a particularly high level of regulation in relation to these according to the Cost of Doing Business Survey data (Bhorat and Cheadle, 2007).

In focusing on the studies that have been mentioned above, the point of rigidity in certain South African provisions is highlighted. The discussion will now shift to views that can be associated with this view of 'rigidity'. In doing so, it becomes important to note the consequences of neo-liberal forms of regulation in the South African labour market. When looking at the regulation of labour markets, some studies indicate that the adoption of neo-liberal policies, similarly to the global trend, has regenerated casual labour markets in post-apartheid South Africa (Valodia, 2001). This author also emphasised that local industries that were not globally competitive (as many small firms are) were negatively affected by neo-liberal policies, as these policies opened up the South African economy by abandoning the protective tariffs and liberalising imports. Such negative effects included job losses, and engaging in extensive restructuring to promote labour flexibilisation and informalisation in an attempt to become more competitive (Grest, 2001). Because of these restructuring approaches, it was indicated that there was higher unemployment, more informal and flexible labour processes, and a decline in stable jobs in South Africa (Theron and Godfrey, 2000). In other words, the adoption of neo-liberal policies through South Africa pursuing international

competitiveness has resulted in many South Africans bearing the brunt of unemployment (Bhorat and Kanbur, 2006).

To address the problem of unemployment, neo-liberals (which also involve many employers) have argued that there should be labour law reform in the country that will attract foreign investment, thereby providing businesses with a competitive edge, through setting lower levels of labour regulation. There are two perspectives associated with this view. The first view assumes that labour law invades the freedom to contract in the labour market on equal terms. This view is expressed through the economic rationalism of the Free Market Foundation, which holds that labour legislation protects workers at the expense of the unemployed and hinders economic growth by undermining the competitiveness of small businesses (Davies, 2009; Bosch, 2003). This view implies that laws that are meant to protect workers have unintentional consequences of protecting the employed at the expense of the unemployed. More precisely, there has been an argument that in some instances the labour market reduces some of the ranks of the unemployed at the same time as it gives others wage income. Thus, the relationship between the employed and the unemployed is essentially of a conflicting nature. While the former group supports the latter, such as unemployed family members in the form of social security, others claim that wage-workers restrict the unemployed in that framework through excessive wage demands (Baskin, 1996). Moreover, according to this view, any statutory regulation is regarded as undermining the right to work under any conditions. In other words, policy makers must choose between allowing workers to work under the conditions that they are willing to accept or to force them to be unemployed against their will (Van Niekerk, 2006). This also reveals the full-costs recovery agenda that is advocated by neo-liberals (Miraftab, 2004).

In support of this view of the Free Market Foundation, it was revealed in a study by Rankin (2006) that the impact of the LRA is largest in small firms. It was argued that small firms that were affected by the LRA seemed to grow faster than those that were unaffected between the years 1994 and 1996. However, in the period between 1996 and 1998, it was revealed that the small firms that were affected by the LRA decreased employment while those that were unaffected continued to grow. In the study, it was indicated that this growth pattern can be attributed to the introduction of the LRA of 1995. It was also indicated that small firms that

were affected by the BCEA were constrained in growth more than large firms, while small firms that were not affected by the BCEA grew by 32 per cent over a period of four years (Rankin, 2006).

Thus, it is evident from this study that the introduction of the LRA of 1995 and the BCEA of 1997 led to a decrease in employment in small firms. Moreover, the Strategic partnerships for business growth in Africa (SBP) survey asked the question of the constraints faced by firms in hiring new employees. Labour laws were the most frequently cited constraints to hiring new employees after all other business factors in all size categories (Rankin, 2006). Thus, a decline in employment levels can be attributed to the fact that rigid regulation, which may be defined several restrictions to the freedom of employers to operate their businesses flexibly, means that it will be more costly for the employer to fire (Zientara, 2006). Dismissal protection raises the cost of a bad hire, and other things constant, makes employers more meticulous in the selection of employees (Addison and Teixeira, 2001). Also, the National Enterprise Survey investigated the factors firms report as reasons for a change in employment. A change in labour laws (in small firms) was cited as the second most common reason for a decline in employment among the unskilled (Rankin, 2006). That is, for the unskilled in small firms the changes in labour market regulations have been the most common reason for the decline in employment. In other words, this substantiates the view of the Free Market Foundation that those employed are protected at the expense of those unemployed. In this case, the effects of regulation on small firms may also translate to effects on employment (Almeido and Carneiro, 2008).

This neo-liberal view has been criticised in a number of ways. In looking at these critiques, it becomes important to note that the Free Market Foundation view can be linked to the potential of small businesses to create employment. For example, earlier it was noted that small businesses are regarded by the Government to be employment creators and encouragement to promote the small business sector is seen as an instrument to foster employment creation; but the Free Market Foundation perspective maintains that this potential of small businesses to create employment is undermined by labour legislation. However, there is little empirical evidence on how strong this effect might be in South Africa (Berry *et al.*, 2002). In other words, even if regulation was relaxed in the labour market there

is still the question of whether small businesses in South Africa create employment. Moreover, from the view of the Free Market Foundation, it has been assumed that the labour market is a commodity market. This assumption is referred to as a narrow false representation of the labour market. More precisely, many neo-corporatists argue that the assumption or approach that high levels of unemployment result from the difference between the supply and demand for labour misconstrues how, when, and why workers enter employment (Elson, 1999). This is so because in the approach of mainstream economics it is assumed that there are great employment levels where labour is cheap, that is, employers seek to reduce their costs by employing at high levels where they will pay low wages or be less restricted in their decisions. The assumption that less regulation of the labour market will result in efficiency is the same as assuming that the micro-efficiencies of individual and firm decision-making will automatically total to a macro-efficiency of the whole economy (Elson, 1999). It has been argued that this is a misconception because the labour market is embedded in society. Thus, individuals and firms do not solely make decisions that are based on their own preferences; rather, these decisions are inscribed in social institutions (Ferber and Nelson, 1993). Thus, decisions that are made at one level may not necessarily be compatible with efficiencies at another level. In other words, it is significant to understand that labour is not a pure commodity because (among others) its reproduction is social.

Another inherent result of neo-liberalism or the ‘cost-recovery’ programme as some term it, is the state not taking part in or having responsibility for labour relations (Miraftab, 2004). Neo-liberals maintains that the South African labour market is too rigid and that it should be deregulated to promote the growth of small businesses in order to allow the ‘invisible hand’ of the market to work (Collins, 2001: 34). According to Wilson (1982: 45), “to deregulate is to reduce or eliminate specific governmental rules and regulations that apply to business”. In other words, according to the deregulation view, the state should reduce the regulatory burden as much as possible; especially in the area of labour laws. In particular, it should focus on reducing the level and complexity of the legal framework that applies to small businesses. This deregulation view was also emphasised by Margaret Thatcher, when she stated that there was no alternative to the free-market approach to economic growth and development (Abramovitz and Zelnick, 2010).

In South Africa, this deregulation initiative is specifically pursued by many employers in small businesses. For example, many South African employers in small and medium-sized businesses are not affiliated to any of the major employer associations, namely the South African Chamber of Business (SACOB), the Afrikaanse Handels Instituut (AHI), and the National African Federated Chambers of Commerce (NAFCOC). Instead, many of these employers are affiliated to a separate employer association: namely, the Confederation of Employers of South Africa (COFESA). The core activities of this body involve the promotion and facilitation of greater deregulation and individualization of employment contracts (Harcourt and Wood, 2003). The ANC government also indicated its willingness to facilitate greater labour market deregulation through 2002 amendments to the LRA (Saul, 1999). This can be seen, for example, in the addition of section 189A to the LRA, which clarifies that small firms can be excluded in relation to retrenchments that are above a certain threshold (Roskam, 2007).

Certain advantages or benefits have been attached to labour market deregulation. For example, it has been argued that deregulation has also been pursued in industrialized economies in the belief that increased labour market flexibility or lower labour standards will be conducive to higher productivity and therefore to greater competitiveness in the globalizing economy (Fenwick *et al.*, 2007). Furthermore, it has been argued that labour market flexibility in the United States of America gives their economy a competitive advantage that is not enjoyed by economies with inflexible labour markets (Blank, 1994). In other words, inflexible or rigid regulation (many restrictions on the freedom of employers to operate flexibly in their businesses) does not result in a competitive advantage in a certain country; rather, it makes it difficult for employers to adapt to the changing economic demands (Bhorat and Cassim, 2004).

However, even though some have claimed that deregulation would result in greater flexibility, a key consideration is whether the 'deregulation' approach is likely to lead to greater flexibility in modes of work organization and industrial structures. In other words, there arises a question whether a reduction in the regulatory burden of labour law can help small businesses flourish in ways that may not previously have been possible. To date, there is little evidence to support the practice of deregulation in this respect; for example, studies in

Latin America, in particular, have failed to identify any positive examples of the sort of 'flexible specialization' that deregulation should have helped to produce (Fenwick *et al.*, 2007). Fenwick *et al.* (2007) also argued that there is little evidence in practice that excluding small firms from labour laws, or failing to apply them in practice, has major positive effects on small firms' growth and economic development.

It has therefore been argued that contrary to the deregulation view, the role of the State in developing a suitable regulatory environment remains vital because employers lack many of the skills and resources needed to pursue anything other than 'sweatshop or homework production' (International Labour Office, 2006). To be sure, Mollentz (2002) notes that while many factors may be responsible for the expansion of the small business sector, the introduction of the LRA and the BCEA correlates with the expansion of the sector, especially in the finance and transport sectors. Critics of this view have suggested that increasing labour standards is likely to drive out 'good' jobs, and replace them with poor ones; employment will shift to areas of the economy where it is possible to evade regulation (Seekings and Natrass, 2005).

Some have extended these claims by refuting the argument of deregulation. In particular, it has been argued that it is not necessarily true that investments and world markets are attracted by low labour standards (Van Niekerk, 2006). More precisely, there has not been any empirical evidence that supports this claim. Instead, research indicates that the opposite is true. It indicates that poor labour standards signal low productivity and restrain export performance or investments. Evidence does, however, indicate that flexible labour laws are associated with less unemployment. For example, a co-publication of the World Bank and International Finance Corporation quotes a study that suggests that in OECD countries with flexible labour laws, there was an increase of employment by 2 to 2.5 per cent (Van Niekerk, 2006).

Although employers' views and studies have revealed that South African labour laws are regarded as too rigid (as indicated above), others such as Standing (1997) revealed that the alleged rigidity of South African labour legislation is a misconception. It has been argued that the South African labour market is flexible in terms of most types of labour market flexibility

(Standing, 1997). More specifically, it has been revealed that the provisions of South African labour laws, including the sectoral minimum wages, collective bargaining and the provisions on unfair dismissals are comparable with international norms (Godfrey and Theron, 1999).

In 1996, the ILO added a new dimension to the labour market flexibility debate by revealing that the South African labour market was more flexible in the international stage than many were willing to admit. For example, Guy Standing, the director of labour market policies for the ILO, argued that South Africa has a flexible labour market. He argued that it is incorrect to label the South African labour market as being inflexible. He substantiated this argument by claiming that many workers in the country have little protection; which may be related to the short or non-existent notice periods as well as employers having the alternative temporary or casual labour (cited in Bezuidenhout and Kenny, 2000). Standing (1997) also argued that the rigidities of wage flexibility have been overemphasised and that South Africa had one of the longest working weeks in the world. This implied that employers used temporal flexibility quite often to adapt to increases in demand for products or services, instead of numerical flexibility. Numerical flexibility involves the ability of the employers to establish different contractual regimes for different workers. Temporal flexibility is an extension of numerical flexibility but it involves organizing working time according to organizational needs. Examples of temporal flexibility include shift working, overtime, short-time working, and flexi-time (Porter, Smith and Fagg, 2006). Therefore, employers often exaggerate the rigidities of working hours because they organise working time according to their organisational needs.

So far, the neo-liberal and neo-corporatist forms of regulation in the labour market have been described in a broad manner, with the focus being on the labour market. The focus of the discussion will now narrow down to the role of employers in small firms. More precisely, neo-liberalism and neo-corporatism do not only affect the way the labour market is regulated, but also affect how employers respond to the regulation as well as industrial relations within small firms.

2.5 EMPLOYER RESPONSES TO LABOUR LAWS

Business in South Africa has historically been sharply divided, like the labour force, along racial lines and between big and small businesses (Standing *et al*, 1996). Nonetheless, some claimed that these divisions could be overcome through having the political will to overcome the apartheid regime. In other words, political liberalisation would result in workplace liberalisation (Wood and Harcourt, 2001). Employers also recognised this; it has been argued that South African employers recognized that corporatism, which was endorsed by the ANC government, was an essential feature of the new dispensation of post-apartheid South Africa. Employers understood that just as the negotiated political settlement of the early-1990s ensured that apartheid structures could be removed without explosive revolutionary struggles, so too could corporatism resolve labour exploitation, which was still evident under the succeeding black majority rule. However, it is important to mention that support for corporatism amongst employers did and still does not necessarily entail destroying elements of the ‘apartheid workplace regime’, which takes the form of low pay, racial differentials, authoritarian management and minimal training for workers (von Holdt, 2003). The reason for this is that many of the South African employers are determined not to allow any redistribution of wealth and power to their detriment (Bramble and Barchiesi, 2003). In other words, although employers claim that they support corporatism they still regard neo-liberal practices as the best strategies for running their businesses. This may lead to a divide between what is promised by the employers or even what is legislated and what employers practice in the workplace.

On this point, it is important to recognise the fact that the degree to which the neo-liberal and neo-corporatist ideologies are accepted by employers in their businesses may affect how these employers respond to labour laws. That is, these two ideologies may inform employer thinking about labour legislation and help employers to justify their resistance to or acceptance of labour legislation. As a result, these two ideologies may affect how employers respond to labour legislation, and thus, the extent of the impact of labour law on these firms. For example, above it was argued that neo-liberalism involves strategies of cost-recovery. The cost-recovery approach is the reason why many employers maintain the view of the deregulation of the labour market in order to attract foreign investments. This deregulatory objective depends on the analysis of the effects of regulation on business (Collins, 2001). Literature on labour regulation highlights the relationship between employment protection

legislation and employer-borne tax to reflect the cost implication of various regulatory provisions for the employer (Zientara, 2006). That is, many employers view regulation as primarily protecting the employees while simultaneously imposing costs to the employers. In the same way, the economists' definition of 'labour standards' is that of labour costs imposed by regulation (Collins, 2001). These labour costs can be firstly associated with the functioning of the labour market. More precisely, the functioning of the labour market is likely to affect employment growth in small firms because small firms tend to be more labour intensive than larger firms. Indeed, small firms are disproportionately found in labour-intensive industries like clothing and furniture, and within a given industry, they are more labour intensive than their larger counterparts. It is therefore expected that high labour costs would hinder the formation of new small firms and employment increases in existing firms (Hirschsohn, 2008).

Secondly, it is crucial to take labour costs into cognisance because although labour productivity is relatively high in South Africa, labour costs are also high when calculated using data from the income statement of particular firms (Clarke *et al.*, 2006). The total cost of wages and other benefits was found to be higher per worker in South Africa than in any of the comparator countries. For example, labour costs per worker were over three and half times higher in South Africa in 2002 (about \$7300 per worker) than in Hangzhou (about \$2000 per worker) (Clarke *et al.*, 2006). Thus, the impact of regulation on firms occurs through the actual (or potential) cost of the regulation to the firm.

The SBP survey specifically examined the actual regulation costs faced by firms. It was shown in this study that regulation costs had increased in small businesses. Moreover, most employers (80 per cent from the employers assessed) expressed views that regulation costs were likely to increase in the future rather than decreasing or remaining the same. Also, in this study it was shown that regulation costs are higher for small firms than large firms (Rankin, 2006). Some reasons for the proposition that regulatory burdens bear especially heavily on small firms are structural. These firstly entail the fact that small firms are more likely to pay lower wages than larger firms and are therefore particularly affected by some laws such as minimum wages. Lower wages in these firms may often result from the fact that many small firms often lack financial reports or records. This means that they have less

access to important sources of capital such as bank loans and therefore are forced to pay lower wages (Morgan, 2012).

Secondly, these reasons may relate to the size of the firms. For example, because of their small size it may be difficult for these firms to accommodate certain laws such as maternity or family responsibility leave. Thirdly, small firms tend to lack personnel departments that provide information on new laws and generate procedures for dealing with labour laws in areas such as discipline and dismissal (Edwards *et al.*, 2004). For example, small businesses are usually operated by a small number of managerial staff. In most instances, the owner is required to take responsibility for most of the management functions and to ensure compliance with legislative provisions and regulations. These regulations, in turn, impose an onerous administrative burden on the owners, resulting in diminished focus on factors that are important to the long-term growth and development of the business. Many owners of small businesses now see the new labour legislation as reducing their control over the business and as a result, this acts as a disincentive to both starting a new business as well as the expansion of existing businesses (Long, 2000).

In addition to these structural reasons, it has been argued that small firms are usually owned and managed by the same person/s that usually want independence and are sceptical of any outside interference (Thorpe *et al.*, 2006). More precisely, while all small firms need to achieve satisfactory business performance, some have argued that only a minority are entrepreneurial ‘growth’ oriented firms while the majority are ‘lifestyle’ enterprises, set up to provide the owners with an acceptable level of income and a comfortable level of activity, and motivated primarily by the desire for independence (Devins *et al.*, 2002). This results in regulations being viewed as a burden and often neglected where possible by these small employers.

Moreover, these costs may be divided into three types: namely direct, indirect and affinity costs. To explain this further, as a middle-income country, South Africa has a highly heterogeneous labour force with a high dispersion of labour productivity (this is as a result of a high variance in skills, which correlates with wage levels if left to the forces of the market) (Berry *et al.*, 2002). While the existence of a large supply of low-skilled labour should allow

small firms to employ such labour at low wages, labour regulation may prevent the balance between skill, productivity and wage. That is, employees are not paid according to their level of productivity or which skills they acquire but rather the pay structure is uniform in each sector. This is so because one of the fundamental problems employers have with current labour legislation is that it is based on the principle that wage-based competition should be eliminated from the South African labour market. This may pose a challenge particularly for small businesses in South Africa. This is so because there are indications that wages matter more to small firms than to larger firms, and that the application of too high a minimum wage makes small firms either exit or become less labour intensive (that is, it makes small firms become more like larger firms) (Berry *et al.*, 2002). This is an example of an indirect cost, which involves a response that is not directly linked to the legislation provision.

Costs associated with labour law may also be direct. This involves a specific response to a certain provision within labour law (Edwards *et al.*, 2003). An example of a direct cost is a change in wages because of the Sectoral Minimum Wage. There may also be affinity costs; these involve practices of a certain firm being consistent with the legal developments without there being any causal relationship. Thus, it is important for firms to respond to labour laws in some way as to attempt to deal with or eliminate these costs. Many employers in South Africa deal with these costs through enhancing their competitiveness (Collins, 2003). This involves, firstly, competing through the exploitation of labour (which is also referred to as a race-to-the-bottom) and secondly, competing on the basis of other costs and factors such as quality, reliability and service (Somavia, 1999; Davies and Freeland, 2004).

These two alternative approaches to the nature of competition are closely associated with the distinction between neo-liberalism and neo-corporatism. For neo-liberals (who are mostly employers), lower labour costs that are associated with minimal employment protection would make it more attractive for employers to hire individuals, forcing prospective job seekers to take positions that might otherwise seem uninviting (Wood and Harcourt, 2001). However, neo-corporatists view this option as the 'low road' to economic growth. They claim that the inevitable outcome of this involves a low wage, low skill economy as labour is ultimately reduced to a cheap, readily disposable input, with limited incentives to invest in skills development (Arestis and Marshall, 1995). It has been argued that this 'low road'

approach may in turn prevent the realisation of the full creative potential of employees, and hence productivity (Arestis and Marshall, 1995). Instead, neo-corporatists claim that the full creative potential of employees (and hence productivity) may be realised through high wages and high skills in the economy.

In short, responses to labour laws can be broadly classified in two ways: namely, the low-road response (which is associated with the neo-liberal ideology) or the high-road response (which is associated with the neo-corporatist ideology). Small firms in South Africa can be shown to exemplify these two strategies of two approaches. More precisely, with the country becoming part of the global market and the integration of national economies, South Africa is adopting the global trend of downsizing and rightsizing. This is an example of the neo-liberal or low-road response to labour law. In contrast to this, small businesses have to compete with large companies without the necessary loan capital and expertise. In order to gain the necessary expertise, small businesses will have to implement a rapid increase of skills development in their labour force through training and education (Long, 2000). This is an example of the neo-corporatist or high-road response to labour law. These two approaches will be explored in more detail below.

2.5.1 Neo-Liberalism: A Low-Road Response

As mentioned above, South African employers may choose between two strategies to reduce the costs that may be associated with their employees. In other words, they may respond to the high regulation costs in two ways, depending on the extent to which they perceive labour laws as imposing unfair rigidities (in this case, the employers view labour laws as a burden on their firms) (Botero *et al.*, 2004). Firstly, and in most instances, employers utilise the various forms of flexibility to avoid minimum standards; for example, numerical flexibility that may involve subcontracting workers or using casual workers (Bezuidenhout and Kenny, 2000). To be sure, it has been argued that by the late-1990s there was less debate about the real or imagined effects of the new labour legislation and more about the changes in the labour market already alluded to. That is, much focus was concentrated on the flexibilisation of the labour market through, for instance, utilising contractual workers. The small firms study, for instance, provides some evidence of this. It was revealed in this study that between 33 and 60 per cent of small firms hired temporary labour and between 37 and 42 per cent of

firms engaged in subcontracting (Benjamin and Theron, 2007). Subcontracting is a species of externalisation, because the workers are not employed by the firm that ultimately utilises their goods or services. A consequence of this is that employment levels in small firms, which engage in contracting out, are reduced (Benjamin and Theron, 2007). With this strategy, an employer can reduce regulatory costs by hiring part-time labour or through temporary contracts; because such practices reduce benefits or termination costs (Botero *et al.*, 2004). This strategy was shown to be particularly utilised in small firms. For example, it was revealed in a study by Devey and other authors that there are differences in the way smaller firms respond to legislation. For the LRA, small firms and medium-sized firms were more likely to respond by decreasing employment than the largest firms. Whereas 6.5 per cent of the largest firms decreased employment, the respective figure for small firms was 12.2 per cent (Devey *et al.*, 2005).

This evidence reflects the idea that the labour regulations may have had the unintended effect of reducing employment, and increasing subcontracting and temporary work (Devey *et al.*, 2005). A greater percentage of small firms responded to the legislation by reducing permanent employment. More smaller firms responded by hiring fewer workers, replacing labour with capital and using more temporary workers than the larger firms (Devey *et al.*, 2005). As for the pattern of subcontracting by firm size, smaller firms subcontract more of their administrative functions (Devey *et al.*, 2005). Thus, among other things, the adoption of neo-liberal policies or forms of regulation, similarly to the global trend, has regenerated casual labour markets in the post-apartheid South Africa (Valodia, 2001).

However, when looking at casualization, or more precisely temporary work, it is important to note that it is not always the case that employers can avoid or bypass labour laws. In explaining this, it is important to outline what is referred to as ‘fixed-term’ contracts. A fixed-term contract involves a contract that is entered into by an employer and employee for a specified period of time or a specific project (in the case of an unknown period) (Department of Labour, 2013). It has been argued that many employers tend to enter into these contracts in the belief that they can avoid provisions included under the BCEA or LRA, by denying their employees certain rights (paid annual or sick leave, among other benefits). This is the case for many employers, and in such cases, it means that these employers are treating their

employees as independent contractors rather than fixed-term employees. Employers prefer independent contractors in bypassing legislation because they are excluded from the definition of an employee (Klerck, 2009).

The LRA firstly defines an employee as any person (excluding independent contractors) who works for another person or for the State and who receives (or is entitled to receive) any remuneration. Secondly, an employee is any person who in any regard contributes to the carrying on the business of an employer (Section 200A). It is therefore evident from the definition of an employee that workers on fixed-term contracts are regarded as employees in terms of legislation and are entitled to enjoy the rights embodied in the BCEA or the LRA. Moreover, continually renewing a fixed-contract may lead to an expectation from an employee that there will be a renewal in all instances upon the expiry date of the contract. In such cases, an employee can file for an unfair dismissal should the employer terminate the contract after numerous renewals (Department of Labour, 2013). It is therefore obvious that in some cases (like fixed-term contracts) utilising the low-road response to labour law does not mean that employers can bypass legislation. Rather, it means that employers can avoid complying with the law permanently; in other words, they can bypass legislations only for certain periods or projects.

Although employers have attempted to bypass labour laws, the legislation has been created in a way to forbid such actions (Klerck, 2009). For example, it was noted that some employers have attempted to bypass protective statutory legislations by persuading their employees to sign contracts which designate these employees as ‘independent contractors’, although their employment relationship fundamentally remains unchanged (Department of Labour, 1997). In a number of judgements, the Labour Court has shown non-acceptance of such a contract at face-value, rather, the Labour Court considers a range of factors to determine whether the person is an independent contractor or an employee. By allowing the Minister of Labour to deem certain workers to be employees, the scope for avoiding statutory protections through ‘disguised’ employment relationships is significantly reduced.

Even so, employers may utilise the low-road response to labour law through exploiting loopholes in the LRA to promote greater individualization (Botero *et al.*, 2004). For example,

an employer can more easily dismiss an employee during probation based on poor work performance. However, sometimes the low-road response to labour law does not necessarily involve an intentional strategy on the part of the employers. More precisely, regulations may change the behaviour of firms even if the firms are not actively trying to avoid regulation (that is, indirectly). For example, if regulation increases the costs of firms without increasing the productivity, then firms will be less efficient. This means that they will be less able to compete in both domestic and international markets. Thus, in response to factors such as global competition and technological advances, firms have been restructuring their operations, and the structure of the domestic economy and labour market is changing. This is evident, firstly, from an increase in the numbers of workers in non-standard employment, primarily because of processes of externalisation (Theron, 2005). Secondly, it is evident from the expansion of the informal economy, as increasingly more workers find themselves engaged in economic activities that are largely or wholly unregulated and unprotected (Benjamin and Theron, 2007). In essence, a low-road response to labour law may be detrimental to the workers as it results in the casualisation of work, leading to a lack of job security and workers who lack training may be an advantage to the employers as a way of reducing labour costs and increasing flexibility to enhance competitiveness (Bhorat, 2006; Theron and Godfrey, 2000). However, the neo-corporatists argue that the enhancement of competitiveness does not necessarily depend on the reduction of labour costs, but on investing in skills development of the labourers. This approach will be discussed next.

2.5.2 Neo-Corporatism: A High-Road Response

It can be recognised from the discussion above that the neo-liberal (low-road) response to labour law can have dire consequences for the workers; one of these involves job losses through firms engaging in extensive restructuring to promote labour flexibilisation and informalisation in an attempt to become more competitive (Grest, 2001). Because of these restructuring approaches, it was indicated above that there was higher unemployment, more informal and flexible labour processes, and a decline in stable jobs in South Africa (Theron and Godfrey, 2000). Thus, an alternative was essential to counter this approach of firms towards competition. Some have argued that an alternative to these neo-liberal forms of regulation involves neo-corporatism (Wood and Harcourt, 2001).

Although many have aligned neo-corporatism with incorporating solutions to the dire consequences of neo-liberalism, neo-corporatism involves much more than that (Fine, 1997). In this regard, it becomes essential to note that successful neo-corporatism is rather more than the realisation of the traditional neo-liberal prescription of the importance of “getting the prices of capital and labour ‘right’” by other means (Fine, 1997: 126). Instead, a focus on developing a more skilled workforce, on co-ordinating wage setting with social spending, and the need for competitiveness, can result in higher productivity from both labour and capital (Bezuidenhout, 2001). This response to the costs associated with labour law that may be utilised by employers entails a high-road approach, which involves business competing on the basis of quality (through training of workers and paying high wages) (Von Holdt and Webster, 2005).

In explaining this, it has been argued that the Congress of South African Trade Unions (COSATU), a trade union federation in South Africa, works within the Tripartite Alliance to alleviate some of the worst excesses of neo-liberalism through promoting neo-corporatism (Harcourt and Wood, 2003). Therefore, it can be seen that neo-corporatism represents a possible mechanism for alleviating unemployment, whilst also contributing to redressing widespread social inequality (Casey and Gold, 2000). This will ensure a real improvement in the conditions of the working class (Harcourt and Wood, 2003). This has occurred through COSATU being extremely influential in ensuring that the bulk of labour-friendly employment legislation is retained (Southall and Wood, 1999). In other words, this case represents a shift of emphasis from exclusively focusing on the costs imposed on firms or employers to a one that incorporates labour standards that can be accorded to employees.

Some have argued that neo-corporatism may be a cost in itself (SBP, 2009). For example, training and educating workers may be at a cost to the particular firm, which may lead to a reduction in profits. Thus, there arises a question of how working conditions within the workplace may be enhanced (for example, through higher wages and training of the workers), while also keeping the employers satisfied. The answer to this depends on the fact that labour market regulation in a neo-corporatist framework involves a commitment to balancing worker protection, employment security and protection of trade unionism with employer interests and small business development and sustainability (SBP, 2009). In other words,

there is collaboration between the employers, employees and the state in negotiations about terms and conditions in the workplaces. This creates a win-win situation because of the compromise between the different interest groups.

While neo-corporatism advances the position of the employees in the employment relationship, it does not do so at the expense of the employers or the firm. That is, as Palley (2004) argued, the high-road response to labour law involves employers attempting to work more co-operatively with unions, seeking broad wage agreements at national level, and productivity-based deals at plant level. This strategy also entails training, improvement of skills and increasing technical knowledge to achieving competitiveness. This is so because these skills and knowledge from employees provide the employers with a competitive advantage. The advancement of skills assists employees in improving their performance. Thus, a learning culture is essential for providing employers with a competitive advantage as well as providing the workforce with job security. This job security may have good and bad implications for the firm. More precisely, job security means that the employment relationship will continue indefinitely, on the one hand. On the other hand, employability as a result of high levels of skills may also mean that workers may have a chance of obtaining a better job with another employer (Kraft, 1998). In this case, the employers would be more susceptible to losing valuable employees.

Although losing valuable employees (indirectly, through providing security and skills to workers) may be a cost to firms, there are also benefits that should be considered. For example, evidence from comparisons between different firms and countries revealed that firms that offer employment security appear to be able to obtain great levels of product and process innovation in contrast to those that do not provide this security (Collins, 2001). In other words, numerical flexibility (dismissing employees when their precise task is no longer required), leads to a decrease in productivity (Collins, 2001). It can be argued that the high-road response to labour law reflects the positive aspects of regulation. In other words, in contrast to the views of some employers that regulation is bad for businesses (which were revealed above in the labour market flexibility debate); this approach raises another aspect that regulation can be good for business.

To be sure, some studies have highlighted these positive aspects of labour regulation. They suggest that regulation can improve welfare by ensuring security for workers in the uncertain labour market (Zientara, 2006). Moreover, it has been argued that regulation may enhance productivity performance by encouraging worker cooperation in the development of the production process, stimulate training, investments, and reduce excessive turnover (Addison and Teixeira, 2001). In this instance, it can be seen that social justice or fairness is not only presented as a desirable end in itself, but also as a means to achieve efficiency. As can be seen from international studies, on this view the emphasis is not on the responsibilities of businesses but on minimising the burdens that workers' rights may place upon them (Fredman, 2001). It can therefore be highlighted or recognised that the willingness to promote social justice, fairness and security depends on the extent that it can be argued to promote and support business interests and to underpin (employers' views of) economic efficiency (Fredman, 2001).

Although corporatism has advantages for both employers and employees, many employers in small firms do not adopt the main essence of the perspective, which involves up-skilling the employees to achieve economic growth. This can be explained through focusing on their orientation towards training. Kitching and Blackburn (2002) provide a useful typology to distinguish between firms based on their overall orientation towards training. In developing this typology, these authors referred to different orientations towards training that have been developed by different scholars. Firstly, there are 'strategic trainers' who recognize that developing human capital through on-going training is critical to business strategy and the primary means to establishing and maintaining competitive advantage, and distinguishing their products or services from their competitors. They train extensively; have a written training policy or a positive and systematic approach to training, even if unwritten, and a budget specifically allocated for training (Matlay, 1997). Investment in training is not only based on immediate operational requirements but is also expected to yield returns in the medium term.

In cases where employers believe that the main source of competitive advantage is based on delivering differential customer service and quality, developing human capital is given greater priority. These employers are more likely to adopt a strategic or tactical training

approach. 'Tactical trainers' do not integrate human resource development and training plans formally into business strategy but provide operationally focused training as and when necessary (Kitching and Blackburn, 2002). They may attach considerable importance to the provision of training, may incorporate strategic elements, and hold a clear and coherent view of the necessity of training, particularly initial training for new recruits (Kitching and Blackburn, 2002). However, they tend to operate in the absence of a dedicated training budget or clear training policy and rely heavily on in-house training, primarily on-the-job, with limited provision of external training (Kitching and Blackburn, 2002). This approach should be distinguished from 'low trainers', for whom training is seen as a last resort and/or as unimportant to their businesses. 'Low trainers' lack training budgets and do not train formally but may train informally. Small firms, competing primarily on price, and employing low- or semi-skilled labour, may have little need or incentive to provide on-going training after induction is complete; that is, they are likely to pursue a low training approach (Ashton, 2001).

2.6 INTERNAL AND EXTERNAL FORMS OF REGULATION

It has been argued that the extent of the impact of labour law on small firms can be determined by the response of the employers to these labour laws. As shown above, this response may also be related to the extent of employer compliance with labour laws. There is another aspect of employer compliance with labour laws in small firms that should be recognised. Even though many employers have argued that regulations have adverse impacts, firms are not affected in the same way by labour regulations. More specifically, it has been argued that many small firms tend to be less concerned by regulations. This may be related to the lack of enforcement of labour legislation in small firms, either because of legal exemptions or widespread informality (International Labour Office, 2006). As a result, it can be argued that small firms do not really feel the costs imposed by labour laws. The question that may therefore arise is why small firms do not feel these costs. Many have claimed that small firms are at an advantage because they are likely to filter the effects of law through their informal practices, and distinct market positions will shape the nature of their response to labour laws (Edwards *et al.*, 2003). For example, the more firms are dominated in the product market, the harder they may find it to raise wages. Yet, firm responses are not solely determined by markets. Indeed, for many small firms a key feature of their existence is their independence, so that each is likely to develop its own style of behaviour (Curran and

Blackburn, 2000). This point illustrates the argument that the impact of labour law on small firms is dependent on the context of the firm (Edwards *et al.*, 2003). That is, there is a linkage between the ‘public justice’ of the law and the ‘private justice’ of firms’ own internal arrangements (Henry, 1983).

2.6.1 Internal Regulation

2.6.1.1 The ‘small-is-beautiful’ view

When accounting for the context of small firms, it is important to study industrial relations in small firms. The literature which may provide insights to industrial relations in small firms has tended to conflate the characteristics of small firms along opposite ends of a continuum of practices and their associated effects towards a ‘small-is-beautiful’ perspective in opposition to a ‘bleak-house’ perspective (Sisson, 1993). The former perspective highlights the harmonious employment relations and low levels of conflict that exist in the workplace because of flatter hierarchies and close working relations (Bacon *et al.* 1996). This view emphasises the internal regulation of the employment relationship (Edwards *et al.*, 2004; Harris, 2002). Mellish and Collis-Squires (1976) argued that in contrast to external regulation, internal regulation involves social norms that arise when employers and employees have their own understanding of what constitutes fairness. In this case, legislation would have little effect if it was not in alignment with the expectations as to what is considered ‘reasonable’ behaviour. For example, the legislation on working time would have little effect if employers and employees of a particular organisation attach some kind of fairness to long working hours.

The ‘small is beautiful’ view is also closely associated with the ‘informality’ that characterises industrial relations in small firms, which is fundamental in mediating the impact of labour law (Edwards *et al.*, 2003). Informality may be defined as a process of management-worker relations based primarily on unwritten arrangements and implicit understandings. It relates to the fact that there is more likely to be face-to-face interaction between the parties in the workplace and that formal processes are invariably kept to a minimum (De Kok and Uhlaner, 2001; Adam-Smith *et al.*, 2003). In this regard, small firms can be expected to behave in at least two ways; firstly, to avoid formal procedures in such

areas as discipline and dismissal, and secondly, more generally to rely on face-to-face understandings with employees. Such understandings will mean that explicit statements of rights and duties tend to be avoided. As a result, social relations within the firms influence the effects of legislation. For example, restaurant workers in an international study that was conducted operated informally through not having precise statements about working hours or pay rates because of their close working relationship with the employer, which allowed them to come and go with little restriction (Edwards *et al.*, 2004). Therefore, the impact of labour law has to be considered in the light of relationships of power and influence between employers and employees (Edwards *et al.*, 2004).

The further implication is that legal obligations will be ignored if they do not relate to the established set of informal norms. For example, if a right to parental leave is perceived as cutting across informal expectations, it may be ignored (Edwards *et al.*, 2003). Thus, it can be argued that small firms often engage in informal practices to deal with or avoid regulation costs (Harney and Dundon, 2006). As a result, the impact of labour law on small firms is often minimal given the flexibility offered by this informal organisation of the firm (Holliday, 1995; Bevan *et al.*, 1999; Marlow, 2002).

2.6.1.2 Bleak-House

As mentioned above, the ways in which law is put into practice may be distinctive in small firms as compared to others. This may be a consequence of the fact that often small firms are felt to be informal and to lack professional approaches to the employment relationship. In other words, this may be so because of the informality which is said to be the central feature of small firms (Edwards *et al.*, 2003). Although some have argued that small firms utilise this informality to filter the effects of regulation (which, according to many employers, may be an advantage for small firms), it is important to realise that informality in small firms may also be a disadvantage (especially for employees in these firms). In other words, the ‘small-is-beautiful’ view of industrial relations in small firms can be questioned. Specifically, it has been argued that informality and precariousness are key reasons why workers and owners in small firms operate under conditions that are very distant from the objective of decent work for all, as outlined by the International Labour Organization and often imply poverty and a lack of social protection (International Labour Office, 2006).

Ethnographic research and in-depth case studies conducted in a variety of small businesses have not painted a 'small-is-beautiful' picture of the relations between employers and employees in small firms. These studies have instead revealed descriptions of poor working conditions, exploitative, autocratic management and low pay (which have challenged the stereotype of industrial harmony in small firms) (Dundon, Grugulis and Wilkinson, 1999). This point accentuates the view of small businesses being viewed as a 'bleak house' (Barrett and Rainnie, 1989). In explaining this view of small firms, the writings of the time emphasised close personal relations between employers and employees, and they suggested that employees in these firms sacrificed being paid low wages for the sake of harmony at the workplace. In other words, the close and personal relations in small firms do not always reflect a beautiful view but may illustrate the authoritarian nature of employers, and more importantly, non-compliance with legislation. Even in firms where there was little harmony (e.g. sweatshops), powerful employers could prevent employees from using the rights that they were entitled to. The important factor to recognise in these cases is that even though there are labour laws put in place, they are not always observed by employers in small firms. In other words, there is disconnectedness between law and practice (Deakin and Sarkar, 2008).

This is particularly true for South African small firms, as the country is known for its high unemployment rate (Roskam, 2007). As a result, many people are willing to work for little pay, little security, or even for merely the hope or promise of future employment or compensation. In this case, the requirement of employer compliance with labour laws is too loose to protect the interest of the workers. That is, the high unemployment rate in the country provides employers with more incentive not to comply with the legislation. As a result, employers may engage in a 'race to the bottom' with regard to labour regulation. Other factors that may contribute to this disconnectedness between law and practice are related to ineffective enforcement. As it was argued by Godfrey (2013), ineffective enforcement of labour laws means that regulation exists on paper only. Poor performance makes it easier for employers to ignore regulatory constraints that have been imposed on them. However, internationally, some have argued that this argument about the disconnectedness between law and practice is overstated (Edwards *et al.* 2004). For instance, it has been argued that a large number of small firms in the United Kingdom were revealed to have faced many dismissal claims. Also, it was evident that many small employers were aware of the law and

consequently changed their behaviour through following the appropriate procedures in dismissing employees (Edwards *et al.*, 2004). The findings drawn above show the impact of the contextual factors (for example, labour regulation) on the firms. In particular, this view emphasises the external regulation of the employment relationship, which will be discussed in the next sub-section.

2.6.2 External Regulation

Research has established that industrial relations within small firms are not exclusively defined by the size of the firm (Wilkinson, 1999). For example, Wilkinson (1999: 214) argued that research has already established that the firm size does not define small firms' industrial relations, rather research that is required is that which shows how the size of the firm interacts with other contextual factors such as 'labour markets and product market forces, ownership, dependency, relationships with customers and suppliers, technology, industrial subculture, and so on'. Moreover, it has been argued that labour process theory has underpinned most literature on small firm industrial relations; however, this theory has failed to recognise the importance of structural factors and has rather overplayed the emphasis of the problems employers encounter in the transformation of labour power into actual labour (Barrett and Rainnie, 2002). For example, Scase (1995) looked at how the strategies adopted by small firm employers to obtain loyalty from employees function within the face-to-face context relations. It is therefore obvious that the focus of this research was on the internal aspect of the small firms. Some have argued that rather, the small firm should not be disentangled from its totality; the approach should not only focus on the inside of the firm but also the context within which the firm exists. More importantly, Barrett and Rainnie asserted that an integrated approach is required to analyse small firms' industrial relations. This approach achieves three goals. Firstly, it recognises the diversity of small firms; secondly, it provides an analytical framework for ordering a range of factors on small firm industrial relations; and thirdly, it integrates a dialectical relationship between structure (effect of external forces) and agency (Barrett and Rainnie, 2002).

2.6.2.1 The influence of the market context on employment relations in small firms

An important factor to note from the above-mentioned is that small firms are not homogenous. There may be differences between sectors (Scase, 2003). For example, two

separate patterns of relations between employers and employees were recognized in three different sectors (Kitching, 1997). It has been argued that these patterns could be attributed to, firstly, the extent to which employers were dependant on employees for their skills and commitment and, secondly, the ability of workers to engage in struggles against management. On the one hand, there are close working relations between employers and employees, often with the employer working together with the employees. In this pattern, there is a high degree of mutual dependence. On the other hand, there is low dependence; more precisely, there is a situation of sweating. In international research that was conducted in the printing industry, it was revealed that even in one industry different patterns of employment relations may exist (Goss, 1991). For example high-quality firms in this industry demonstrated a situation in which there was a high dependency, while instant-print firms utilised lower skilled workers and paid low wages (which may be an example of sweating) (Goss, 1991).

Rainnie (1989) developed a model to explain the variations in the patterns of market circumstances of small firms. He argued, firstly, that some small firms are dependent on large firms. Secondly, others compete with these large firms based on lower prices, and they thus tend to offer lower wages and worse conditions. These firms are described as being dominated. Thirdly, small firms may operate in sectors that large firms choose to neglect. These firms are described as being isolated. Examples of these firms may be found in parts of the hospitality sector. Finally, some firms operate in high-risk areas, developing new products and services. These firms are referred to as innovators (Rainnie, 1989). Some later research has extended these ideas. For example, Moule (1998) studied a small button manufacturer, which might be classified as dependent on its large customers according to the model developed by Rainnie (1989). Nonetheless, it had successfully occupied a niche in the market, which meant that it was less subject to its customers (the large firms) than might be expected and that relations in the workplace reflected a degree of worker autonomy and independence, rather than being driven by the market. Different product market circumstances thus shape behaviour within the firm. In many cases, small firms operate in economic sectors with low barriers to entry, fierce competition and low profit margins (International Labour Office, 2006). These may therefore influence industrial relations within small firms.

The key dimension of the external environment is the ‘competitive context’ of the sector in which the firm operates (Grant, 2002). In this regard, the economic context of firms becomes significant. This is so because in some sectors pay levels may be above the sectoral minimum wage; in such cases, the effects of the sectoral minimum wage are small. Also, the market context of a firm will affect the ease with which it can absorb the costs of legislation. For example, international research has shown that for firms that are operating on the margins of the economy, the minimum wage would have a negative effect because it would add to the existing market pressures on the firms (Gilman, Edwards, Ram and Arrowsmith, 2002). In this view, employment conditions in small firms are harsh because the firms are exposed to intense competitive pressures and are dependent on large firms as customers (Rainnie, 1989). Although this view may be related to the bleak house view as discussed above, it is different in that it accentuates the external determinants of regulation; that is, workplace rules originate largely from national and sectoral contexts, and from labour legislation (Deakin and Sarkar, 2008).

However, some have argued that writers such as Rainnie (1989), who emphasise external regulation when categorising the internal relations of small firms, tend to be too deterministic in linking market position to the behaviour of firms (Ram, 1994). For example, Ram (1994) found that firms that would be expected to have harsh working conditions in fact displayed other features. In this case, small, Asian-owned clothing firms facing intense competition were investigated. In some respects, for example, wage levels, the firms showed the ‘sweating’ characteristic (that is, exploiting workers through low wages). Yet, most workers could pursue some of their particular needs (Ram, 1994) For example, firms were often willing to vary starting and finishing times to meet family needs, which is a characteristic that cannot be described as being repressive in nature as could be expected from the sweatshops.

2.6.3 The Impact of Labour Law: Internal Regulation or External Regulation?

In opposition to the stark contrast between the perspectives outlined above, it has been argued that the impact of labour legislation on small firms is not readily predictable in advance. Statutory regulation is mediated not only by the different external environments in which the firms operate, but also by the often opaque and complex internal dynamics within an individual small firm (Ram and Edwards, 2003). For example, some authors have argued that

industrial relations in (small) firms are shaped by many factors. Arthur and Hendry (1990) identified a range of factors that influence small firms' industrial relations. These factors include the characteristics of the sector, the nature of competition, skill requirements, the local labour market, and the ownership and organizational character of a firm. For Fuller and Lewis (2002), small firms' industrial relations are shaped by the interests of the employers and a complex pattern of interactions between the firms and their business environment.

In reality, small firms are characterised by complexity and unevenness with employment practices mediated through a web of social and economic relationships (Edwards *et al.*, 2003). Informality, for example, cannot be automatically associated with harmonious work relations (Ram *et al.*, 2001). Evidently, even among theoretically 'good' employers, the reality of employment practices can be very different to what regulatory models would imply. Control, for example, can be achieved through the simultaneous use of both paternalistic and authoritarian managerial styles (Dundon *et al.*, 1999). Industrial relations in small firms are therefore neither beautiful nor bleak, but can be rather best understood as 'complex' (Wood, 1999).

In explaining the above it is important to note that the employment relationship is the product of economic, social, political, legal and technological developments as well as the ways in which employers and employees respond to the changes brought about by these developments (Dibben *et al.*, 2011). Although many have emphasised informal relations in small firms, these firms should not be expected to respond to employment legislation in wholly informal and unstructured ways (Edwards *et al.*, 2003). They will have their own ways of behaving that may be well entrenched, and we need to recognise that they have to operate in an environment with a wide variety of regulations governing how business may be conducted. In other words, there will be a process of adjustment in which informality is important, but always operates within an environment that is governed by regulations (Edwards *et al.*, 2003). Although small firms are regarded as a major source of employment, job quality in these firms is often very poor. This is because employment in small firms is often precarious. A related problem is that many small firms operate in a semi-formal manner (Fenwick *et al.*, 2007). That is, their owners and managers respond to the regulatory

environment in which they operate by making strategic choices about whether and when to comply with regulatory requirements (Fenwick *et al.*, 2007).

Thus, although it has been argued that the main characteristic of small firms is that of informality, other evidence has revealed that small firms do not exclusively operate informally. Rather, it has been argued that informality is a matter of degree (Dickens *et al.*, 2005). For example, a survey of 1071 firms with up to 50 employees conducted in the United Kingdom in 2000 revealed that many of the employers had knowledge of the law (Dickens *et al.*, 2005). When asked about the effects of the different legislation, 62 per cent of the participants argued that there was no effect, while 30 per cent claimed that there were negative effects and 8 per cent argued that there were positive effects. However, when asked directly whether labour regulation was a burden, 35 per cent said that it was (Dickens *et al.*, 2005). Therefore, it is evident that small firms are aware of the existence of labour regulation, and as a result, they have changed their behaviour to accommodate labour regulation. In addition, the employers surveyed reported a limited effect of labour regulation on small firms (Dickens *et al.*, 2005).

It is therefore a weak argument to claim that small firms are isolated from external forces (such as labour law). Rather, the degree of isolation should be an empirical question, and researchers should seek to explain the ways in which the structure of small firms can reject some aspects of legal regulation while being open to others (Edwards *et al.*, 2004). For example, the unique circumstances of small firms (such as less administrative resources) might discourage small firms' employers from complying with legislation such as keeping written records but limited capital might encourage these employers to not dismiss employees unfairly. Furthermore, the SBP survey also asked a question about the factors that constrain the expansion of business. Labour problems (which included labour market regulation and labour productivity) were cited as the third most frequent constraint in most size categories of the firms (SBP, 2009). In most cases, labour problems were cited as the most frequent constraints in firms that also mention access to finance as a constraint (SBP, 2009). Although this confirms the argument that regulation is seen as a constraint to doing business, it also indicates that it is difficult to isolate the impacts of regulation (Rankin, 2006).

2.7 REGULATED FLEXIBILITY

As indicated above, the policy debate over labour market reform is routinely posed in stark “either/or” terms opposing regulation and rigidity to deregulation and flexibility. Central to this debate is the view that “the general trend has been towards deregulation, or what might be called market regulation rather than state regulation” (Hepple, 1993: 257). In other words, there is a tendency for the debates on labour market flexibility to be portrayed as ideological battles between proponents and opponents of regulation. More precisely, it is argued that the choice confronting the state, employers and trade unions is between (i) a low-wage, low-skill, deregulated and fragmented framework which emphasises the need to attract foreign investment and reduce social spending; and (ii) a high-wage, high-skill, centralised and co-determinist framework in which employee participation and training are seen as vital for increasing the productivity of the economy (Klerck, 1998). In practice, however, regulatory changes involve distinct trade-offs between the various forms of flexibility and security rather than a simple process of substituting one for the other (Regini, 2000). Very rarely can changes in a regulatory regime be understood as simply an extension or a restriction of the role of statutory or social regulation to the benefit or detriment of market mechanisms (Regini, 2000).

The ideological battle between neo-liberals and neo-corporatists, or proponents and opponents of regulation, is premised on a false dichotomy because there can never be a total absence of regulation. ‘Deregulation’ concerns the replacement of one set of regulations with another and is therefore more accurately described as ‘re-regulation’ (Sengenberger, 2001). More fundamentally, there is no simple dichotomy between regulation and deregulation. The state (or other parties) may regulate more or less directly, but there are always modes of regulation. For example, if deregulation of labour markets were to occur, the theory is that it would be in favour of allowing the market to determine outcomes; in essence, the law of contract would then regulate labour market exchanges (Fenwick *et al.*, 2007). However, what this means is that the ordinary legal system and courts, together with the ‘market’, would be substituted as the regulatory mechanism, instead of state-based law. It is immediately clear that this is not an absence of regulation, but a shift in types of regulation. More important to note is the fact that markets themselves require regulation. Indeed, they do not and cannot exist without it (International Labour Office, 2006).

With regard to South Africa, it is crucial to note that while the increasingly globalised economy demands high levels of labour market flexibility, commitment to democracy from the South African government requires that this must be compatible with labour market security (Torres, 1998). In this regard, it is important to recognise the fact that democracy in South Africa created heightened expectations among many workers, particularly those who were previously disadvantaged. In an attempt to meet the expectations of black South African workers for significantly improved terms and conditions of employment, the post-apartheid government has pursued a combination of neo-liberal economic policies and neo-corporatist labour market strategies. The goal of these policies is the combined attainment of 'security' and 'flexibility' (Klerck, 1998). Thus, the government is faced with the task of balancing the need to attract foreign investment and enhance the adaptability of workplace relations with the requirements of equity and stability. This 'balancing act' has led to a contradictory fusion of neo-liberal and neo-corporatist forms of labour regulation (Klerck, 1998).

Thus, instead of looking at removing regulation, a more fruitful avenue of analysis is to determine whether regulation is appropriate. That is, to ask the question whether the legislation reflects an appropriate balance between the needs for economic growth and those for social justice (Benjamin, 2005). The ruling party, the African National Congress (ANC), has the capacity to implement union- and worker-oriented policies. More precisely, this capacity may be reflected in the fact that the ANC has close connections to the trade union movement to the extent that twenty former COSATU officials sit as ANC members of parliament, whilst considerably more hold senior positions in the ANC government (Boroughs 1996; Barrett 1996). Despite this, the ANC may not have the desire to do so. More specifically, the ANC is not committed to socialism or any specifically labour-oriented philosophy, despite the pro-union sympathies of some of its leaders. The ANC represents an extremely broad coalition of interests, such as social justice as well as economic freedom (Southall and Wood, 1999).

2.7.1 Defining the Notion of Regulated Flexibility

As a result of the broad coalition of interests within the ANC (with aspirations for social justice as well as economic freedom), South African labour laws are premised on the notion of 'regulated flexibility', which involves a framework within which a balance is achieved

between employers' interest in flexibility and employees' interest in security (Klare, 2000; Standing *et al.*, 1996). 'Flexibility' may be defined as the ability of an organisation to respond to product and labour market pressures on the demand and supply sides as well as changes in employment conditions (Appiah-Mfodwa, Horwitz, Kieswetter, King, and Solai, 2000). There are at least three kinds of flexibility (Cheadle, 2006). These are, firstly, employment flexibility, which entails the freedom of the employer to change the levels of employment quickly and cheaply. An example of this is employing staff on the basis of fixed-term or temporary contracts. Secondly, there is wage flexibility, which involves the ability of the employer to change wage levels freely. Thirdly, there is functional flexibility, which entails the liberty of employers to change such factors as work processes and the terms and conditions of employment swiftly and cheaply.

On the other hand, security can also be divided into several types (Cheadle, 2006). Firstly, there is labour market security, which includes opportunities for employment in the labour market. Secondly, there is employment security, which involves protection against the loss of employment randomly. Thirdly, there is work security, which involves health and safety in the workplace. The last is representation security, which entails employees having representation in their workplaces. It is important to mention that regulated flexibility is not merely a balance between the interests of employers and employees; rather it provides a framework or a structure within which an appropriate balance is achieved (Cheadle, 2006).

2.7.1.1 The complementary nature of flexibility and security

The Constitution of South Africa also addresses the balance between flexibility and security by recognising the right to humanity at its core (Roskam, 2007). More precisely, it recognises the promotion of the interests of those who are vulnerable and disadvantaged, and who face adverse socio-economic conditions in the country (Roskam, 2007). Some have argued that the government's commitment to neo-liberal economic policies and the emphasis in industrial strategies on creating an investor-friendly climate have significantly weakened the trend towards neo-corporatist regulation of labour market policies endorsed by the LRA (Klerck, 1998). In other words, flexibility and security are commonly perceived as being linked in a zero-sum trade-off (the more you have of one, the less you have of the other and vice versa). For example, for some increasing flexibility in the labour market is the same as decreasing

security in the labour market (Stanford and Vosko, 2004). This is so because they associate flexibility with a relaxation in the regulation of hiring and firing and with flexible forms of employment, such as fixed-term jobs, temporary agency jobs and other forms of non-standard jobs yielding less security (Stanford and Vosko, 2004). Even so, it is important to note that in the regulated flexibility framework, flexibility and security are presented as being complementary (you can have both in a sort of win-win arrangement). That is, they are represented in a framework to sustain each other (Auer, 2007).

It can be argued that the need for social justice in the country can also be beneficial to those who are concerned with maximising their profits (namely, employers). This is so because poverty (which might be the outcome of lower levels of security for the workers in the labour market) represents a real risk to the political stability and economic growth of a country. Moreover, in order to be competitive in international standards, the country needs to attract foreign investment. This can be assured by, among other things, showing how the regulation of the South African labour market reflects a sustainable balance between the needs for economic progress and social justice (Roskam, 2007). In this regard, there is a representation of the neo-corporatist framework in which extensive regulation is not viewed as being bad for business (Benjamin and Theron, 2007). For example, strict unfair dismissal provisions may be good for business through creating more incentive for employers to train workers, which may result in a more efficient workforce (Benjamin and Theron, 2007). Also, it has been argued that when employers have overwhelming formal power, employers may seek to retaliate or reduce this power through theft of the firms' properties or through strike action. In this case, labour law has been described as 'saving employers from themselves' through limiting the power of the employers (Dibben *et al.*, 2011).

2.7.2 Evaluating the Balance between Flexibility and Security

The commitment of the state to regulated flexibility can be seen through or is reflected in the LRA of 1995 and the BCEA of 1997, which were implemented to ensure fair and equitable labour relations while affording employers a measure of flexibility. This objective is primarily achieved through the provision of core labour rights and targeted exemptions (Basson *et al.*, 2002). Some examples of the balance are reflected in collective labour law, which is incorporated in the LRA of 1995, through the promotion and facilitation of

collective bargaining; a choice in bargaining levels, range and agents; the extension of centralised collective agreements; the promotion of employee participation through workplace forums; and the development of Codes of Good Practice. Secondly, in legislation dealing with the individual employment relationship (i.e. the BCEA) a balance is established by allowing for the variation of employment standards such as overtime payments and working hours (through collective agreements, sectoral and ministerial determinations as well as the various Codes of Good Practice) (Bhorat and Cheadle, 2007). As mentioned above, there are always debates about how the efficiency interests of employers are balanced with the job security and decent employment interests of employees (Roskam, 2007). Thus, given the commitment to regulated flexibility, there has to be a continuous evaluation of the extent to which a balance between flexibility and security is struck; in other words, whether the mechanisms intended to promote regulated flexibility are appropriate.

This balance can be determined by (among others) assessing the burdens imposed by regulation on small firms (Van Niekerk, 2006). For example, employers in small businesses in South Africa view regulation as being detrimental to their businesses because of the imposition of significant administrative and labour costs (Bezuidenhout and Kenny, 2000). These employers argue that a key reason for this is that small firms are treated like large firms. This is so because small firms are exempted from some provisions, but they are not exempted from unfair dismissal laws or unfair labour practices provisions; workers serving a qualifying period are not excluded from certain forms of protection; and labour legislation requires a formal hearing before effecting a dismissal (Cheadle, 2006).

To be sure, it has been argued that the flexibility (for example, differences in treatment for small businesses and limitation of labour law rights) that is afforded by international standards is not reflected in South African labour law (Van Niekerk, 2006). As a result, many employers in small firms argue that South African labour laws do not adequately reflect the needs of small firms (Van Niekerk, 2006). Thus, the mechanisms that are argued to promote regulated flexibility and their application may need to be reviewed (Van Niekerk, 2006). For example, Cheadle (2006) identified the selective application of legislative standards or requirements. More precisely, small employers (those employing 50 or less employees) are excluded from Chapter 3 of the Employment Equity Act (EEA), but this selection application

does not apply to unfair dismissal laws. This means that the difficulties of small employers are not taken into consideration in relation to unfair dismissal laws (if the logic behind excluding them from the EEA is their difficulty). Also, most supervisory or management employees are excluded from hours of work provisions, but not from unfair labour practices or unfair dismissal laws. The logic behind this exclusion is that they enjoy bargaining power that allows them to negotiate the terms of their employment contracts, but if they can negotiate their hours of work, then it is clear that they can also negotiate their rights to unfair dismissals (Van Niekerk, 2006). Unfair dismissals will be discussed below, offering reasons why employers feel that labour laws are not accommodative of small businesses and thus the reasons why small businesses should be exempted from unfair dismissal laws.

2.7.2.1 Unfair dismissal laws

Even though South African labour law is not as inflexible as comparative studies claim, it is still necessary to revise South African labour laws, especially dismissal laws to reduce the burden on small businesses (Cheadle, 2006). This is so because the new LRA led to a number of unintended consequences, most of which have a severe impact on small firms because of the few resources they have to address these. For example; dispute resolution structures have been faced with an excessive unanticipated number of disputes, delays in determining disputes are common, the cost of dispute resolution (both for the state and in terms of cost to the employer) is high, and proceedings before dispute resolution bodies and Courts are overly technical (Cheadle, 2006). Therefore, because of these burdensome unintended consequences (more so for small firms as they have fewer resources required to address these consequences) there has been a view that small firms should be exempted from certain provisions. As can be seen with the example of unintended consequences provided above, it can be argued that small firms should be exempted from the unfair dismissal provision as well as the provisions related to disputes on unfair dismissal (such as probation). Furthermore, while regulated flexibility is a sound framework, international labour standards generally allow greater degrees of flexibility than are recognised by the South African labour legislation. For example, according to ILO Convention No. 158, which entails the Termination of Employment Convention of 1982, small businesses can be excluded from the laws on unfair dismissal. Thus, mechanisms such as the selected application of labour standards can be better implemented to accommodate the interests of small employers (Van Niekerk, 2006).

It is important to define a dismissal in an effort to bring to the fore the criticisms of the provisions on dismissals by employers. According to the LRA, together with the Code of Good Practice, a dismissal provides the steps to be taken when an employer desires to dismiss a worker. In addition to providing a definition of a dismissal, the LRA of 1995 defines an automatically unfair dismissal and what can be considered a fair reason for dismissal. These reasons may be related to misconduct, incapacity and operational requirements. Moreover, the LRA requires that any dismissal be done according to a fair procedure, which can be ensured through abiding with the steps set out in the Code of Good Practice. The Act also sets out the remedies available to employees when they have been unfairly treated (Schedule 8).

When looking at fairness, it becomes important to consider that a dismissal must be substantively fair as well as procedurally fair. Substantive fairness involves the reason for the dismissal. In small firms, this reason is fair if it is related to misconduct or incapacity. Procedural fairness refers to the fairness of the procedure undertaken when dismissing a worker. These procedures are set out in the Code of Good Practice (Cooper *et al.*, 1997). Most employers have argued that, because of these procedures, it is impossible for South African businesses to adapt to economic demand, especially when there is an economic downturn. A reason for this is the fact that businesses always have to comply with specific procedures established by the law. In some countries, regulation on dismissals allow for a threshold scale below which the most restrictive regulation provisions are not enforced, the legal procedures for firing are eased, and severance payments are reduced (Boeri and Jimeni, 2005). However, in South Africa, small businesses are treated the same as large ones. The President's State of the Nation speech, ANC discussion documents, and a number of press statements indicate that there is a strong perception in a number of quarters that the LRA and BCEA are not sufficiently accommodative of small business problems and interests (Godfrey, Maree, and Theron, 2006).

Although employers and economists have claimed that dismissal laws are too rigid or are a burden on businesses, it has been argued that it is rather the way that the employers (who are influenced by labour consultants, lawyers, arbitrators, and judges) interpret the requirements for procedural fairness as being too strict and not the actual dismissal laws (Cheadle, 2006). In other words, the employers demand more technical pre-dismissal procedures than required

by the Code of Good Practice. As a result of these strict interpretations, dismissal laws are interpreted as requiring complex pre-dismissal hearings in the workplace and being a burden on small firms, without advancing the rights of workers in the process (International Labour Office, 2006). Instead, labour consultants, lawyers, arbitrators and judges benefit in the process through financial compensation (Cheadle, 2006).

Because of these interpretations, it can therefore be argued that employers are correct in their claims that pre-dismissal hearings have become a burden on small businesses. Apart from the monetary costs attached to these, it has been revealed that administrative burdens and time costs that are associated with these procedures may also be burdensome or be regarded as excessively costly (Rankin, 2006). As a result, in most cases regulation is not a burden in itself, rather it is burdensome because of the bureaucratic processes that firms must comply with (in other words, the burden of complying with regulation) (Benjamin, 2005). For example, many employers have argued that provisions on dismissals have an indirect effect of restricting the exercise of managerial decision-making. For instance, unfair dismissal laws require management to exercise decisions in a manner that is fair. The restraints may be of a procedural nature (requiring adherence to procedures before a decision is made) or of a substantive nature (requiring an evaluation of the content of the decision) (Benjamin, 2005). Consequently, it is difficult to distinguish the number of regulations that may be burdensome as one regulation may be burdensome more than the addition of many regulations because of complying costs (Rankin, 2006). For example, it has been revealed by Clarke *et al.* (2006) that senior management of manufacturing firms in South Africa spend an average of 10 per cent of their time dealing with regulatory officials and regulations. The average time spent with regulations is uniform across different categories of firms (Clarke *et al.*, 2006). Moreover, concerning dismissals, the Codes of Good Practice does not set out any guidelines on the conducting of dismissals by small firms. As a result, the CCMA and the Labour Court treat small firms similarly to large firms in relation to disputes about dismissals (Roskam, 2007).

Although many small employers have argued that small firms are treated like large firms in relation to dismissal laws, it has been shown that there are instances where they are exempted from provisions in these laws. This can be shown through looking at dismissals for

operational reasons (retrenchments). According to Section 188 of the LRA, an employer may retrench workers if there is a fair reason based on its operational requirements. There have been different interpretations from the Labour Court and the Labour Appeal Court about the substantive fairness of retrenchments (Roskam, 2007). These reasons vary from retrenchments being viewed as a technique used to increase profits to them being allowed as a measure of last resort (Roskam, 2007). Employers are obliged to follow certain guidelines, which are set out in Section 189 of the LRA, when implementing a retrenchment. These guidelines apply to all employers, including small employers. Moreover, the guidelines have to be followed regardless of the number of proposed retrenchments. In other words, even if one employee is to be retrenched, the guidelines set out in Section 189 have to be followed. This was seen to be impractical by employers of small firms (Van Niekerk, 2006). In recognising the difficulties faced by small firms due to this impracticality, section 189A was added to the LRA amendments in 2002. This section only applies to firms that employ more than fifty employees and when the proposed retrenchments per year are above a certain threshold (Roskam, 2007). Internationally, ILO Convention No. 158 permits the requirements of notification and consultation to be limited when the proposed retrenchments are above a certain threshold (Van Niekerk, 2006). Thus, international standards allow small firms to be excluded from the more complex and burdensome procedures required by the LRA when retrenching (Cheadle, 2006).

2.7.2.2 Probation

The issue of a dismissal has often been mentioned concerning probation. It has been argued that the difficulty of dismissing employees when they are still on probation results in employers being reluctant to hire new employees (Cheadle, 2006). This is so because probation represents a stage when the employers assess whether a new employee is suitable for the particular workplace and/or job. The Code of Good Practice only allows for dismissal during probation on the grounds of poor performance and not incompatibility or unsuitability in the workplace (Cheadle, 2006). There is some leniency for employers because it is easier to dismiss employees during probation (on the basis of poor performance) than after the completion of this period. However, this may also be burdensome for employers because, as a result of the difficulty of dismissing employees for unsuitability during this period, they may be trapped with unsuitable employees in their firms (which may be a problem for the economic interests of the employers) (Roskam, 2007). For example, although an employee

may be performing a job well, his or her values may not be aligned with those of the firm (which means that they are not suitable for the workplace). This is the reason why many employers enter into fixed-term contracts for a short period of time, and if the employee is not suitable to or compatible with the workplace, the contract is not renewed at the end of the period (Cheadle, 2006).

Moreover, probation can be argued to be burdensome because when dismissing employees for poor performance and incompatibility employers would still have to adhere to the procedures and requirements that apply to employees who have completed their probationary period (Van Niekerk, 2006). However, some have argued that there is no empirical evidence to support the claim that there is a positive relationship between reduced protection for workers during probation and employment creation. To be sure, those opposing less protection during probation have argued that deceitful employers might take advantage of less protection during probation by, for example, relentlessly dismissing workers because it is easy to do so. Internationally, many countries have eradicated protections against dismissing employees during a probationary period (Van Niekerk, 2006). In other words, international standards allow for ease of dismissal during the probation period.

Some authors have argued that the problem of dismissal in the probation stage can be addressed through introducing a 'qualifying period' (Cheadle, 2006). It has been argued that during this period there would be a non-application of any protections against ordinary unfair dismissals. This would, of course, exclude automatically unfair dismissals such as discrimination and victimisation. In other words, the qualifying period represents a period in which it would be easy for employers to dismiss employees (without the usual protections), who are performing poorly and who are unsuitable for the needs of the organisation. However, it is important to recognise the fact that some employers may take advantage of this period and use it to exploit employees. To address this, it has been argued that employees who would have completed this period for another employer (for a similar position) or for the same employer in another position should not be appointed for a qualifying period (Van Niekerk, 2006). Moreover, the duration of the qualifying period could be altered through collective agreements, sectoral determinations and ministerial determinations (Van Niekerk, 2006).

As many employers have argued, all of the above-mentioned are allegedly responsible for the high costs incurred by small businesses, which they can ill-afford because of limited resources. In this section, it was shown that even though there are limits to deregulation, there are other measures that can be implemented to introduce greater flexibility to benefit small firms and change employer perceptions about the nature of labour laws in South Africa, but still keeping in accordance with international standards as well as keeping regulated flexibility in tact (Van Niekerk, 2006). However having mentioned these, it is important to take note of the very high unemployment rate in South Africa. Thus, if we look at unskilled or semi-skilled workers and their families or dependants (many of whom are unemployed), dismissal for any reason is distressing. Job security for the unskilled and semi-skilled in South Africa is often a matter of survival. Thus, many workers and trade unions view flexibility in dismissal laws with great suspicion (Roskam, 2007). Moreover, besides the unemployment rate of 25.2 per cent in 2012 and the lack of job creation in the country, it has been revealed that South Africa faces large income inequalities, and these inequalities are growing above the international average. Thus, labour may view any changes in the regulation of wages with great suspicion as well (Roskam, 2007).

2.8 CONCLUSION

Central to the theoretical framework of the study on the impact of labour laws on small firms are the rules that govern the South African labour market. These rules are reinforced by the role of the government in industrial relations. In the South African context, the rules governing the labour market revolve around, firstly; market regulation (liberalism), and secondly; the capacity of government regulation (corporatism). On the one hand, advocates of the liberalism ideological perspective (which involve business) maintain that economic growth can be attained through a minimum role of the government which involves only the facilitation of a framework for negotiations between employers and employees. On the other hand, advocates of the corporatism ideological perspective (which involve labour) maintain that there should be an active role of the government in industrial relations. In looking at the role of the government in industrial relations, it becomes important for one to note that the government intervenes through labour laws as an attempt to reduce the power of employers in the unequal employment relationship. Furthermore, the role played by the government in industrial relations reveals the political and ideological orientation of the ruling party (the ANC in the case of South Africa), in the context of specific social and economic challenges.

This means that although South Africa signed ILO conventions (which means that the country has to commit to implementing its provisions in the labour laws of the country), South African labour laws are also specific to the country (in the context of specific social and economic challenges faced by the country).

In the context of economic challenges, it can be highlighted that the democratic South Africa emerged with a high unemployment rate. Given this high unemployment rate in the country, the government highlighted the importance of small firms. The South African government has noted that these firms create employment for many people, who have been retrenched from big firms or entering the labour market for the first time. Small firms were defined according to the National Business Strategy as those that employ a maximum of fifty employees and that are managed by their owners. Furthermore, existing research has revealed that these firms are especially negatively affected by labour laws as they have fewer resources (such as administrative or financial resources) to respond to any costs that may be incurred because of these laws. As a result, the government has sought to reduce the regulatory burden on these firms. Hence, it is always important to study the impact of labour laws on these firms.

One of the ways to study the impact of labour laws on small firms is to focus on the above-mentioned sets of principles that form the basis for the rules governing the labour market, namely: liberalism and corporatism. It was shown in this chapter that neo-liberalism and neo-corporatism are often portrayed as opposite ends of a continuum. For example, some have argued that the adoption of neo-liberal ideological standpoints in South Africa by the democratic government (through the adoption of GEAR) indicated support for the domestic and international business interests, while ignoring those of the workers (Bramble and Barchiesi, 2003). Thus, these two ideological perspectives are often viewed as conflicting each other. Consequently, there emerged a debate between neo-liberalism and neo-corporatism. . This debate was based on labour market reform which is routinely posed in “either/or” terms opposing regulation and rigidity to deregulation and flexibility (Hepple, 1993: 257). More fundamentally, this debate focuses on the nature and extent of regulation in the South African labour market (thus the importance of this debate when focusing on the impact of labour laws on small firms). These views can be divided into neo-liberals one the

one hand who claim that there is rigid or inflexible regulation in the South African labour market. For neo-liberals, firstly, rigid labour laws protect employees at the expense of the unemployed as employers. Secondly, they argue that there should be deregulation (a reduction or elimination of government rules and regulations that apply to business) in the labour market. International studies that showed that South African labour laws were inflexible were outlined in this chapter (Bhorat and Cheadle, 2007). However, it was illustrated that there are other scholars have revealed that South African labour laws (such as unfair dismissals and sectoral minimum wages) are not inflexible or are comparable in the international stage (Standing, 1997).

Placing liberalism and corporatism on opposite ends of a linear spectrum was also shown through focusing on the extent of employers' compliance with labour laws. One way of looking at this compliance is through employers' responses to labour laws. In particular, it was shown that neo-liberals respond to labour laws through the low-road approach through exploiting loopholes in the LRA to promote greater individualisation. This involves employers utilising the various forms of flexibility such as numerical flexibility (which involves subcontracting workers or using casual workers) to avoid minimum standards such as the unfair dismissal provision. In seeking to avoid these minimum standards it was shown that employers may disguise employees as independent contractors (which are not protected by the legislation) and they may also misuse fixed-term contracts. However, it was shown that regulation has made it difficult for this disguise to take place because of the permission given to the Minister of Labour to deem certain workers as employees (Klerck, 2009). Even though it was argued that employers always seek to evade regulation, it was also shown that sometimes this action might not be intentional on the part of the employers. For example, it was shown that regulation might indirectly change the behaviour of firms. For example, if regulation increases costs of the firm without increasing productivity employer may less efficient and thereby may respond to such factors as competition through non-standard employment (Theron, 2005).

Neo-corporatists, on the other hand, were shown to respond to labour laws through skilling their employees by providing them with training and thereby providing security to these employees. It is clear from this that for neo-corporatists the focus is not on the costs imposed

on the firms or employers, rather they focus is on the labour standards that can be accorded to employees through investing in their skills as well as co-ordinating their wage levels. Some have argued that neo-corporatism may have negative implications as investing extensively in employees may turn out to be costly for employers and their firms. In response to this concern, it was argued that neo-corporatism is a framework that involves a commitment to balancing worker protection, employment security and protection of trade unionism with employer interests and small business development and sustainability (SBP, 2009).

The second aspect of employer compliance with labour laws involves industrial relations within small firms. Industrial relations within these firms are often presented along opposite ends of a continuum, namely the 'small is beautiful' on the one hand and the 'bleak house' view on the other. The 'small-is-beautiful' view involves the close employment relations and low levels of conflict that exist in the workplace because of flatter hierarchies and close working relations. This view highlights internal regulation, which involves social norms that arise when employers and employees have their own understanding of what constitutes fairness. This view is also associated with the informality that characterises many small firms. In this regard, small firms can be expected to behave in at least two ways: firstly, to avoid formal procedures in such areas as discipline and dismissal, and secondly, more generally to rely on face-to-face understandings with employees.

On the other hand, the 'bleak-house' view, similarly to the low-road approach discuss above, involves employers engaging in a 'race to the bottom' in terms of labour market regulation. In contrast to industrial harmony that is said to exist in small firms, this view emphasises poor working conditions; exploitative, autocratic management; and low pay. It is important to note that with both these views there is disconnectedness between law and practice, and therefore minimum impact from legislation on small firms. For example, employers may allow employees to work more than the legislated working hours for a lesser wage. It can therefore be recognised that the 'bleak-house' view may be associated with neo-liberalism. Furthermore, although research has shown that many employers perceive labour laws as being burdensome on their firms it can be recognised that a consequence of industrial relations within small firms (whether through the 'small-is-beautiful' or 'bleak-house' views)

is that of a minimum effect of labour laws in these firms as there is a disconnectedness that is evident between law and practice.

However, some scholars brought to the fore another perspective to the industrial relations within small firms (Wilkinson, 1999). According to these scholars, industrial relations in small firms do not solely depend on the size of the firms (as is assumed through the 'small is beautiful' and 'bleak house' views) (Wilkinson, 1999). Rather, the size of the firms interacts with other contextual factors in the external environment. In looking at this external environment, it became clear that small firms are not identical. They respond to labour laws differently depending on (among others) the sectors in which they operate. When looking at the different ways they respond, it was important to take note of the competitive market. For example, employment conditions in small firms depend on competitive pressures as well as the degree of dependency on large firms (Rainnie, 1989). It becomes clear from this that workplace rules originate from national and sectoral contexts. In opposition to the differences between the perspectives outlined above, it has been argued that the impact of labour legislation on small firms is not readily predictable in advance; statutory regulation is mediated not only by the different external environments in which the firms operate, but also by the often opaque and complex internal dynamics within an individual small firm (Ram and Edwards, 2003).

The outline provided above therefore shows that neo-liberalism and neo-corporatism are often presented as existing at opposite ends of a regulatory spectrum. More precisely, they are often portrayed as being in conflict with each other. However, research has shown that in reality the two frameworks do not exist independently of each other, but instead can be complementary. For example, it was shown that the nature and extent of informality in small firms adapts to the changing circumstances such as the nature of the product market as well as regulation among other factors.

Although neo-liberalism and neo-corporatism have been shown to exist at opposite ends, the South African democratic government has pursued a complementary or balanced regulatory framework. This is reflected in the notion of regulated flexibility (a framework within which a balance is achieved between flexibility for employers and security for employees). The

commitment of the state to regulated flexibility can be seen through or is reflected in the LRA of 1995 and the BCEA of 1997, which were implemented to ensure fair and equitable labour relations while affording employers a measure of flexibility. Furthermore, commitment to regulated flexibility involves a continuous evaluation of the extent to which a balance between flexibility and security is struck. One of the ways to evaluate this is through assessing the burdens imposed by regulation on small firms. In assessing these burdens, it was revealed that existing research shows employers believe small firms in South Africa are treated like large firms, as they are not accorded the flexibility that is contained in international standards. Consequently, many employers in small firms argue that South African labour laws do not adequately reflect the needs of small firms. Many of these employers assert that certain provisions need to be re-evaluated in order to lighten the burden on small firms (Cheadle, 2006). These provisions were primarily related to unfair dismissals and probation.

3

RESEARCH DESIGN

3.1 INTRODUCTION

This section will outline the research methodology that was adopted in this research. This will be done through a focus on the objectives of this research, data collection methods, data analysis methods as well as the challenges that were faced in the conducting of the research. Sanders and Pinhey (1983) referred to a research design as the process of total planning for a study. This section will therefore provide the plan that was prepared for this research, referred to as a research design. This includes instruments that were used in collecting data, sampling procedure, analysis of data. Lastly, it involves the challenges that were faced in the course of collecting data and how those challenges were overcome.

3.2 RESEARCH SIGNIFICANCE AND RESEARCH OBJECTIVES

It is evident from the preceding chapters that the debate on labour market regulation and small firms cannot be disentangled from a discussion of the impact of labour legislation on small businesses. This is so because any solutions to the perceived rigidities will likely benefit small firms the most (Van Niekerk, 2006). Moreover, it is important to study the impact of labour law on small businesses in order to assess the regulatory burden on small firms, which is central to evaluating whether the mechanisms that promote regulated flexibility are appropriate. More importantly, evaluating the regulatory burden on small firms means that strategies may be found to reduce unemployment in South Africa (it may be recalled from the above that small firms are regarded as employment creators in the country). Therefore, it is important to study the impact of regulation, especially post- 1995 labour law, on the procedures, norms and practices in small firms (firms employing up to 50 workers), that is, how labour law has moderated industrial relations within small firms.

In light of this, the main objective of the thesis is to explore and explain the impact of labour on small firms. The particular focus will be on employer perceptions of the key provisions of

the LRA of 1995 and BCEA of 1997 in selected firms in Grahamstown, Port Alfred and Port Elizabeth.

The secondary goals are to:

1. explore the labour market flexibility debate by assessing the extent to which South African labour laws have undermined flexibility and imposed unfair rigidities on small firms;
2. assess whether small employers adopt the ‘high road’ or ‘low road’ responses to labour laws;
3. assess the extent to which South African labour laws, which promote regulated flexibility, address the needs of small businesses; and
4. assess the compliance of employers with labour law by exploring the approach to labour regulation that employers of small firms adopt in their organisations.

This research focused on the two Acts that are most clearly associated with regulated flexibility and have been identified as the cornerstones of legislation in the democratic era: namely, the Labour Relations Act (LRA 66 of 1995) and the Basic Conditions of Employment Act (BCEA 75 of 1997). More specifically, the focus was on legislative provisions designed to govern the individual employment relationship because these tend to be the most contested aspects of South African labour law. This relates, among others, to issues of working time, leave, dismissals and redundancies (Bhorat and Cheadle, 2007). Other provisions that were explored were the sectoral minimum wages, fixed-term and part-time employment contracts.

3.3 DATA COLLECTION INSTRUMENTS

Prior to the collection of data, the dynamics between employers and employees of small firms were taken into account. Consequently, there was an adherence to ethical considerations such as ensuring confidentiality and ensuring informed consent.

In carrying out this research, the qualitative research methodology was utilised. This approach always involves some kind of direct encounter with the world. In order to understand the importance of using this approach, it becomes important to define it. Qualitative research refers to the 'meanings, concepts, definitions, characteristics, metaphors, symbolism, and descriptions of things' (Berg, 1998: 3). In this case it becomes clear that qualitative researchers are concerned not only with the objectively measurable facts or events, but also with the ways that people construct, interpret and give meaning to these experiences. Qualitative researchers aim to develop new concepts rather than impose preconceived categories on the people and events they observe (May, 2002). Moreover, qualitative research entails interpreting social realities, and is considered 'soft research' (Bauer & Gaskell, 2000). This methodological approach was particularly relevant in this research because the aim of the current research was to identify the impact of labour law on small firms, consequently, it was recognised that this impact could be identified through a focus on the perceptions of the employers. In other words, the qualitative approach enabled the researcher to gather the meanings, definitions, and characteristics that employers attached to this impact. Also, through utilising this approach the researcher was able to interpret the social realities of the employers from the small firms.

Many have revealed that the qualitative approach has many advantages that are not associated with the quantitative approach. For example Patton (2002) argued that the qualitative approach allows issues to be dealt with in an in-depth and detailed manner. This is so because with the qualitative approach, the researcher is allowed to approach the collection of data without any predetermined categories of analysis (as is the case with the quantitative approach); this ultimately results in the openness, depth and detail of the qualitative approach. The qualitative approach thus creates great detailed data about a small number of people and cases. This facilitates the depth of understanding cases and situations studied while reducing generalizability.

Furthermore, the qualitative approach involves the researcher being naturalistic (in contrast to controlled experimental designs), that is, the researcher does not attempt to manipulate the phenomenon being studied. Thus, the phenomenon of interest unfolds naturally as there are no predetermined courses established by or for the researcher. In this case, the participants

are interviewed with open-ended questions in settings that are comfortable for and familiar to them (Patton, 2002). More specifically to the present research, the employers were interviewed in their offices or workplaces, because these are the settings in which they have control (for example they have controlling power over employees in these settings). The fieldwork was carried out in English.

3.3.1 Sampling

As mentioned earlier this research focused on small towns in Grahamstown, Port Alfred and Port Elizabeth. In focusing on these towns in the Eastern Cape, non-convenience sampling was employed. Non-convenience sampling is a non-probability sampling technique. In non-probability sampling, there is no way of specifying the probability of each unit being included in the sample, and there is no assurance that every unit has some chance of being included. This is in contrast to convenience samples which involve researchers obtaining a convenient sample by selecting whatever sampling units are conveniently available (Frankfort-Nachmias and Nachmias, 1996). Thus, for example in the present research, the researcher took those employers and employees of small firms who were willing to be interviewed. Consequently, there was no way of estimating the representativeness of the sample, and thus not being able estimate the limit of those that will be interviewed. There were 24 participants in this study, including 21 employers and 3 employees. The following are the names (pseudonyms) of the employers, names of their businesses (pseudonyms) as well as the dates of the interviews:

1. Brian. Rite and Parrot, Grahamstown: 10 January 2013
2. Madelaine. Mad's Restaurant, Grahamstown: 12 January 2013
3. Catherine. Sidehouse Guesthouse, Grahamstown: 22 January 2013
4. Mariane. Slip Stream Bar, Grahamstown: 22 January 2013
5. John. Bakery Tin, Port Elizabeth: 29 January 2013
6. Mike. Renewed Laundry, Port Elizabeth: 29 January 2013
7. Mohammed. Vale Butchery, Port Elizabeth: 29 January 2013
8. Brenden. Curtains and Linen Shop, Port Elizabeth: 30 January 2013
9. Isaac. Ukhanyo Events Organisers, Port Elizabeth: 31 January 2013

10. Ray. PUB, Port Elizabeth: 31 January 2013
11. Fiona. The Diners, Port Elizabeth: 31 January 2013
12. Elizabeth. Elizabeth's Construction, Port Elizabeth: 1 February 2013
13. Simon. Friends' Liquor Store, Grahamstown: 7 February 2013
14. Mellanie. Black Café Shop, Grahamstown: 11 February 2013
15. Leanne. Fresh Tea Restaurant, Port Alfred: 18 February 2013
16. Pam. Fish Market, Port Alfred: 18 February 2013
17. Matthew. The Brew Pub, Port Alfred: 19 February 2013
18. Laura and Danny. B.G. Restaurant, Port Alfred: 19 February 2013
19. Michael. Spake's Furnitures, Port Alfred: 19 February 2013
20. Benson. Evolution Restaurant, Grahamstown: 25 February 2013
21. Miles. Hatraas Restaurant, Grahamstown: 7 February 2013

In choosing a sample, the goal is to select a group of participants who are strategically located to shed light on the larger forces and processes under investigation (May, 2002). For example, this research was dedicated to employers in small firms who shed light on the impact of labour law on small firms, through primarily looking at their perceptions of these labour laws. Although it has been argued that within a specified group (for example the employers in small firms), it is important to interview people who vary in their resources and in their responses. For example in this particular research this was done through looking at employers in different firms and different industries (which meant that they varied in their resources as they had individualistic circumstances based on their individual firms). Even so, this study did not look at certain sectors but focused on employers irrespective of their sectors. From this, it was intended that there would be no limitation to the data. More precisely, the data was expected to be broad from this, which would then mean that the researcher would be able to compare and contrast on the basis of the available data. However, this was not the result. Instead, many of the employers that were interviewed were from the service sector. Thus, to a large extent much of the data was related to this sector rather than including a comparison of the different sectors. It is also important to recognise that a sample is chosen carefully and with little bias as possible (May, 2002). This is the reason why in this

study, although the main focus was not on employees they were also utilised in the interviews. As suggested by Scase (1995), it is important to capture employers' strategies and how these, within different contexts, are negotiated with employees to determine varying patterns of accommodation.

3.3.2 Interviews

In collecting the data through the qualitative inquiry, face-to-face, semi-structured interviews were conducted. In qualitative research, interviews are often taken to involve some form of 'conversation with a purpose' (Burgess, 1984: 102). The style is conversational, flexible and fluid; and the purpose is achieved through active engagement by interviewer and interviewee around relevant issues, topics and experiences during the interview itself. This is the reason why interviews are sometimes referred to as a dialogue. This means that they are joint endeavours between the researcher and participant, through conversation, searching for true understanding and knowledge (Kvale, 2006). Interviews are also considered to be 'the gold standard of qualitative research' (Silverman, 2000: 291).

As mentioned above, the interviews were semi-structured. Semi-structured interviews involve the implementation of a number of predetermined questions (These questions can be found on appendix A). These questions are often asked of each interviewee in a systematic and consistent order; however, the interviewer is allowed the freedom to deviate. In other words, the interviewer may probe beyond the answers to their prepared and standardized questions (Berg, 1998). Moreover, face-to-face interviews were utilised in this study instead of telephonic interviews because when looking at interviews, it is important to note that there are limitations to how much can be learned from what people say. In order to capture and understand the complexities of many situations, it is significant that the researcher observes the phenomenon of interest. Face-to-face interviews allow for this observation. While interviewing, the researcher also has a chance of observing or reading non-verbal messages (Patton, 2002). In capturing this informal, non-verbal communication from the participant, face-to-face interviews allow for communication that may indicate that a follow-up question or probe is required (Cresswell, 1998). May (2002) stressed that no single interview can offer more than limited insight into general social forces and processes. Only by comparing a series of interviews can the significance of any one of them be fully understood. In the long

run, each interview will contribute to the final story. This is the reason that interviews were conducted with a number of employers.

In addition to the interviews, archival records in the form of legislations were utilised. These records gave the opportunity to ensure reliability of the information that was obtained from the employers through the interviews.

3.4 DATA ANALYSIS METHODS

After the data had been collected through interviews as well as the reviewing the legislations, the material was transcribed and then analysed. The data was analysed in light of the research questions, which were centred on the secondary goals of this study. In doing so, thematic analysis was adopted in analysing the available data. The themes that developed from the interviews and legislations were structured so as to form the empirically-based chapters. The empirically-based chapters therefore were divided in light of the secondary goals of this research.

3.5 CHALLENGES

There were some challenges that were encountered through the course of the fieldwork. One of these involved difficulty of finding employers who wanted or agreed to be interviewed. Many of the employers, especially in Grahamstown, did not want to be interviewed. This may be related to the fact that many owners of small firms are also the managers. Thus, many of them claimed that they did not have the time to be interviewed. Others even stated that they did not want to be interviewed as they had nothing to do with labour laws or labour laws were not applicable to their businesses. I had to reassure them that there was no right or wrong answer. I was not there to ensure that they comply with labour law, but was there to study the impact labour laws have on their businesses and it was not wrong to argue that labour laws had no effect. I also made appointments with the employers to ensure that we met when they were not busy.

Another challenge that was faced was related to the noisiness, and therefore disruptiveness, of the interview settings (which were usually the firms). For example, some of the employers

did not have their own offices, thus they had to be interviewed at the same space where their businesses were conducted. This was a major challenge as it has been argued that these distractions during the interview may result in a researcher not getting the “heart of the matter” (Wolcott, 1999: 87). This challenge was overcome through making an appointment beforehand the interview meeting, asking for a suitable (quiet) place for the conducting of the interview from the interviewee and having ground rules between the interviewer and the participant before the beginning of the interview meeting. Also, the appointments were usually made for times that are known to be quiet or not busy. For example, just after lunch for restaurants.

The last challenge which was faced in this study is one that has also been revealed in existing literature. More specifically, the fact that qualitative methods may provide detailed data, the researcher may face a challenge with analysis of this data as the data obtained from these methods (in this case, interviews) may be difficult to analyse as a result of the responses being neither systematic nor standardized (Patton, 2002). In overcoming this challenge, data which was collected through the interviews was recorded and notes were written. Overcoming these challenges contributed to the measures that were taken to ensure validity in this study.

4

EMPLOYERS' PERCEPTIONS OF STATUTORY REGULATION

4.1 INTRODUCTION

This chapter as well as the following ones will provide an outline of the research findings on the impact of labour laws on small firms. The findings of this study were produced through interviews as well as through the analysis of the legislations. Furthermore, the following chapters will draw on the conceptual framework outlined in Chapter 2. In outlining these findings, the focus will firstly shift to the employers' perceptions of regulation.

It is important to note that the impact of regulation is determined or influenced by, among other factors, the perceptions of the managers or owners of small businesses. These perceptions are extremely important to the present study because they may affect the extent to which regulation has an impact on small firms. As noted in Chapter 2, the perceptions that employers have of labour law may shape how they run their businesses in responding to labour law. For example, these perceptions may relate to how they respond to labour law, and how or if they comply with the different legislations (these will be explored in the following chapters). Consequently, these responses to and compliance with labour laws may affect the extent to which labour law affects small businesses. In this regard, it becomes essential to note that these perceptions, as illustrated in Chapter 2, revolve around what has been conceptualised as the labour market flexibility debate. In this concern, it was important to capture the perceptions of the managers on the nature of labour law as well as the degree to which they view labour laws to be affecting their firms. More specifically, these perceptions involve the extent to which South African labour laws have undermined flexibility and imposed unfair rigidities on small firms. Discussions with the managers in the present study suggested different perceptions of or views on the nature and degree to which they are affected by labour law, which ranged from views that labour laws imposed great costs or were a burden on these firms to those that held that labour laws did not impose any unnecessary costs on their businesses. This chapter will therefore explore the different themes

of these perceptions that were gathered through the interviews, putting these responses in the context of previous studies as well as legislations (specifically focusing at the Labour Relations Act of 1995 and the Basic Conditions of Employment Act of 1997).

4.2 General perceptions compared to particular incidents at the firms

In looking at the different perceptions of legislation that were expressed by the employers, it is important to recognise the fact that the negative perceptions that some of them voiced did not necessarily mean that there was a direct effect from the legislation on the firms. In explaining this, labour laws (among other factors such as finances) were identified by the employers in the researched small businesses as hindering the growth of their firms or as being too rigid. However, little evidence was revealed to substantiate these claims. In other words, although the employers had negative views of labour laws, there were no specific events that had occurred in the businesses particularly to reflect this. For example, no employees were dismissed, and there were no disputes about leave or unfair treatment. This raises a distinction between the general and the particular. That is, generally, employers held a negative view of labour laws, but there were no particular events or incidents to show the negative impact labour laws had specifically on their businesses.

Specific examples will be used to illustrate this point. To demonstrate this argument, firms that provided specific incidents to substantiate their claims of the negative effect of labour laws on their firms will be distinguished from those that claimed these negative effects without substantiation or support from specific events. An example of the former is an employer of a small restaurant, Hatraas, in Grahamstown. He argued that South African labour laws are financially costly, onerous, and consequently hinder the growth of his business. He supported this argument by providing an example of the CCMA forcing him as the employer to compensate former employees that were dismissed for being drunk during their working hours. According to the employer, these employees were screaming and threatening other staff as well as the customers. This employer stated that they were forced by the CCMA to compensate these employees on the grounds of ‘non-compliance loop-holes’ on the part of the employer.

The example provided above shows that the general views of the employer are supported by a specific incident within the firm. However, this was not the case for many other employers that were interviewed. Another employer of a small coffee shop/restaurant in Grahamstown can be used to demonstrate this. In this case, the employer complained that

At the moment, the labour laws work very much in favour of the employees; more so than the employer. The fact that you can have three warnings for one thing wrong is costly to us. You need to get three for the same thing in order to get fired. So, for instance, if you're late for work, and you talk rudely to the owner; those three things aren't going to count for dismissal because they are different (Mellanie).

From the response above, it would be expected that the employer would have at some point in the business gone through an unfair dismissal dispute. However, when asked about specific incidents that had occurred in her business, she argued that there were no incidents. Contrary to the view she gave above, she stated that she had had her employees for a long period. In other words, there was a low staff turnover. Thus, although she complained about the burden imposed by the unfair dismissal provision, she did not correlate this view with specific incidents in the business. Instead, specific incidents suggested a different orientation to her views.

Another employer in the hospitality industry also emphasised that labour laws were very costly to the business. However, when asked about the major shifts that had taken place in the cost structures of the business, she argued that these were mostly related to the prices of food, which increase drastically. She argued that

Every year because of inflation, at the beginning of every year it's kind of difficult to change prices. For instance, it was R22 a kg for tomatoes at the end of last year and now they've increased it. Because they were R22 last year I can't make everything on my menu that has tomatoes more expensive. Prices come down again a few months later, so it's kind of tricky. All that happens is your profitability comes down (Mellanie).

It can therefore be noted that although she stated that labour laws had cost implications for her business, it was obvious from the example she gave that she regarded the prices of food as a primary cost. These prices formed part of the major shifts that had taken place in the cost structures of her business (and not labour laws). In other words, it was the food prices that shaped the cost structures of this business rather than labour laws. From the above, therefore, there is a contradiction in the argument or view of the employers; the employers' perceptions that labour laws are very costly are not substantiated when one looks at the cost structures of the firms. It is also obvious from the responses of the employers that their negative views of labour laws were mostly influenced by what they had heard from fellow small business owners. For example, an owner of a small business in the hospitality industry had negative views of the legislation, but these views were not supported by specific incidents in her own business. Instead, she based these views on incidents that had occurred at a friend's business. This further illustrates the discrepancy between the general and the particular. This distinction between the general and the particular was further illustrated through the time spent on regulation by employers. For example, some of the employers that were interviewed claimed that labour laws were an administrative burden and took too much of their time. However, when asked about the time they spent on regulation it was obvious that they did not spend much time on it. For example, an employer of a coffee shop in Grahamstown pointed this out when she was asked the amount of time she spent on regulation:

Hardly any time (Mellanie).

Another employer of a small restaurant in Port Alfred, asserted:

Very little, I pay an accountant to make sure I pay the right taxes... (Leanne)

Although the distinction between the general and the particular was apparent, it is also crucial to note that the negative perceptions that were revealed by the employers should not be dismissed. As indicated in Chapter 2, employer perceptions are crucial to consider when focusing on the impact of labour laws on small firms. More precisely, the views employers may have may affect how they run or operate their small businesses and how they respond to

labour laws. The argument above on the distinction between the general and the particular shows the subjective perceptions on labour laws from the employers that were interviewed. Although these subjective perceptions may shape how employers respond to labour laws, they do not shape the objective impact of labour laws on small firms. This is so because the objective impact of labour laws does not solely depend on the perceptions of the employers. If this was the case, the sole purpose of labour law would not be achieved, that is, employees would be treated unfairly. The objective impact of labour laws is rather dependant on the form of state intervention in the labour market, and particularly, in the employment relationship. Thus, the impact of labour law is not purely a matter of subjective perception. Although the subject of the compliance of employers with labour laws will not be explored in detail in this chapter, the importance of these subjective perceptions of employers (whether or not these are supported by specific incidents within their firms) lies in the fact that they may be used in understanding the extent of the impact of labour law on small firms as they may affect the degree to which labour law may be avoided, and therefore likely compliance of these employers with the labour laws. Therefore, although it is important to draw a distinction between the general and the particular, this distinction does not take away the importance of these perceptions in determining the impact of labour laws.

4.3 THE EXTENT OF REGULATION

Above, it was indicated that employers' negative perceptions of labour laws are often exaggerated, as they are not supported by specific incidents within their businesses. However, some of the employers that were interviewed justified their perceptions by providing direct as well as indirect effects of legislation. These effects informed the perceptions of the employers. In explaining this it is important to recognise (as indicated above) that many of the employers suggested that there were no incidents that occurred in the workplace that could illustrate the effects of labour law. This was to a large extent as a result of the close and friendly employer-employee relations in those particular firms. For example, some employers argued there were no events of direct or indirect effects of labour laws on their businesses because of the close or intimate relationships with their employees. They argued that this could be related to the fact that they had worked with their employees for long periods, so there was a sense of loyalty in the business. This point can be ultimately associated with the conformity of the employers (as well as the employees) with labour laws; for example, employees who work for their employers for extensive periods become loyal to them. In

these kinds of relationships, labour laws are treated as external elements to the firms (or employment relationships) and informal agreements between the employers and employees become the norm. Consequently, employers rather focus on these informal agreements and not labour laws. This will, however, be discussed in the next chapter.

In spite of these unsubstantiated claims, some employers that were interviewed argued that labour law has had direct as well as indirect effects on their businesses due to certain incidents that occurred. Such incidents were related to, among other factors, theft by the employees. For example, when an owner of an entertainment (gambling) business was asked of such incidents, she stated that

Yes, we have disciplinary hearings. We have had people stealing from us in the past because it's a cash-based business. So, it's easy to steal the money ... If the people are not trustworthy and there's been dismissal for people that stole and we've had even the police; they involved lie detectors, and then when we went to the CCMA. Actually, the law was in favour of our company ... because we treat the people in a way they are supposed to be treated (Mariane).

It can be seen from the above incident mentioned by the employer, that there was a positive effect resulting from labour law. More precisely, it is evident that the employers were favoured by labour law through the CCMA. Secondly, it can be seen that as a consequence of this incident, the firm was encouraged to move towards formal labour relations processes and procedures. In this case, because of theft by employees, the firm developed disciplinary procedures. It may be asked whether this is the case for other small business owners. In other words, do labour laws always have a positive effect on small business? This would be a substantiated question as it was indicated in an example above that labour law had a negative effect on one of the businesses in the service sector in Grahamstown, where employees were dismissed for pitching up for work drunk. Thus, it will be revealed below that even though labour law has been shown to have an indirectly positive effect on firms, some employers that were interviewed provided incidents that showed that labour law could be indirectly detrimental to firms. In indicating these effects, it is important that this be done in the light or consideration that the outcomes of cases or disputes may depend on the facts of each case,

therefore, whether employers or employees win dispute cases does not necessarily indicate the negative or positive effects of labour laws but rather the facts as well as procedures followed in each case.

4.3.1 Labour Laws Reduce Employers' power

In the view that labour laws are detrimental to small firms, employers argued that in many circumstances labour law 'favours' the employees, consequently, reducing the power of the employers in the workplace. To clarify this, employers argued that employees know their rights and are aware that they are favoured by labour law and, as a result, they act inappropriately at the workplace knowing that the employer has no power to do anything about this inappropriate behaviour. An employer of a construction firm in Port Elizabeth provides a picture of this:

Yes, we had a situation where we had employees that actually threatened me as the manager, they threatened us, and we could only do so much. We did the whole warning system, continually be misconducting on various things but we couldn't actually do something about it because of the labour law. Before you can actually do something about it, they would know that (our employees) so they would do different things knowing that they would get away with it and we cannot say or do anything (Elizabeth).

Thus, it is evident that the employers that were interviewed viewed labour law in small firms as having an indirect effect of reducing the power of the employers over their own businesses. Moreover, it can be seen that these employers perceived this reduction of power as occurring, among other provisions, through the unfair dismissal provision. Particularly, many of the employers interviewed claimed that it is easy for employees to take advantage of labour law and act inappropriately because they know that it is very difficult to dismiss them. Although this will not be dealt with in great detail in this chapter, one may relate this perception of the employers in the current research as corresponding to findings of previous research where it was indicated that the main problematic aspect of the unfair dismissal provision is related to the procedures that have to be followed when dismissing an employee (Cheadle, 2006).

Other employers that were interviewed pointed out events that show that employees are always 'favoured' by labour laws. These employers argued that, no matter what the dispute is about - whether it is about leave, pay, or dismissal - the employees always win. For example, when asked about certain events that could show the effects of labour law on the firm, an employer of a curtain shop in Port Elizabeth, who employed close to 40 employees, argued that

Lots ... leave, disputes about leave, there's disputes about pay, I think sick leave, disputes with warnings (you know, first and second warnings, final warning). Then you have to get an outside person in to chair your meeting and dismissal, and they can sort these out. The commissioner, the CCMA ... no matter what you say or do, they can side with the employee, and you either pay the employee out and that's a problem. Hey, especially when that person who's chairing the meeting doesn't understand what's going on, I'm speaking as an employer (Brenden).

4.3.2 Labour Laws Negatively Affect Employer-Employee Relations

According to many of the small employers interviewed, labour laws reduced their power in the business. In addition, they indicated that this power reduction of the employers also brought about an effect on the employment relationship. The employers that were interviewed 'falsely' blamed labour laws for reducing the employers' power in the employment relationship, and argued that this reduction in power led to the relationships between employees and employers being negatively. Particularly, some employers perceived labour laws to be creating conflict between them and their employees. These employers argued that this was related to the financial costs that were imposed by labour laws. For example, they stated that they were forced to employ labour experts (who demand a large amount of money) when dealing with disputes in the workplace. Consequently, there is much resentment towards employees from the employers, which stems from their perceived financial loss. Moreover, the strife between employers and employees also results from the fact that many employers believe that South African labour laws mostly favour employees rather than employers. Therefore, they claimed that during disputes, employees always have the upper hand or are always the victors. In such cases, employers are either forced to continue working with the employees that 'defeat' the employers during the disputes or are

forced to pay these employees out. An obvious result of this is conflict in the workplace. It is also recognizable that this may have an indirect, negative result on the productivity of the firm.

From the above, it can be noted that although a minority of the employers indicated positive effects of labour laws, many disputed this and claimed that labour laws affected their businesses negatively. From this, it can be deduced that many of the small employers that were included in this research have a negative view or perception of labour laws. As argued above, firstly, labour laws reduce the power of employers in their businesses through 'favouring employees'. Secondly, it can be seen that employers perceive labour laws as negatively affecting employer-employee relationships in the workplace. Thirdly, employers attach financial costs in the businesses to labour laws. For example, many of the employers claimed that they are often forced to spend large amounts of money employing labour experts to deal with workplace disputes or spend money paying subscription fees to a small business employers' association (which deals with many disputes at the workplace). One of the employers even claimed that adhering to labour laws may mean that they get nothing in return as entrepreneurs. For example, an employer in the entertainment industry stated that

In order to adhere to all the rules and regulations, you jeopardise your business. Sometimes, when you have to pay the profits at the end of the day, sometimes there are no profits for the owners to take out and the salaries, us taking out a salary for the manager and for the owners of the business is impossible. Sometimes, we can take out the salary and sometimes we can't (Brian).

Employers perceived the above-mentioned factors as being detrimental to their small businesses, and thus hindering their development or growth. It is therefore obvious that many small business employers that were involved in this research generally had a negative view of labour laws. This negative view correlates with what was discussed in Chapter 2. More specifically, it can be associated with views linked with the neo-liberal ideology. For neo-liberals, labour laws can be viewed as an interference to the businesses which increases the costs within the businesses. They hold that the level of productivity and profitability are reduced as a result of labour laws. Although not the case for all the employers that were

interviewed, these are clearly the same views that were held by many of the employers across the sectors in the present study. This can be seen from the overall impressions of labour laws which were held by these employers. These involved the claims that “*there is too much regulation*” (Ray), “*there are high levels of regulation*” (Miles). Some even argued that labour laws “*restrict flexibility in small industries*” (Mike). It is obvious that these views correspond to the neo-liberal views, and were evident across the different sectors that were included in this study.

Although the negative perceptions of labour laws were held by many of the employers interviewed, it is obvious from as the analysis above that there is some misunderstanding of the law by the employers. For example, one employer (as indicated above) claimed that employees purposefully act inappropriately in the workplace with the knowledge that employers do not have the power to do anything about their behaviour. This shows a misunderstanding of the law. This is so because labour law does not forbid an employer from dismissing an employee, but section 185(a) of the LRA accords employees the right not to be unfairly dismissed. When looking at the unfairness of a dismissal, section 188 (1) of the LRA clearly points out that a dismissal is only unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the conduct or capacity of the employee. Hence, an employer may dismiss an employee based on any misconduct in the workplace. In doing so, section 192(2) states that ‘if the existence of the dismissal is established, the employer must prove that the dismissal is fair’. In other words, employers may dismiss employees for their threatening behaviour but the employers are also left with the responsibility of proving this misconduct.

It is thus evident that the perception that employers cannot do anything about threatening behaviour of the employees indicates a misconception of labour laws on the part of the employers. Moreover, employers also indicate a false perception by arguing that during disputes, employees always win. As outlined above, employers may dismiss employees but they have the responsibility of proving that the dismissal is fair. They can do this through proving the substantive as well as procedural fairness. Substantive fairness involves the reason for the dismissal while procedural fairness refers to the fairness of the procedure undertaken when dismissing an employee (Cooper *et al.*, 1997).

It was also obvious that the perception of the employers, who were interviewed, includes the idea that labour laws reduce the power of employers over their own businesses shows a misunderstanding of the main purpose of South African labour laws. The purpose of labour law is to protect the employees through limiting the power of employers. Thus, in their perception of labour law it is obvious that employers are questioning the main purpose of labour law. Some scholars have argued that sometimes limiting the power of employers might benefit the employers and their firms. For example, these scholars argued that when employers have overwhelming formal power, they might seek to retaliate or reduce this power through theft of the firms' properties or through strike action. In this case, labour law has been described as 'saving employers from themselves' through limiting the power of the employers (Dibben *et al.*, 2011: 12). Although sections 4.3.1 and 4.3.2 clearly demonstrate employers' negative perceptions of the degree to which labour laws affect their small firms, it is evident that these perceptions do not reflect or are not aligned with actual statutory regulation.

4.4 THE NATURE OF LABOUR LAWS

4.4.1 Time-Consuming Administration

Above, it is evident that the employers that were included in this research viewed labour laws as costly and pointed out the consequences of these costs. Moreover, it can be noted that employers recognised the financial costs incurred through labour laws, but it is also obvious that it is not only finances that the employers regarded as being onerous. They also regarded the administrative burden as playing a huge role in their businesses. In other words, it was not only the provisions in isolation that were argued to be burdensome by the employers. Rather, when looking at the impact of labour law on small businesses, it is important to focus on the inherent characteristics of small businesses and relate these to labour laws. In looking at these inherent features of small businesses, existing research has shown that many small firms do not have the administrative resources to deal with labour laws. This is the same response that was gathered from employers in the current research. More precisely, they argued that undertaking procedures in the process of dismissing an employee takes up a lot of their time.

When relating this to the fact that most owners of small businesses are also the managers of these firms; it becomes evident that this may be burdensome to these employers and may be

detrimental to their businesses. For example, an owner of an events-management company in Port Elizabeth argued that going through the different channels when trying to solve a dispute may be time-consuming. He stated that

We had a case of an employee missing work; we discovered that he had been operating a couple of business on the side-line. So, we went through the procedure and it was correct, and he was dismissed. Then he took us to, I think, first to the labour court and then to the CCMA or vice versa ... They spent a number of days, came back and the employer was correct. We followed the right procedure, and so that kind of case is quite frustrating because it's time consuming and not what you really want to do, but when you have to, you're forced to (Isaac).

Although employers claimed that the procedures that have been set out in the LRA for a dismissal might be time consuming, it is also important to recognise that the main purpose of labour law is to protect employees. These procedures are therefore essential for the protection of the employees through proving the fairness of the dismissal. Consequently, there is always going to be a trade-off between equity and efficiency, or security and flexibility.

4.4.2 Opportunity Costs and Knowledge of Labour Laws

It is also important to recognise that, when following these procedures in dispute resolution, the employers have to keep up to date with certain records. That is, their administration must be up to scratch. For example, the BCEA requires that documents such as contracts of employment and pay slips must be kept under record. This is the reason why these employers also claimed that labour laws might result in an administrative burden on their businesses. In this regard, it can be seen that the time the owners could have spent managing their businesses is spent on dispute resolution channels as constituted by labour law. This may ultimately be a downfall to the performance of the business. This is so because there are opportunity costs involved in this regard. For example, when asked about his views on the costs of labour laws, an owner of an events company in Port Elizabeth stated that

I don't really know any kind of costs. We didn't go and hire a lawyer or a labour consultant or anybody like that. I suppose administrative costs and opportunity costs, and pulling out documents and putting them in writing. You know it took a couple of days to do all that; so that opportunity cost we could have been doing other business (Isaac).

Again, it becomes crucial for one to view this downfall in the light of the inherent trade-off between equity and efficiency. Opportunity costs, which are incurred through the time consumed by labour law-related factors, can also be understood by looking at the knowledge the employers had of labour laws and the number of employees that a business employed. This is so because the knowledge they have of labour laws could determine the time they would spend on them. Moreover, it has been revealed in the sections above that most employers that were interviewed largely demonstrated false perceptions of or even a misunderstanding of the labour laws. Hence, it becomes important to look into their knowledge of labour laws in analysing their perceptions of these labour laws. Some of the employers that were interviewed insisted that they were extremely confident of their labour law knowledge. Some of these employers related this knowledge to previous jobs they held before becoming entrepreneurs. For example, an owner of a bakery shop in Port Elizabeth stated that

I'm an ex-unionist, so I know some of the laws off by heart. It might not be understandable to a large portion of the employers because of illiteracy or ignorance. But, if you really go into your labour laws, they are straightforward. They take things into place that are hard to follow (John).

Other employers attributed this knowledge to the fact that they had been dealing with labour laws for extended periods, as they had been small business owners for a long time. This can be revealed through a response from a business owner of a coffee shop in Grahamstown, who was an employee of this shop for many years before becoming the owner. In her response, she stated

I think you know I've been in the industry for a long time; more as a waiter than a manager. I think all the things along the way haven't really changed that much. The only big one was the regulation of waiters' salary than they were a few years ago (Mellanie).

Although these employers indicated that they were very confident about their knowledge of labour laws (specifically the Labour Relations Act and Basic Conditions of employment Act), some provided a different view on this. Many employers that were interviewed across the sectors stated that they had little to no knowledge of South African labour laws. For example, an employer of a restaurant in Grahamstown when asked about his confidence of his labour law knowledge stated that.

I am not that confident because they continually change (Miles).

Some of the employers did not admit to having no knowledge of labour laws; rather, they argued that they 'knew the basics' or they 'had an idea of it', or they knew as much as they needed. Although a lack of labour law knowledge was noticeable from most small employers that were interviewed, some constantly looked at the Department of Labour's website to enhance their knowledge of the relevant laws.

It can therefore be recognised that although the employers did not have much knowledge of labour laws, they attempted to gain this knowledge through certain channels. It becomes obvious from this that looking at a website to acquire labour law knowledge could be time-consuming. This could prove to be unmanageable, particularly for small business employers, who both own and manage their businesses. Thus, some employers seek different solutions to acquiring this knowledge. It was found that they went beyond just looking at the Department of Labour's website for labour laws; they hired experts that would deal with labour issues. This is reflected in the response of an employer of a laundry shop in Port Elizabeth, when asked about his knowledge of labour laws:

Unfortunately, I'm from the old school. I believe in fairness and working with people and understanding their problems. This is not always conducive when there are issues. I think that the economic times that our country is in means that it's becoming extremely difficult to deal with people. I've had to rely on the resources of people who are knowledgeable. I'm just an employer with no HR staff. It wasn't conducive to running a business trying to solve the issues, and he got in and specifically all they do is control the basic conditions of employment (Mike).

Another route employers took in dealing with their lack of knowledge of labour laws involved joining an employers' association. For example, the owner of a butcher shop in Port Elizabeth noted:

I only know the basics; that's why I belong to COFESA. It costs me R2000 a year. I don't do my labour things. If I've got a problem with the labour can be sorted out because I haven't really got the knowledge. I just know the basics; that's all (Mohammed).

This means that any labour issues (such as disputes in the workplace) could be dealt with by these associations, instead of the employers dealing with these issues (in the little time that they have available). It is evident from the above quotes or views that many employers that were interviewed showed little knowledge of labour laws. One of the results of this little knowledge is a false perception and misunderstanding of labour laws.

4.4.3 Financial Costs

In spite of the advantages to the employers that are attached to having external parties dealing with labour issues, disadvantages were also recognised. More specifically, although employers spent little time dealing with labour problems, they spent a large amount of money paying other people to deal with these matters. In other words, on the one hand, employers managed to reduce their administrative costs but, on the other hand, financial costs were increased. An employer of a curtains shop in Port Elizabeth claimed that these financial costs

were large and hinted that they could be detrimental to the business. When asked about his views on the costs of labour laws, this employer indicated that

Yeah, there is a lot. For instance, we outsource experts to deal with labour: does all our labour, handle the big things like disciplinary hearings and we pay them every month. We pay just over a thousand Rands a month and if you look at it annually, that's R12 000 than we never had to spend before and handle my labour wasting more money. It's just a big snowball effect (Brenden).

Some might argue that the employers incur financial costs because of their own doing by not acquiring labour law knowledge themselves. However, the data indicated that labour consultants were not only employed by employers who did not have labour law knowledge, but were also employed or required by those who had some knowledge. In other words, although some employers were knowledgeable, they still needed the labour consultants to coach them when dealing with labour matters. For example, when asked about his knowledge of labour laws, an owner of a small firm in Port Alfred stated that

I'm pretty knowledgeable ... I know what to do. I know, but then I have labour consultants that help me with it. So, I do warnings, but when it gets to disciplinary and things like that, they can coach me on it, and say 'listen you're wasting your time, don't even bother or you've got a case, you can go for it', that sort of thing (Michael).

In looking at the financial costs employers or small firms incur, it is important to note from the views above that these financial costs are not directly linked to labour laws. Rather, employers incur financial costs through paying labour consultants or labour experts. More importantly, one may argue that labour laws are not costly or burdensome, but the channels employers choose to go through to understand labour laws (such as involving and therefore paying labour experts to guide them through disputes) are costly. However, employers perceive the financial costs that they incur in paying labour law experts as costs that are incurred from labour laws.

4.5 LABOUR LAWS AND EMPLOYING DECISIONS

In focusing on the negative perceptions of the employers, one of the themes that prevailed from existing research was the relationship between labour laws and the high unemployment rate in South Africa. It was important to explore this theme for three reasons. Firstly, as indicated in Chapter 2, the importance of small firms in the country has been recognised due to their crucial role in job creation and poverty reduction. Secondly, from the interviews of the present research it was revealed that many of the small firm employers indicated that their businesses had been in existence for a long time. However, during these periods, it was revealed that the staff turnover had been declining. More precisely, even though the staff turnover was seen to be increasing during the early stages of the businesses, it faced a decline afterwards. It was therefore important to look at data that will show if labour laws, especially the Labour Relations Act of 1995 and the Basic Conditions of Employment Act of 1997, have a role in this decline of staff turnover as well as other aspects of the operations of small firms. Thirdly, this theme can be linked to neo-liberal views that were discussed in Chapter 2. More precisely, existing literature revealed that many neo-liberals expressed the view that labour law protects employees at the expense of the unemployed. In other words, neo-liberals argue that the high unemployment rate in South Africa may be a result of the existing labour laws.

4.5.1 Unfair Dismissal Provision

Inquiring about how labour law affects the employers' employment decisions was very important (especially considering the high unemployment rate in South Africa in general and the Eastern Cape in particular). When asked this question, many of the employers noted that there are many labour laws in South Africa. Some argued that these labour laws affect their hiring decisions. More specifically, they argued that when employing someone, they consider that it will be difficult to get rid of that person. For example, when asked about his overall impressions of labour laws in South Africa, one of the owners of a restaurant interviewed stated that

The levels of regulation are really high. It's easy to employ someone, but it's difficult to get rid of someone. There's no comebacks; you're gonna struggle. Because, I mean, there are people who abuse the system and there's definitely a place for labour law and minimum wages. But I think there's a point where we need to employ people.

I think the biggest problem within South Africa is the unemployment rate, which then leads to the crime levels that we have ... I'd say we're half way to solving the problem (Fiona).

Thus, the unfair dismissal provision was regarded by many employers (across the different industries) of the small businesses as being the main provision that constrains them in their employing decisions. It is also obvious that this particular employer looked at the problem from a macroeconomic level, which is that of unemployment in the country. Focusing on this level, he adopted the views of the neo-liberals, which are that South African labour laws are excessively burdensome, which ultimately means that fewer people are employed. It can also be seen that this view holds, on the one hand, that labour laws may be helpful to a certain extent in protecting the workers, while; on the other hand, it brings to the fore that the problem of unemployment rests with labour laws. Hence, the respondent's view that the country is *'half way there to solving the problem'*. Although the unfair dismissal provisions were referred to as the primary provisions that negatively affected the employing decisions of employers, this was not the only provision on which the employers based their decisions not to employ.

4.5.2 Sectoral Minimum Wages

The other provision that seemed to affect employing decisions (predominantly in the hospitality industry) was the sectoral minimum wages. For example, according to the sectoral determination for the hospitality sector, minimum wages are determined by the size of the firm (namely, less or more than 10 employees). In other words, there are two sets of minimum wages in this sector, one relating to firms employing less than 10 employees and the other relating to firms employing more than 10 employees. For example, if an employer employs more than 10 employees then the wages of all the employees have to be increased by the amount stipulated in this provision. Table 4.1 and 4.2 below illustrate this point.

Table 4.1: Minimum wages for employers with 10 or less employees

Minimum rate for the period
1 July 2012 to 30 June 2013

Monthly	Weekly	Hourly
R2240.60	R517.10	R11.49

Table 4.2: Minimum wages for employers with more than 10 employees

Minimum rate for the period		
1 July 2012 to 30 June 2013		
Monthly	Weekly	Hourly
R2495.80	R576.00	R12.80

It can be seen from the tables above that employers employing more than 10 workers have to pay an additional amount of R1.31 an hour for each worker as compared to an employer who employs 10 or less workers. When looking at this amount on a monthly basis, the difference is R255.20 for each worker. In the current research, this has been shown to affect the employing decisions of the employers in the sector. This is so because although it has been argued that the increases in wages are becoming smaller every year (while the sectoral minimum wages consistently increase by a CPIX +2% every year, 2% of a larger amount is smaller than that of a smaller amount), many small employers are reluctant to employ more than 10 employees because of this differentiation of wages according to the size of the enterprise. This was specifically referred to by numerous employers in the hospitality sector. For example, one of these employers from Port Alfred argued that

We're limited to 10 staff because that's the labour rate. It's R11.49 for 10 staff and then if you go one more than that, it's R12.70. Everybody's the same, so it's not just one staff member, it's 11 staff members all go up R1.20 an hour. So, we're limited to 10, and we have to pay the same minimum wage as you do wherever in the country (Laura and Danny).

This view was expanded by another employer in the hospitality industry when he argued that

Well, you've got to abide by the minimum wage obviously, in different sectors. I think it's R12 in the restaurant industry at the moment and it will probably go up again at the end of July. You get people from out of school that have these expectations of getting a job that's gonna pay them. You know they're prepared to work for R10 an hour to gain experience, but you as an employer are prevented from employing them because it's less than what the minimum wages is. I can't hire you so in the olden days I think the restaurant industry (and I can only speak about restaurant industry) was kind of like a stepping stone for a lot of kids to gain a footstep in the workforce, then some of them went up to be managers. We don't do it anymore. We just can't afford to do it and we now employ people that have got experience. So, as opposed to being an industry to teach people skills, the guys are only looking for people that have got experience because of what the minimum wage affords to you (Matthew).

The view that labour legislation results in more being unemployed is one that correlates to past research. For example, in Chapter 2 a perspective related to the Free Market Foundation was explored. This perspective maintained that labour legislation protects the employed at the expense of the unemployed through undermining the competitiveness of small businesses (Davies, 2009). Therefore, one can recognise from the above views that employers in the hospitality industry confirm the views associated with the Free Market Foundation by claiming that their employing decisions are negatively affected by the minimum wage provision and as a result, they always seek to keep their employees at less than ten. Although the views of the employers in the current research can be associated with those of the Free Market Foundation, they were in contrast to other views that were explored in past research. For example, scholars such as Godfrey and Theron (2000) argued that unemployment is rather a consequence of the neo-liberal policies due to the restructuring processes. Therefore, it can be recognised that while in the current research employers' perceptions are restricted to the minimum wage on the issue of unemployment, research has shown that unemployment is rather a consequence of the wider implications of the neo-liberal ideological standpoint.

Although employers (especially in the hospitality industry) argued that the sectoral minimum wage provision may impose costs on their small firms (and consequently negatively affect

employing decisions of these employers), employers from other industries argued that these costs are not excessive and can be managed like any other costs incurred by a business. In other words, costs from labour law are not different from other costs; they can easily be put into the budget of the business and absorbed. For example, when asked about his views on the costs of labour laws, a small employer from Port Elizabeth stated that

I think from a company, they are budget-able costs that you can work around and put into your business plan. I think they are essential to the labour course, in my instance, not in all categories of the business. I think labour laws are restrictive because I always try to pay my staff a better wage, better environment than what's legislated ... but this is not the case in all businesses (Fiona).

This response also shows that not only can costs imposed by labour laws be managed by small firms; they also discourage small firms' employers from paying higher wages to their employees. For example, the employer referred to above states that in other businesses employees are paid the minimum wage and not more. In other words, instead of being restrictive or costly to small firms, they are costly to the employees as they are not paid more because of the sectoral minimum wage. Therefore, even if the employer was going to pay the employees more than the minimum wage, they do not do so because they have been provided with a minimum wage that can be paid to the employees. Although the legislation permits employers to pay employees more than the minimum wage, most small employers pay them just the minimum wage. This subject will be elaborated on in preceding chapters.

4.5.3 Working Time Provisions

Apart from the sectoral minimum wages in the hospitality industry, small employers also argued that the issue of working time was a concern. More precisely, these employers criticised the provisions for forcing them to treat temporary staff as permanent staff if these workers work for more than 24 hours a month. Many of the provisions in the Basic Conditions of Employment Act apply to employees working more than 24 hours in a month. This means that workers employed for more than 24 hours a month have to be treated in the same manner as permanent employees. For example, an employer of a small restaurant in Port Alfred argued that

Like, for example, we can't take on temporary staff because the labour law says temporary staff only works up to 24 hours a month. In other words, that's one hour a day ... Well, that's not temporary; that's ridiculous. Temporary means somebody who comes in ... Like we need them now; we need them for five days or 10 days. That's temporary, but that's considered a casual. So, temporary then is they can work for a pre-set period or for a certain, specific job. But, now the thing is we have to put them on UIF, and if we're running with ten at the moment, if we take on somebody on a temporary basis. Now that's 11 staff, which means all the wages go up (Leanne).

These employers claimed that, among other things, this provision increases administrative burden such as registering and compiling contracts for these workers. This burden can also be argued to restrain these employers from employing part-time workers for longer periods. For example, the employers argued that this provision did not make it feasible to employ people during busy seasons because they would then be obliged to take the employees in as permanent ones. Thus, during the festive season, National Arts Festival in Grahamstown, or conferences less people would be employed to assist on a temporary basis. This shows the negative effect of the Basic Conditions of Employment Act (particularly the working time provision) as perceived by small employers, predominantly in the hospitality industry.

From above, two things can be noted. Firstly, when discussing the negative perceptions small employers have of labour laws (specifically the LRA and the BCEA); it is important to note that these perceptions are not based on the statutes as a whole, but rather on specific provisions within these statutes. More precisely, many employers included in this research had a common perception of certain provisions, which were regarded as particularly burdensome. As can be seen from the above, these provisions included unfair dismissals, working time as well as the sectoral minimum wage provisions.

Secondly, it was obvious that because of labour laws the employers saw their employees as 'problems'. For example, when asked about whether he felt that unemployment could be attributed to South African labour laws, a butcher from Port Elizabeth suggested that

Definitely... definitely; because they make it so difficult for us to employ people. We're too scared because of the labour laws. So, we just have enough people to do the work. We can't afford to have more people. I don't want extra people; I'm too scared to have extra people because you don't want more problems. In other words, I don't want to look for problems. I don't, but it seems to help, you know but I can't ... I can't do that (Mohammed).

Although the view that labour laws negatively affect employing decisions was dominant (especially in the hospitality industry), there was evidence or views that were contrary to this. More specifically, some employers stated that they did not think of labour laws when employing, they employed only on the basis of competency or even referrals. The issue of referrals will be further explored in Chapter 5. However, for purposes of this chapter, it is obvious that although some employers in small businesses may view labour laws as being detrimental to their businesses; this perception is not always reflected in their employing decisions. This may be related to the fact that small businesses are to a large extent labour-intensive, therefore, employers are in some way forced to employ workers irrespective of the negative views they have of labour laws.

Section 5 shows the importance of employers' perceptions of labour laws. For example, it shows how the negative views attached to labour laws may negatively affect employing decisions. More importantly, it shows how perceptions of labour laws may affect other aspects of the economic (unemployment) and social challenges (poverty). It can be noted from Chapter 2, that the Government plays a role in industrial relations in an attempt to overcome these challenges through neo-liberalism and corporatism. Thus, as is evident from section 5 the employers support neo-liberalism, which involves a free-market. In other words, according to the employers interviewed, a free market will result in employers employing more workers. The negative consequences of the free-market were identified in Chapter 2, and these are contrary to the views of the employers in this research such that there will be more unemployment through the free market. Therefore, it can be argued that employers' perceptions of labour laws are only based on profit-maximising rather than the economic and social challenges facing South Africa.

4.6 EMPLOYERS' SOLUTIONS TO 'COSTLY' LABOUR LAWS

As can be seen from the above, many employers that were interviewed had negative perceptions of labour laws. It becomes significant to mention the fact that some of these employers did not only complain about the negative effects of labour law, but also mentioned a few solutions to the 'problem' of labour laws. That is, some employers argued that labour laws should be reduced; they even went as far as arguing that the free-market system should be followed. This system, as noted in Chapter 2, is advocated by neo-liberals. To repeat, the notion of the 'free' market refers to the labour market being governed or depending on market forces rather than government intervention (through labour laws). The neo-liberal approach, as noted in Chapter 2, is widely criticised for (among others) ignoring the fact that a reliance on market forces without any government regulation (via labour laws) would lead to more leniency towards the employers. This would mean that it would be easier for employers to exploit their employees. Similarly, in her speech on Workers' Day (1st May 2013), the Minister of Labour stated that there are some who continue to advocate the unchecked free market system as the way of determining the most appropriate conditions of employment for South African workers, including the level of wages and the extent of wage differentials (Department of Labour, 2013). She argued that this is an extreme view that runs contrary to the policies of the present government and it shows little sensitivity to the history of labour relations in South Africa and the rights that have been won by trade unions through many years of struggle against the Apartheid dispensation (Department of Labour, 2013).

In response to these claims by the Minister of Labour as illustrated above, employers in the present study, who seemingly adopted a free-market perspective, argued that the market could sort itself out. They argued that the firms who exploit workers, through bad working conditions and low wages, would not attract or retain good employees. In other words, these employers revealed that there is no need for guidelines on how to treat employees, rather employers are obliged to treat employees in a good manner to attract good employees, and thus maximise productivity. However, research has shown the opposite of these claims by the employers that were interviewed. Research shows that the consequences of the 'free-market' include negative effects such as job losses and engaging in extensive restructuring to promote labour flexibilisation and informalisation (Theron and Godfrey, 2000). Therefore, in contrast to the claims by the employers in the current research that the free-market would 'sort itself out' as employers would be obliged to treat their employees fairly, research has shown that

the free-market would result in South African employees bearing the blunt of unemployment as there would be a decline in stable jobs (Bhorat and Kanbur, 2006).

4.7 THE POSITIVE EFFECTS OF STATUTORY REGULATION

As it can be seen from the above, many of the small employers that were interviewed highlighted the negative perceptions they had of labour laws. However, it is important to note that some employers argued that regulation has positive aspects. For example, within the hospitality sector (which, from what has been stated above, has many small employers who regard labour laws as being too costly), only one employer of a restaurant in Grahamstown had differing views from the rest. It is important to mention this employer because he acknowledged the South African political context when he spoke about labour laws. It is also important to mention that this employer employed almost 50 employees. Hence, his views were not related to the fact that he did not have a significant number of labourers (this perception from the employers that were interviewed of linking the number of employees to costs will be discussed in subsequent chapters). When asked about his views on the benefits of labour laws, he stated that

Yeah, like I said, I'm a firm believer that things need to be fair. Before the Labour Relations Act, you know 15-20 years ago, if I had a business and I didn't like what you were doing, I would fire you. There was no job security. No ... no, I can't do that. You have to follow fair procedure and I think that's very important for a well-run business, and I think it benefits me as a business owner (Brian).

He further argued that

Labour has costs, but there are no costs from labour laws. The laws that are there don't cost any money. Labour laws impose a burden that you as a business owner need to keep your records properly and treat your staff according to a certain set of rules. It's like traffic laws. We all need traffic laws, we need to have a drivers' license to drive a car safely and traffic laws regulates how we drive. It's the same with labour law; it regulates how you run your business. Without rules and laws, no person can

have job satisfaction or job security, and without job security ... you know, where would business be? Nowhere... So, ja we might consider them a burden, but it needs to be there ... The burden is that you need to keep records; you need to act in a particular manner according to the rules-How much leave people are supposed to get? How many hours they're allowed to work? I believe these are there for safety sake, to create a basis so that people can't be exploited ... which I think is very important (Brian).

It is important to mention this employer's views because they are contrary to those held by many other employers in small firms. This perception was also important because it brings to the fore an area of labour law that is closely associated with post-apartheid South Africa. This perception is reflected in what may be referred to in Chapter 2 as a neo-corporatist perspective. This perspective is most apparent in the first quote of this employer, where he attaches fairness to labour relations. More precisely, he notes how labour relations during the apartheid era afforded employees very little protection and how labour laws under the democratic period afford greater protection to the employees. He extends this view in the second quote, by claiming that labour law is not a bad thing and that it is not necessarily a burden. Rather, it should be looked at from the view of not only bringing efficiency to businesses but also ensuring fairness for employees. This neo-corporatist perspective was explored in Chapter 2, where it was held that although the South African government has a responsibility to enhance economic growth (through providing efficiency to businesses). It also has the responsibility to rectify the injustices of the past through providing fairness and protection to employees. Thus, when looking at the labour market flexibility debate, neo-corporatism (which is reflected in the view of this employer) holds that existing labour laws are reasonable, that labour laws should not be looked at as costs, and that there should not be deregulation in the labour market.

Similarly, a few of the small employers that were interviewed from other sectors also suggested that labour laws could be of benefit to their businesses. This benefit was attached to the administration becoming lighter for their businesses. In other words, when disputes arise in the workplace it becomes easier for businesses to respond to these as labour law forces employers to be up to date with certain administration. This positive view of labour

laws can be summed up by a response from an employer of a restaurant in Grahamstown. This employer was asked about the experiences with certain provisions from the Labour Relations Act and the Basic Conditions of Employment Act, and whether these had a positive or negative effect on the business. Responding to this question, he maintained that

Yes, all of them. They have had both negative and positive effects, but mostly positive because we do thing properly. We have had cases that have been challenged and we've been to the CCMA and once again it's not always a positive outcome to the business, but in the long-run I believe it's fair. It forces businesses to keep their records up to date. Any person that works more than 24 hours in a month can't be considered a casual; people need to get leave days, etc. So you need to, you have to have your ducks in a row as a businessman, have your paperwork. You have to be organized otherwise you will battle with the labour law; you will come second if you are not 100 per cent organized. How you appoint staff, absolutely everything must be correctly done and filed. If you don't have that and you have a disciplinary hearing or whatever that may be, then you will be in trouble (Brian).

From the above response, it can be seen that labour laws are seen as an advantage as they forced the employers to be ready for whatever disputes may take place in the future. Related to this, is another advantage that was recognised by these employers: namely, that the laws provided a guideline for them. That is, labour laws provide a framework of the rights and responsibilities of both the employers and the employees.

Likewise, various employers also mentioned how labour laws can be beneficial, specifically to small firms. These employers argued that labour laws to some extent allow the employers to know where they stand, as they have no other assistance in regulating the employment relationship (such human resources consultants or managers). For example, an owner of a restaurant in Port Alfred stated that

As I said, a small firm is basically a one-man show or two-man show, and yeah, it does become difficult. I do believe you do need to have guidelines so that you can know when you are going in the wrong direction (Matthew).

Although these employers argued that labour laws were beneficial to small businesses, a large number of the employers interviewed disagreed with this. These employers did not regard labour laws as having any advantages or positive aspects. When asked about the benefits labour laws could have on their firms, they argued, without any hesitation, that labour laws were only a burden or cost to their businesses and did not bring any benefits to the employers.

4.8 CONCLUSION

The thrust of this chapter was to explore the perceptions of employers concerning the nature and extent of the impact of labour laws on small firms. These perceptions would assist in exploring the extent to which employers of small firms regard South African labour laws as undermining flexibility and imposing unfair rigidities on their firms. It is important to mention the findings in this instance. Firstly, it was revealed in this chapter that employers' negative perceptions of labour laws are sometimes an exaggeration. This point was made through drawing a distinction between the general and the particular. Simply put, in most instances it was found that employers generally have negative perceptions of labour laws, but could not provide specific incidents in their firms to support these perceptions. Although this distinction was made, it was argued that this does not reduce the importance of these perceptions, as they may affect other aspects such as how employers respond to labour laws. The distinction between the general and the particular demonstrates the subjective perceptions on labour laws from the employers that were interviewed. These subjective perceptions do not shape the objective impact of labour laws on small firms because the objective impact does not solely depend on the perceptions of the employers. However, they may shape how employers respond to labour laws.

Secondly, the extent of regulation was explored. In doing so, it was revealed that many employers across the sectors had the view that labour laws were detrimental to their businesses for several reasons. These included the fact that labour laws reduced the power of the employers through allegedly constantly favouring employees. In other words, employers

claimed that the fact that employees in small firms know that they always win in disputes gives them the power to act in whatever way they see fit. Employers also argued that labour laws negatively affect the relationships between the employers and employees because these laws always favour employees. Although the employers that were interviewed had these negative views of labour laws, it was evident that that these views were based on a misunderstanding or misconception of the labour laws. In particular, the employers that were interviewed indicated a misunderstanding of the unfair dismissal provision. They did not understand that employees could be dismissed for threatening behaviour on the grounds of misconduct. Also, it was a misconception from the employers that employees win all disputes because the LRA places the onus on the employers to prove substantive as well as procedural fairness in dismissing employees. Therefore, this also shows that the subjective perceptions of the employers do not reflect the objective impact of labour laws.

Thirdly, employers claimed that there were certain aspects of labour regulation that introduced unfair rigidities into small firms. They argued that labour laws impose time-consuming administrative duties on their firms. Related to this, they also claimed that labour laws impose opportunity costs on small firms because employers spend precious time on regulation which could have been spent on other areas of the business. The time that is spent on regulation may be affected by the knowledge these employers have of labour laws. It was evident that although some employers were confident about their knowledge of labour laws, many across the sectors were not. This resulted in many of the employers referring to labour law experts when dealing with regulation, which results in small firms incurring additional financial costs.

Fourthly, the relationship between labour laws and employing decisions was explored. In this regard, it was evident that the employing decisions of employers (especially in the hospitality sector) were affected by labour laws. More specifically, the employers felt that the unfair dismissal, sectoral minimum wage, and working time provisions restricted them in employing more employees. It is obvious that many employers regarded labour laws as imposing great costs and rigidity on their firms, thus some came up with a solution. These employers argued that the labour market should regulate itself. In other words, the free-market path should be followed. By contrast, a minority of the employers across the sectors pointed out that labour

laws are not too rigid and do not undermine flexibility, rather they are essential for rectifying the injustices of the past. Similarly, some employers claimed that labour laws do not impose rigidities; instead, they provide guidelines for both the employers and employees. It was therefore evident in this chapter that the employers of small firms that were included in this research regarded labour laws as being extremely costly or burdensome on their firms. However, it was evident that these perceptions were based on a misunderstanding or misconception of labour laws by the employers that were interviewed. There, the subjective perceptions of the employers do not reflect the objective impact of labour laws. However, these perceptions may affect how employers respond to labour laws.

5

EMPLOYER COMPLIANCE WITH LABOUR LAWS

5.1 INTRODUCTION

In the previous chapter, a distinction was made between the general and the particular. In recapping this, it was mentioned that although many of the employers that were interviewed had negative views of labour laws there were little to no specific incidents in these organisations to substantiate these claims. From this, some may conclude that labour laws have a minimal impact on small firms. In other words, small firms are not really affected by labour laws. When exploring the reason for this minimal effect of labour laws, it is important to refer to the compliance of employers in small businesses with labour laws. This compliance matter was explored in Chapter 2, where it was indicated that the extent of the impact of labour law on small firms could be, among other things, determined by the compliance of employers in small firms with regulation. As indicated in that chapter, existing research has shown that many small firm employers are not concerned with labour laws; they do not comply with them. Consequently, labour laws have a minimal to no effect on these firms.

A question that may arise is of why small firms do not comply with labour laws. In attempting to respond to this question, it was argued in existing research that employers of these firms were able to filter the effects of regulation through the internal organisation of the firms as well as the distinct market positions of these firms (Edwards *et al.*, 2003). In looking at these means of filtering the effects of labour laws, it was therefore essential for the present research to focus on this issue of compliance in order to explore the extent of the impact of labour laws on these firms. This was done through exploring the approach to labour regulation adopted by employers of small firms in their organisations. Existing research has identified two of these approaches, namely: the internal and external regulation. The former refers to the firms drawing rules internally from their relationships, while the latter refers to firms drawing rules externally from the economic, political, legal or technological environment. This chapter will also demonstrate how these two approaches cannot influence the impact of labour laws independently of each other; in other words, they are closely inter-

related. The fact that these two approaches are closely inter-related is the reason why they will both be discussed in this chapter in revealing the main themes in the data that was gathered.

5.2 AVOIDANCE OF REGULATION

In initiating this chapter, it becomes significant to focus on the extent to which employers in small firms accept regulation. This will ultimately determine whether they comply with or avoid it. In exploring this, the focus shifted to the employee side of the small businesses that were studied. This was done through looking at the staff turnover in these businesses. Specifically, many of the employers that were interviewed indicated that they had had their employees or workers since the infant stages of their businesses. More importantly, they indicated that there was a low staff turnover in their businesses; some firms had had their employees for more than a decade. Moreover, recruitment often occurred through referrals from existing employees. Thus, for example, a mother would refer her daughter for a position at the small business she works or worked at. This was an overriding factor mostly in the hospitality sector.

When one explores the above, it is important to recognise that this represents or is related to the internal organisation of the firm. More importantly, referrals when employing someone may be argued to reflect informal practices within the firm. In Chapter 2, informality was associated with relations between employers and employees that are fundamentally based on unwritten arrangements and implicit understandings (Adam-Smith *et al.*, 2003). Although the practice of referrals when employing are in alignment with labour laws (for example, recruiting through utilising word of mouth), it is also important to stress that this recruitment method may be associated with informality as there are no formal, written methods that are utilised (such as placing an advertisement in a newspaper). Thus, this recruitment method to some extent represents the informality that has been known to be a characteristic of many small firms.

However, claims of informal practices within small firms cannot only be based on the informal recruitment methods. In the current research, the employers interviewed also provided other evidence of this informality. To substantiate the claims of informality in the

firms that were studied, firstly, most of these employers across the sectors indicated that there were no formal procedures or agreements in their businesses. Therefore, factors such as formal grievance procedures, formal productivity agreements, or formal appraisal and promotion systems were not in place in most of these firms. The only measures that were conducted formally in most of these firms were the pay structures.

Keeping in mind that the owners of small firms are also the sole managers (without any administrative and finance divisions), it can be argued that not having these formal procedures in place is not always intended to exploit workers through robbing them of certain rights that have been accorded to the employees. For example, employers in these firms do not decide that they should not have formal appraisal and promotion systems so that they can exploit their workers or keep them in lower positions. Rather, it is obvious from the above that the law is mostly concerned or associated with formal arrangements. This means that there are many activities in small businesses that are hidden through the informality that largely characterises their labour relations. These activities are not covered by the formal arrangements associated with labour law. This may ultimately mean that the formal arrangements of the law are not covered in the practice within small firms. For example, on the one hand, many small firms do not operate through written records or documents but through unwritten agreements. This may be because small firms have fewer administrative resources than large firms. On the other hand, labour law requires that firms keep written records of many agreements between employers and employees. Thus, although small firms are operating within the reach of the law or under the law, the requirements of labour laws may discourage employers of small firms from complying with labour laws. This view confirms a view that was discussed in Chapter 2, where it was argued that researchers should seek to explain the ways in which the structure of small firms can reject some aspects of legal regulation while being open to others (Edwards *et al.*, 2004: 249). The example provided above indicates that labour laws require that employers keep written records but many employers in small firms are unable to keep these records because of fewer administrative resources. More importantly, the claims made above show that legislation reflects the norms of each of the firms. This statement means that the extent of employer compliance with regulation depends on the extent to which organisational practice already reflects similarity with the legislative objective.

Furthermore, the claims that were made above that informal practices were dominant in the small firms that were studied were also confirmed by the employers and employees that were interviewed. More precisely, it was obvious from the claims of these two parties that the employer-employee relations in these firms (across the sectors) were informal. Many of the participants revealed that they had very close relations with each other, which were often reflected in the fact that the employers knew and had close relations with the families of their employees. Often, they referred to their employees as family. Through these close relations, the employers indicated that they preferred resolving issues with their employees on a face-to-face manner rather than referring to legislation. This shows the close or intimate relations in these firms, which were often brought about by the small size of the firms as well as the fact that the employees had been with the particular firms for extensive periods. More importantly, this reflected the informal arrangements within these firms.

Similarly to what was discussed in Chapter 4, when looking at the impact of labour law it is significant to focus on specific provisions rather than focusing on a whole statute. For example, it was gathered from the interviews that most employers generally had an informal approach to the working time provision. In other words, employers and employees had informal arrangements or agreements on the hours that would be worked. These were not in alignment with the set provisions but the employers and employees regarded these as being fair. For example, according to the working time provisions as outlined in section 9.1 of the BCEA an employer may not require or permit an employee to work more than 45 hours in a week; and nine hours in any day if an employee works for five days or fewer in a week; or eight hours in any day if an employee works for more than five days in a week. Section 9.2 points out that an employee's ordinary hours of work may by agreement be extended by up to 15 minutes in a day but no more than 60 minutes in a week to enable an employee whose duties include serving members of the public to continue performing those duties after the completion of ordinary hours of work. Nevertheless, in the hospitality industry it was evident that the provision was not adhered to. For example, an owner of a restaurant in Port Alfred stated that

It's so difficult to get through the year; we don't increase the wages for the season term where they work pretty much 10 hours a day. They don't get lunch and they

don't get a day off, they work six days a week during the season term. I promise you by the end of the season we are like zombies walking around, you work so hard during season (Matthew).

While section 11(1) of the BCEA regulates the compressed working week through pointing out that an agreement in writing may require or permit an employee to work up to twelve hours in a day, including meal intervals and without receiving overtime pay; according to section 11(2)(a) this agreement may not require or permit an employee more than 45 ordinary hours of work in any week and (b) on more than five days in any week. The view above therefore reveals non-compliance with labour laws, as it is evident in the quote above that the employees are permitted to work in excess of 45 hours a week and in excess of five days in the week. Although for this particular firm (and probably across the hospitality sector), this only happens during busy seasons, there are some firms who are busy for longer periods depending on the location of the firms. For example, Grahamstown tends to have more busy seasons than Port Alfred with the National Arts Festival, Rhodes University conferences, and so on. In such cases, employees work for long hours. Related to this, it is important to note that little attention is paid to regulation, especially when faced with pressure from the market (for example, a competitive market). Even though the law was not complied with, it becomes significant to mention that in the hospitality industry these long working hours were acceptable to the employees. For example, one of the employees of a restaurant in Grahamstown stated that they work for long hours, especially during busy seasons, but this was satisfactory as they received more tips from the customers and also because they had arranged to do so with their employers. In other words, employees working in excess of the legislated working hours did so because of financial incentives attached to it as well as the fact that they had informally agreed (verbal agreements rather than a written agreements as required by the BCEA) to it with their employers.

The claim made above can therefore confirm the claims of the 'small is beautiful' view of small firms that were made in Chapter 2. More precisely, this view accentuates the close employment relations and low levels of conflict that exist in the workplace because of flatter hierarchies and close working relations (Bacon *et al.* 1996). This was the case with most of the firms that were looked at across the service sector. It can also be assumed from the above

that most matters are not looked at from what has been legislated but from what the employers and employees define as being fair. For example, both the employees as well as employers in many of the restaurants that were researched attached fairness to the long working hours. It was fair to the employers as they would meet expectations of the customers (and get more profit in the process) and it was fair to the employees, as they would receive more 'tips' from the customers. It is apparent in this situation that the working time provision has little effect as employers and employees do not refer to it. This highlights (as indicated in Chapter 2) the internal regulation that occurs in these small firms, which means that rules of the business originate from the internal relations in these firms. Many employers claimed that this type of regulation was very advantageous to the firm. More specifically, they argued that there were lesser chances of conflict in the workplace. As one of the employers argued: *'if they've got any grievance or complaints or whatever they're more than welcome to see me'* (Mariane).

However, it is also important to note that these close family-like relations in small firms may also be paternalist and authoritarian. As can be seen with the quote provided above (relating to the hours worked by the employees) there is a sense of being paternalistic and authoritarian on the part of the employer. For example, the employer clearly asserts that they do not increase wages, employees have to work for the long hours, and they do not get lunch or days off. It is evident from this that there is a sense of a dominant father-figure (employer), imposing certain rules on the family (employees). This confirms a view that was brought up in Chapter 2 where it was stated that even among theoretically 'good' employers, the reality of employment practices can be very different to what regulatory models would imply. Control, for example, can be achieved through the simultaneous use of both paternalistic and authoritarian managerial styles (Dundon *et al.*, 1999).

In focusing on the 'small-is-beautiful' view, it is also important to mention that even for the small businesses who focused entirely on what was legislated (and not what the employees and employers deemed as fair among themselves) labour laws were deemed by the employees as something that was external and was not required for the operation of the business. For example, some of the employers argued that legislation only changed arrangements within the firms because of the ways employees interpret legislation. They

argued that employees, mostly the ‘uneducated’ ones, abuse labour laws for purposes of their own benefit. However, the benefit to them can be questionable. This can be explained through the argument that was presented by certain employers that labour laws negatively affect the employer-employee relationships. In this sense, there is a modification from the ‘family-like’ and friendly relations between the employers and employees, to more formal and subordinate relationships. For example, an employer of a laundry shop in Port Elizabeth argued:

As I said earlier, the uneducated don’t understand the full concept of the labour laws and abuse that. We’ve had where; I believe the relationship when we started was a lot better and more forgiving. So it was to the employees’ benefit. However, now they have forced me to a situation where the company controls the labour as according to the legislated labour laws, which now the staff are realising they were better off before and now they’re saying they want to go back to the old way. Well, I say you’ve made the call, now I will do it by the book (Mike).

It can therefore be acknowledged that labour laws change the relationships within the workplace. In some cases, as illustrated with the above quote, this may not be of a beneficial nature to the employees. This may lead to some employees at some points viewing labour laws as a punishment or as messing up established relationships within their workplaces. This increases the chances of employers arranging with their employees to ignore labour laws. More importantly, it can be seen that labour laws are accepted by neither employers nor employees in these small firms. However, labour laws do exist in the labour market and provide guidelines to the employers and employees. Furthermore, formal relationships may benefit employees (especially when employers mistreat their employees). In this regard, it is important to note that employers of small firms cannot always disregard labour laws. The next sub-section will show that there are times when employers do not avoid legislation.

5.2.1 Events Leading to the Avoidance of Regulation

The discussion above signifies avoidance of labour laws in small firms largely because of the informality that characterises many small firms. It can be noted that this avoidance of labour laws may not always be a bad thing. For example, some of the employers argued that they

were not really affected by the sectoral minimum wages because they were already paying their employees above the minimum wage. One employer of a butcher shop in Port Elizabeth stated:

I haven't had any problems with minimum wages because we pay far above the minimum wage (Mohammed).

It can therefore be argued that employers assume that labour laws only refer to the minimum wage provision or regard this provision as an important aspect of labour laws. More importantly, it can be recognised that these employers do not reduce existing wages in order to be in line with the set sectoral minimum wages. This may be related to two factors. Firstly, it may be related to the relations within the small firms. For example, existing research shows that employers in small businesses may be locked in deeply entrenched institutional relations with employees, and may be reluctant to jeopardise these relations with wage cuts (Fuller and Lewis, 2002). This is so because it has been argued that whatever the state of the broader labour market, relational contracts remain essential to securing the competitive advantage of firms (Fuller and Lewis, 2002). Secondly, this may be related to the legislation. For example, the sectoral minimum wages provision holds that workers should not be paid less than the minimum wage set according to the different sectors. However, workers receiving more than the prescribed minimum wage should continue earning the higher wages as conditions of employment cannot be changed unilaterally. In the assumption of the former (deeply entrenched institutional relational relations with employees), it can be argued that informality may be an advantage to the employees as among other factors they get to receive higher wages than the set minimum wage.

Although these advantages for the employees were attached to the informal relations within the small firms, several employers that were interviewed claimed that close and friendly relations also had some disadvantages. These included, firstly, the fact that some employees took advantage of the close employer-employee relations. Secondly, employers found it difficult to 'pull rank' with certain insubordinations or foul play from the employees. To explain this further, the employers claimed that the close working relations with the employees often meant that there was some kind of informality within the workplace. For

example, an employee would often call from home to tell the boss that he or she had a problem and thus would not make it to work, or in some instances an employee would pitch up at work with her child. These were treated very informally; in other words, employees need not follow any formal procedures (such as signing a leave form, and so on). On the one hand, some employees would take advantage of this informality. More precisely, they would not pitch up for work for numerous days without any notification. Employers would find it hard to discipline these employees because of the fear of creating awkward or uncomfortable relations in their workplaces. For example, an owner of a small restaurant in Grahamstown referred to this disadvantage when she stated that

Sometimes if you need to be the boss you have to say something. Not nasty, but ... like maybe someone has made a mistake or you're unhappy with something it makes it a bit more difficult because people do tend to take it personally, and they can't seem to separate that this is a business-related matter; but it's work and as your boss I'm entitled to say I'm not happy with this. So that's the real difficulty with having such relationships (Benson).

As a consequence of these contradictions of informality in small firms, employers claimed that they did not practice full informality in the workplace. In other words, through these occurrences employers are forced to accept formal regulation. For example, if an employee did not pitch up for work for several days without notification, that employee would receive a warning. One of the employers in the retail industry confirmed this when she stated that

Staff, if they cannot come to work they have to call so that we can obviously make alternative arrangements. If it becomes a habit and they start doing it on a weekly basis then obviously action has got to be taken against them, but the staff do have issues as well. So they should just phone and let me know (Pam).

It is therefore evident that in the firms studied, informality is a matter of degree; more importantly, there are instances when labour laws are not avoided by employers of small firms. Indeed, there were informal relations within these firms, but when there was a need for

formal procedures, they were followed or action was taken against the employees. This indicates that labour law is not disregarded in small firms; that is, small firms are not entirely disconnected from labour laws. Although formality may not be as dominant as in larger organizations, it does play a role in small firms. For example, when asked about specific events that took place in his business that indicate the direct or indirect effect of labour laws on this firm, an employer in the entertainment industry stated that

I mean in order to have a well-run and well-managed business, one has to have discipline. You need to have discipline with the staff. So, we have a very detailed company booklet. We call it our company rules and procedures. It outlines absolutely everything on how we do things, our policy on HIV/AIDS, how we deal with staff, how we deal with disciplinary proceedings (warnings, disciplinary hearings), the whole thing. It happens, those people who come late for work, they get warnings. On more serious charges or more serious incidents, we have disciplinary hearings. So it's a part of daily life in a business ... that set off rules of conduct. Anything in the business is governed by it and without it we won't survive (Brian).

It is also important to mention that this kind of formality provides guidance on rules and procedures within the small firms. For example, as indicated above, one may recognise a degree of formality in keeping a company booklet which provides rules and procedures within the firm. Furthermore, it was evident this formality that is incorporated in small businesses is most prominent in those businesses that employ a slightly larger number of employees. For instance, businesses that employ between 30 and 50 workers, rather than those that employ 8 or 10 employees. This may be related to the fact that larger numbers are able to organise themselves instead of handling issues on an individual basis. Furthermore, handling issues on an individual basis (informally) may mean that there is inconsistency in the rules governing the workplace, and this may lead to conflict within businesses, especially those with more employees (for example, more than 30 employees).

5.2.2 Avoidance of Regulation: Disconnectedness between Labour Laws and Practice in Small Firms?

Even though labour law has an impact on small firms, it was obvious from the responses of the employers as well as employees that the role of labour law in these firms is not significant. Many employers even thought that they were not the right participants for this particular research because they did not feel that they practised labour law. This disconnectedness was also reflected in the responses of the employees, who often felt a sense of unfairness from their employers. For example, an employee who was interviewed had recently been on maternity leave. Because of not being compensated during this period, the employee was intending on going back to work before completion of the four-month maternity leave period. However, while on leave, the employer wrote her a letter informing her that she should extend her leave until the end of the four months, and that she was free to resign if she was unhappy with this. Thus, there is disjuncture between the practices in small firms and the provisions on maternity leave. This is so because labour law does not restrict employees from returning to work after the birth of a child. According to section 25(3) of the BCEA, no employee may work for six weeks after birth of her child unless a medical practitioner or midwife certifies that she is fit to do so. Therefore, after the six week period, there is no clause in the BCEA that forbids an employee from returning to work.

Other incidents that reflect this disconnectedness between labour law and what is practised within the researched firms were related to recruitment procedures. It was obvious that some employers recruited whomever they liked; in other words, they did not refer to any procedures required when employing someone, such as shortlisting candidates or looking at the skills the candidates possess. Further examples relate to working hours where the employers required workers to work for more hours than permitted by legislation. This deviation from the legislation is mostly evident in the hospitality industry. More precisely, many employers in this industry claimed that their employees often worked more hours than the legislated working periods. Above, this working time provision was looked at in a positive light; that is, from the view of fairness to both the employers and employees. However, it was also found that although some of the employers stated that agreements to do this were made informally between them and the employees (for example, arrange to pay employees more for overtime as permitted by the legislation), others claimed that the employees understood that this had to be done for the benefit of the business. These

employers argued that even though their employees worked more hours than those allowed by legislation, they did not receive any compensation for doing so from the employer but would receive it from elsewhere. For example, an employer of a restaurant in Port Alfred stated that

I abide by the laws, I mean I talk with my staff and find out you know we stretch the law. I think we are fair to me and my staff. I always say to them straight I'd rather employ 4, 5 or 6 people and you guys are going to work more overtime, you'll work your 45-hour week plus give you more than 8 hours of overtime; which is breaking the law essentially but I'd rather do that than another person that comes here then we've got to start retrenching. So if the labour inspectors come here I would be in trouble, they would be in trouble (Matthew).

The same employer asserted:

I take on ten people at R5 an hour as opposed to the minimum wage. At least they're getting some form of employment and I mean in the restaurant industry you get tips as well. If the guys perform well, their tips are good. But, we basically cover their costs of their transport to and from work. They get a skill and they get a share of the tip. So, the guys can walk out with that on top of covering their costs to and from work (Matthew).

It can therefore be seen from the example provided above that the employees work for more hours than permitted by labour law, and get no compensation from the employer for doing so. Moreover, they receive a lesser wage than the sectoral minimum wage set in place (see tables 4.1 and 4.2). Instead, the employer refers the employees to other sources of income for compensation (which are not reliable and explicitly excluded by the sectoral determination). For example, in this case the employer indicates that workers in restaurants often get tips from customers above their wage. It can therefore be recognised from this that there is some evidence of law not being followed in these small firms, especially in the hospitality industry as well as in firms that have a very small number of employees. The above shows that a small

number of employees does not necessarily mean that everything is ‘beautiful’ within small firms. More precisely, it can be seen that informality in small firms may sometimes lead to employees working in dire conditions.

Furthermore, it can be recognised that employers refer to labour regulation when it is convenient to them. For example, when an employee does not pitch up for work the employers refer to labour regulation, but when the employees work for longer periods than is legislated, then labour regulation is ignored or avoided. This point accentuates (as discussed in Chapter 2) the view of small businesses as a ‘bleak house’. In this case, employees sacrifice working under poor conditions (with low wages and long working hours) for the sake of harmony in the workplace, and more importantly, for the sake of staying employed. With the country facing a very high unemployment rate, this is the route that many employees take (especially in small businesses within the hospitality sector).

5.2.3 Selective Implementation of Statutory Regulation

As illustrated above, the actions of some employers of small businesses (especially in the hospitality industry) are not in alignment with existing labour laws (especially the working time and sectoral minimum wage provisions). More precisely, informal arrangements within these firms allow employers (as well as employees) to avoid their obligations as required by the labour laws. As a result, it was found that compliance occurs only to a certain degree; in other words, there is no full compliance among these employers. Therefore, a question that comes to the fore is how the minimal compliance with labour laws shapes the impact of labour laws on these small firms. In attempting to answer this question, certain factors should be pointed out. Firstly, it should be recognised that employers comply with regulation only when challenged. Moreover, it is obvious that employers react to individual incidents, rather than integrating labour laws into their organisational structures. For example, they react to individuals who do not pitch up for work for several days, but do not have a rule in place stating the implications of not coming to work for a particular number of days.

The fact that employers only react to individual situations through labour laws and do not use these laws as a source of regulation is the reason why labour legislation has a minimal impact on these businesses. Moreover, it can be highlighted that the inconsistency in complying

with labour laws may mean that employers use labour laws only to their advantage. More specifically, it is evident from the above that many employers (especially in the hospitality sector) comply with labour laws for the sake of efficiency in their businesses and not for the protection of the employees. This means that the businesses benefit to the detriment of the employees.

5.3 ENFORCEMENT OF LABOUR LAWS

From the above, it can be seen that there is a discrepancy between what is legislated and what is practised in small firms. It is evident that employers have a choice to avoid or not to avoid labour laws (which will ultimately affect their compliance with these laws). The question that may arise is of why it is so easy for these employers not to comply with or avoid labour laws. Among other factors, this question should be answered through looking at the enforcement of these laws. Enforcement of labour laws, which is normally carried out by labour inspectors, is an issue that is important to discuss when looking at the connection between law and practice in small firms. Moreover, it was obvious from data collected in this research that the enforcement of labour laws plays a crucial role in the employers' views of labour law.

While some employers criticised the enforcers of labour laws (specifically focusing on labour inspectors) for their lack of effectiveness, these criticisms were on different levels. Firstly, the employers, who had a larger number of employees argued that the focus of labour inspectors is on the more visible businesses. These involve businesses in the urban areas, and those with a larger number of employees. In focusing on the distinction between small firms employing a 'smaller' and a 'larger' number of employees, it is important to recognise that although in Chapter 2 small firms were defined as those which employ a maximum of 50 employees, there may be a variation in these firms. In particular, these firms may be distinguished on the basis of very small firms (which are those that employ less than 20 employees) and small-firms (which employ fewer than 50 employees). From the responses of the employers that were interviewed, this distinction became important, as it was evident that there were different responses from employers in very-small firms from small firms. In other words, it was evident that these employers did not appreciate the visits from the labour inspectors; they saw this inspecting as being checked up on. However, checking up on certain factors is the

definition of an inspection. Therefore, it is clear that these employers had a problem with the inspection itself. For example, an owner of a fish-selling shop claimed that

Labour inspectors do come in. My feeling is that they focus on more visible businesses. The bigger your business, the more visible it becomes, the more likely it is that you get checked. Whereas the Labour Relations Act governs contracts or housekeepers, so the lady that works in your home she needs to have books signed in on. So I think it's some places but they don't blanket everybody. For example, a tavern that runs in the township, are they checked? Where are their contracts? Are they in place? Do you hear stories of them and whatever all the time? So they check us and they check big businesses, but I don't think they check everybody and it should be everybody (Pam).

This view seemed to be substantiated by responses from other employers, especially in the retail industry and in very-small firms. In these kinds of firms, employers argued that it was rare for labour inspectors to do inspections. Some even argued that they had never been inspected. Other employers extended this view to argue that the enforcement of labour laws through labour inspectors created opposition between labour inspectors and the employers. More precisely, it was argued that the inspection process should not be about checking or focusing on the wrongdoings of the employers with regard to labour law, but instead, the focus should be more on training and assisting the employers as well as the employees in terms of any shortcomings they may have with labour laws. In other words, the focus should not be on punishing employers for not complying with the law, but should be on striving to rectify compliance problems through working together with the employers. When asked about the effectiveness of the enforcement of labour laws, an employer from an entertainment business in Grahamstown, argued:

Yes, labour inspectors do come and visit, but like I said it should be more of how to assist and how to train people. if they come with a more positive attitude and say: 'listen let's sit and see what you've got available ... No sorry this is not the way to do things' and not give you a letter and say we will summon you in two weeks. So come and give the people some training (Mariane).

It is obvious that employers of small businesses did not regard the existence of labour inspectors as a benefit for them or the employees. This may be related, firstly, to the education and training levels, and secondly, to the alleged corruption of inspectors. Some employers revealed the fact that they had unfortunate encounters with labour inspectors because these inspectors showed no knowledge of what they were doing. The owner of a restaurant in Port Alfred summed this up by maintaining that

The labour inspectors that visited us here were ignorant. They were ignorant; they weren't educated in the way of different businesses and different locations and doing different things. They just had a broad spectrum outlook on the way things should be ... How often do they come here? Well we've only experienced them once. They came last August and they stayed for three days. They interviewed all the staff, and they interviewed us and they checked all of our books and all of our UIF. Essentially, like I said, I think they were ignorant, they weren't educated. They never knew what they needed to know ... They weren't prepared to learn new things, or listen and I'm not saying negotiate, but there was just no communication but 'it is the law' (Laura and Danny).

The fact that the inspectors allegedly had little knowledge of labour laws means that it would be hard for them to ensure compliance by employers with these laws. Labour inspectors were also criticised by the employers for being corrupt. For example, one employer of a construction firm in Port Elizabeth described a situation in which an inspector came to the firm drunk and did not follow the correct procedures. She stated:

We had a situation with employees and apparently, he took us to the CCMA. A gentleman came here under the influence of alcohol, demanded various administrative contracts, and without prior notice. Because we at that stage had just opened, he said well he'd give half an hour to prepare and get our papers together. He left, came back, you could smell alcohol. We had not completed our paperwork and he said that's fine, we will have a week to sort it out, know when we are ready ... Which is fine because the paperwork wasn't in place. We phoned around 9 o'clock in the morning. I clearly woke him up and I've never seen him again. We had

everything ready, I think everything's still in one file and we've never seen him again
(Elizabeth).

All of the above reinforces the low levels of compliance with labour laws by small business employers. It is evident that many labour inspectors are unable to carry out their duties, which primarily involve ensuring that employers adhere to the labour laws. This inability to carry out their duties may not only relate to the skills and corruption of the labour inspectors but also to the constraints on resources in the Department of Labour. Although this is so, this highlights the gap between law and practice in small firms. As it was argued by Godfrey (2013), ineffective enforcement of labour laws means that regulation exists on paper only. Poor performance makes it easier for employers to ignore regulatory constraints that have been imposed on them. Above, it was also noted that labour inspectors may be effective as one of the employers that was interviewed stated that labour inspectors visit the more 'visible' firms (which included small firms rather than micro firms) often. This particular employer showed disconcert with this effectiveness of labour inspectors. In this case, it can be argued that the gap between law and practise may not only result from the ineffectiveness in enforcement but also by the views employers may have of regulation. For example, Godfrey (2013) asserted that employers might ignore effective enforcement if the estimated cost of the sanction is outweighed by the benefit of non-compliance with labour laws. The result of this is an insignificant impact of labour laws on small firms.

5.4 RELATIONSHIP BETWEEN THE SIZE AND CONTEXT OF SMALL FIRMS

It can be recalled from earlier in this chapter that employers in small firms pointed out that they mostly focused on what was fair to them as well as their employees rather than complying with the legislation. More precisely, as some of the employers put it, they do 'what is best' for themselves and for their employees. From this, some might argue that employees agree or are happy with the conditions they work under (for example, long hours and little pay). However, it is important to note that the employees are forced to choose between working under these conditions that go against the law and facing dismissal. One might even go as far as arguing that the employees are forced to work more than they wish under the threat of dismissal. In this respect, it is important to recognise the high

unemployment rate in South Africa. Thus, the obvious choice these workers would make is working for long hours and thereby not being unemployed.

From the above, it can be recognised that the informal relations within small firms may not always be fair to the employees. As argued earlier in this chapter, close family-like relations may also be paternalistic and authoritarian. These paternalistic and authoritarian relations were recognised by the state and consequently, the state intervened in the labour market to reduce the power of employers. The paternalistic and authoritarian nature of the informal relations within the small firms that were included in this research could result in one questioning the effectiveness of the state in the labour market (especially focusing on small businesses). For example, the existing research holds the view that the state intervenes in the labour market through labour laws to protect workers from the abuse of employers (whose primary goal is profit-maximisation) (Botero *et al*, 2004). As the South African Minister of Labour stated in her address for Workers' Day in 2013: 'for many employers it is business as usual' (cited in Department of Labour, 2013). This statement by the Minister can also be linked to neo-liberalism. Perspectives employed within the neo-liberal framework were evident from the employer, quoted above, who compelled his employees to work for long hours on a low wage. It is obvious that these kinds of employers sought to recover all labour costs, through extracting as much productivity from the employees as possible and providing them with as low a wage as possible. Similarly, the example that was provided in section 5.2.2 supports findings in the existing research that neo-liberalism forces prospective employees to accept jobs that may otherwise seem unpleasant (Wood and Harcourt, 2001). Moreover, from this there may be a confirmation of the claim that was explored in existing research, which involves that labour laws have a minimal impact in small firms because of the internal arrangements within these firms. However, similarly to large firms, small firms do not exist in isolation.

These firms exist within an external environment (economic, social and legal context) which may influence or restrict the ways in which businesses or employers interact with employees. A significant factor in this regard involves the fact that the act of evading regulation by the employers does not solely rely on the internal arrangements within small firms. Rather, this choice is mediated by other factors, which are external to the firms. Employers choose to

comply with or avoid regulation because of the relationship between the firm, the internal environment and the external environment. For example, the unfair dismissal provision limits employers from encouraging employees to work in less favourable conditions under threat of a dismissal. As Dibben *et al.* (2011) point out, the employment relationship is the product of economic, social, political, legal and technological developments as well as the ways in which employers and employees respond to the changes brought about by these developments. Therefore, small firms are not different to large firms; for both these kinds of firms, the employment relationship is not only influenced by the internal arrangements of the firms but also by the external environment.

Earlier in this chapter, the internal organisation of small firms was stressed. More specifically, it was recognised that whether or not employers avoid regulation is affected by the internal environment of the specific firms. In small firms, this internal environment is largely influenced by the informality, which characterises these firms. It is important to note that the internal organisation of the firm (which focused on the internal environment of the firm) is only one dimension of the environment in which small firms operate. As can be seen above, although this internal organisation of the small firms is important, it also becomes significant to highlight how the size of the firm interacts with contextual factors. In the present research, this interaction between the size of the firm and contextual factors was dealt with by recognising that small firms (as large firms) do not exist in isolation but within an external market environment. In Chapter 2, it was indicated that the distinct market position of small firms usually shapes their responses to labour laws, which ultimately affect the nature of employer compliance with labour laws. In the present research, many of the employers attached importance to the economic context in which their businesses operated. These employers described their product markets as being very competitive. This was particularly true for the entertainment industry. Some of these employers that were interviewed argued that growth was constrained in some instances because of this competition, and more importantly, because of the recession. They argued that their business depended on what people could spend on leisure. In relation to this, they stated that tough economic times resulted in people spending less on leisure and thus negatively affecting the businesses in the entertainment industry. For example, when asked to describe the product market in which her firm operated, an owner of a gambling/restaurant business in Grahamstown explained:

It's very competitive. It's the entertainment business, so people cut the entertainment allowance for themselves. People can't socialise anymore. We see it when the Rhodes University is closed, then there are less customers and certainly over a certain a period of the year, especially December/January (Mariane).

It can thus be seen from the above that the entertainment/hospitality business is only good during certain periods of the year. A recession may increase the chances of small businesses not being able to compete in the market. Consequently, one may recognise the interconnectedness of the functioning of the economy and competition. The data gathered for this research shows that competition could be between small firms alone. For example, an owner of a coffee shop in Grahamstown stated that

There's always that competition right across the road or right next door. People running specials and things like that ... every single day (Mellanie).

On the other hand, many employers across the sectors argued that they faced competition from big businesses. For example, an owner of a retail store in Port Elizabeth argued

The competition has gotten stronger because we're retailers. I think we used to be very strong and independent, but now the big retailers have taken over. You can go for example and sell curtains and linens but you can go to Woolworths now. At the same time, if you sell food you can go to Woolworths. Convenient shopping is becoming much more used by people. People are getting lazy and so in a way it's detrimental to our businesses. It's not good at all; we have to change our ways to keep up (Brenden).

This competition with big businesses could make it more difficult for small businesses to compete because they have access to fewer resources than big businesses. One of the employers in Port Elizabeth in the retail industry mentioned the competition between small businesses and large businesses when he asserted that

We're struggling to survive financially, and they can just look at one's books. You know there are the Spar shops, the big supermarkets. These people are killing us they sell below cost ... These big supermarkets are practically next door and operate below cost. It's impossible; so we need financial assistance (Mohammed).

From the above, it can be seen that in market competition big businesses are able to absorb more costs than small firms can do, and therefore have an advantage over small businesses. Related to this, a small employer in the service retail supported the view above when he spoke about how small firms mostly struggle with competition. He primarily mentioned the difficulty small firms have in accessing capital as opposed to big businesses. More precisely, when asked about the major barriers to growth of small businesses, he stated that

Access to capital is your first one; your big financial institutions don't want to allow the freedom to the capital for growth. Based on that the business is so small, based on that there's no track-record, based on the 90 per cent of entrepreneurial small businesses are started by people who haven't got a history either. So the banks are loath to loan them and lend to them. If you come up with surety, they quickly give you the money but that's as far as they go and I think that's a fault from the financial institutions that I see: lending money but not only just giving the money the back-up service must be proper. The small and medium-sized enterprises are always delegated to a lower person within the banking institution who can't make a call or can't do things themselves. I just want to speak because I've been there... I'm retired to this business so I've come from a big business that I sold after 25 years. The banks were clamming to do business with me in that other business. This business I started from scratch and it's completely different, completely. Irrespective of my personal attributes and what I've achieved, in my personal life and all banks are the same; it doesn't matter which bank you're talking to or which financial house you're talking to (Mike).

It can therefore be recognised from the above-mentioned that although competition may be necessary for the economy not to be dominated by monopolies; competition between small firms and large firms may be detrimental to small businesses. This is so because small

businesses have lesser access to capital. This can be seen through a view of the owner of a retail store in Grahamstown when he argued that the retail industry was very competitive. He further argued that sometimes things are good, but “*when they become bad, they become really bad*” (Simon). Employers in the hospitality industry argued that many entrepreneurs go out of business because of competition and the fact that the economy is not good. As a result of having less access to capital, small firms’ employers may have a greater incentive to not comply with labour laws. For example, in Chapter 2 it was indicated that existing research shows that small firms, which face intense competition (especially from large businesses), tend to offer low wages and poor conditions to their employees. This means that these firms usually offer conditions or standards that are in non-accordance with labour laws. This is so because the fiercely competitive context affects the ease with which the firm can take on the costs of legislation. More importantly, research also showed that labour costs are the only costs that employers of small firms can control. Consequently, these employers always seek to reduce these costs through avoiding minimum standards. Some of the employers that were interviewed gave a different impression: they stated that they used other methods of dealing with competition rather than reducing the costs of labour.

Many employers in the hospitality industry insisted that it could not be disputed that the industry was competitive, but this competition could be overcome or countered by certain factors. These factors involve the increasing number of people (consumers) in a particular town, which results from other institutions such as universities or the general increase of residents in a particular town. For example, referring to this competitive market, an owner in the same industry in Grahamstown argued

Look, the entertainment industry is a high-risk business to be in. It’s very competitive and it’s very volatile. New restaurants open all the time, so it’s very volatile. I do think there’s opportunity for growth. Once again, if you run it well, then one can grow and we’ve been reasonably sheltered from the world economy and the national economy in Grahamstown. As the economy has been battling, so Rhodes and Grahamstown have been growing and that will counteract the external economy that makes us vulnerable. So we’ve been reasonably protected (Brian).

The view above suggests that, although there is a lot of competition within the entertainment industry, some employers found ways to deal with or counter this competition. This was also the case in the other industries. For example, owners who operated in such industries as retail also agreed that the market they operated in was very competitive. Moreover, they claimed that their businesses could not compete through prices of their services as they were restricted by competition policies. From their view, this competitiveness could be countered through quality rather than focusing on costs. The owner of a laundry shop in Port Elizabeth summed up this argument when he stated that

I think it's a very competitive, service-driven market. The pricing structure is pretty much limited to the client base. It is governed by the municipal charges and the only way to get around that is by being an excellence-driven rather than being a cost-driven company; not the cheapest, but better than our competitors (Mike).

Therefore, a relationship can be discerned between the external factors (such as the product market or external costs) and the internal arrangements within small firms. From the view above, it can be seen that external factors force firms (particularly in the service sector) to focus on the quality of their services (which depends on the quality of their employees). In other words, it forces owners of these firms to train their workers in order to counter the adverse impact of external regulation. Although the issue of the training of workers will be discussed in more detail in subsequent chapters, for purposes of this chapter, it became obvious through the interviews as well as observations that advancing the quality of the employees was essential to keep up with the competitive market. More fundamentally, it is evident from this that when small businesses respond differently to regulation than do their larger counterparts, these firms might be placed at a competitive disadvantage in the marketplace. Thus, small firms are forced to comply with regulation in order to have a competitive advantage.

Some employers argued that they diversified their businesses in order to deal with market competition. For example, during the collection of data some businesses were observed as having different sections within one firm (for example, a gambling section, a restaurant and a bar). In other cases, the business owners would have multiple businesses either in the same

town or in different cities. The owner of a coffee shop in Grahamstown saw this as a way of countering market competition:

There's definitely potential for growth, you need to be doing different things. Ten years people would be bored. You need to change things; you kind of need to be always doing something different (Mellanie).

5.5 ORIGINS OF SMALL FIRM REGULATION

It has been shown how, similarly to large firms, the market position of firms (specifically focusing on market competition) affects small firms and their internal organisation. A more important issue in relation with the present research relates to how market competition relates to the compliance of employers with labour laws. For example, one of the questions that may arise includes whether the intense market competition confronting these businesses (which many of the employers mentioned as the main constraint when they described their product market) means that certain provisions within the legislation are not followed. More precisely, does fierce competition mean that employees can be unfairly dismissed or forced to work in excess of the legislated hours? It was shown that the small firms that were included in this research exist in a competitive environment, similarly to big firms. However, as mentioned before, small firms have more incentive to avoid labour laws because of intense competition between small businesses and big businesses. This is so because small firms are less able to absorb costs than big businesses. Moreover, it was also indicated earlier that the employment relationship is the product of economic, social, political, legal and technological developments as well as the ways in which employers and employees respond to the changes brought about by these developments.

Hence, although small firms sometimes employ similar methods of responding to the competitive environment as big firms (such as training workers and diversifying their businesses), the former can be distinguished from the latter on the basis of the degree of informality that may allow small firms to avoid labour laws. Therefore, evidence from this research has shown that regulation of small firms results from the interaction of the internal context with the external context. As past research has revealed, industrial relations in small firms are complex, and it is not simply a matter of internal versus external regulation. Rather,

statutory regulation is mediated not only by the different external environments in which the firms operate, but also by the often opaque and complex internal dynamics within an individual small firm.

5.6 CONCLUSION

Fundamentally, in responding to employer compliance with labour laws, it was important in this chapter to scrutinise whether or not these laws were implemented in small firms. It was revealed that the internal organisation (which can be characterised largely by informality) of these firms led to employers treating labour laws as external elements, which were unacceptable in regulating their firms. However, even though these employers mostly avoided labour laws, there were some instances in which they complied with labour laws rather than avoid them. More specifically, the informal, close, intimate relationships within these firms resulted in certain disadvantages for small firms (such as employees taking advantage of these relations and acting insubordinately). As a result, the employers that were interviewed regarded a degree of formality (through complying with labour laws) as being required in managing the employees. Furthermore, it was evident from this partial integration of formality that small firms are not entirely disconnected from labour laws. Even in such cases, it was revealed that employers only complied with labour laws when these corresponded with the internal arrangements of the firms.

Similarly, it was evident that labour laws are not integrated into the structures of these organisations. This meant that there would be little impact from legislation as employers only complied with it for individual incidents, and not consistently. The issue of labour law enforcers (labour inspectors) was also dealt with in this chapter. It was revealed that they play a part in the actions or choices of employers of not complying with legislation. This is so because the employers interviewed identified them as being corrupt as well as lacking education and skills for their job.

Lastly, it was revealed that although small firms may avoid labour laws through their internal relations, similarly to large firms, they are also affected by an external environment (which involves the legal, economic and political environment). For example, it was found that small firms operate under the umbrella of labour laws and face the same competitive pressures as

the large firms. However, it was evident that although small firms may employ the same strategies of responding to this external environment or pressure as big businesses, their limited resources may give small firms' employers more incentive to avoid labour laws (especially when faced with intense competition from big businesses). Small firms may use the informality that many of these firms are characterised by to deal with any pressure from the external environment. Thus, the rules of regulation within small firms do not solely depend on the internal arrangement of small firms as these firms are also affected by the external environment. Rather, the discrepancies in the nature and extent of compliance with regulation reflect the differences in degrees to which the particular legislation fits not only the internal organisational structures, but also the market context. Put in simpler terms, it was revealed that the interaction of the internal (through informality) and external environment mediates the influence of labour laws on labour practice within small firms.

6

EMPLOYER RESPONSES TO LABOUR LAWS

6.1 INTRODUCTION

Research has shown that although employers may perceive labour law as imposing excessive costs on their firms, labour laws have a minimal impact on small firms. One of the reasons for this minimal effect was explored in Chapter 4, where it was argued that this insignificant effect is the result of non-compliance by employers in small firms with labour laws, which is related to the distinct industrial relations within small firms. In this chapter, a second reason for this minimal effect will be explored. This involves the different methods or means employers adopt in responding to labour laws. The means employers adopt in responding to labour laws depend on the views these employers have of labour laws. For example, it may be recalled from previous chapters that most employers perceive labour law in South Africa as being too rigid because it provides a framework that discourages firms from competing through the exploitation of labour and encourages them to compete based on other costs and factors such as quality, reliability and service (Collins, 2003). As a result, employers pursue methods of responding to labour laws in an attempt to allow their firms to compete by reducing labour costs through increasing flexibility.

Although existing research has shown this method of increasing flexibility as widely used by small business employers, it is not the only method small employers may adopt in order to compete. Some firms may compete through increasing the quality of their employees through training employees and offering higher wages (Von Holdt and Webster, 2005). With the increasing flexibilization of work in the country, it is often assumed that employers follow the first method referred to above, which involves employers seeking to reduce labour costs and increase flexibility. It is therefore of utter importance to explore these responses to labour laws in order to grasp the growing trend of flexibilisation in the South African labour market. More importantly, exploring these responses to labour laws may allow one to evaluate the impact of regulation on small firms, whether these responses reduce the effect or enhance it. For example, exploring these responses will assist in explaining the extent to which labour

laws may be evaded through flexibilisation or the extent to which unnecessary costs may be avoided (if this avoidance occurs) through training workers. This chapter will explore the main themes associated with the manner in which employers respond to labour laws through firstly revisiting and extending on a subject that was explored in Chapter 4; namely, employer perceptions of labour laws. These perceptions will be explored by looking at the degree to which employers perceive labour costs as unnecessarily shaping cost structures of their firms. The chapter will then shift to how these perceptions affect the responses of employers to labour laws, that is, the methods employers may utilise in reducing these costs.

6.2 HOW LABOUR COSTS SHAPE THE COSTS STRUCTURES OF FIRMS

As mentioned above, when focusing on how employers respond to labour laws, it is imperative to note that these responses depend on how the employers view the rigidity or costs associated with labour laws. More specifically, employers who view labour laws as being burdensome and extremely costly are more likely to attempt to filter these costs for the survival of their businesses. Chapter 4 points out the perceptions of the small firms' employers that were interviewed on the costs associated with labour laws. As is evident in that chapter, a majority of the employers that were interviewed claimed that labour laws were very costly to their businesses. Even though in some cases there was no confirmation of these perceptions from the specific operations of the firms, this does not take away anything from these perceptions. Existing research has portrayed employers with this view as neo-liberals (Benjamin *et al.*, 2010). More importantly, neo-liberals often use methods (such as subcontracting or other various forms of flexibility) that will enable the employers to avoid minimum standards.

In order to address the issue of the methods utilized by small employers in responding to labour laws, it becomes essential to firstly scrutinize these costs. For example, findings of this research as drawn out in Chapter 4 correspond with findings of previous research as indicated in Chapter 2 that indeed employers' views on labour regulation emphasise the relationship between employment protection legislation and employer-borne tax to reflect the cost implication of various regulatory provisions to the employer (Zientara, 2006). In simpler terms and as indicted in Chapter 2, research has shown that many employers define or refer to 'labour standards' as labour costs imposed by regulation (Collins, 2001). This was also

recognised through focusing on the factors that shaped the cost structures of the specific firms that were included in this study. On the one hand, some of the employers interviewed regarded labour costs (which they associated with the wages that are paid to the employees) as the main factor that shaped the cost structures of their firms. This was mostly evident in the retail industry. For example, when asked about the factors that shaped the cost structures of the firm, an owner of a fish-selling firm in Port Alfred mentioned that:

Your highest expense is obviously your payroll, then comes your rental as your next biggest expense, and then obviously your electricity, water and lights. Interest rates do play a part, but obviously the more money you make, it will not make much difference (Pam).

The above confirms a study, which was conducted by Clarke *et al.* (2006) where it was found that the total cost of wages and other benefits was higher per worker in South Africa than in any of the comparator countries that were included in the study. This was indeed the case in the current study too where employers viewed the wages of the workers as very high and as mostly shaping the cost structures of their firms.

Although some employers indicated that labour costs shaped their cost structures, other employers that were interviewed claimed that their cost structures were to a large extent not shaped by labour costs. This was evident in the micro-small firms (for example, a maximum of 10 employees) than small firms (for example, between 20 and 50 employees)). Although these employers put forward the argument that some factors were costly, they argued that most of these costs did not involve labour. Most of these employers complained about factors such as government regulations (through municipal regulations or charges) or the prices of the food (in restaurants). In indicating this view, an owner of a guesthouse in Grahamstown argued that

The main problem that I face is that the Makana rates and payments are so high that we can hardly function. I think many businesses in Grahamstown are closing down because of it. They're just charging too much. They perhaps think we're making a lot

of money, but it's not like that. We're just making ends meet. There's no money left over, to go on holiday or anything like that. The maintenance costs are high (Catherine).

In these cases, where no unnecessary costs were associated with labour or labour laws, there were no changes (such as contractualisation, flexibilisation, or training) introduced to the workforce in attempting to recover the costs. For example, many employers in the hospitality industry argued that in dealing with or offsetting the costs, they increased the prices of commodities. This, in turn, would increase profits. In other cases, as can be seen in preceding chapters, the profits are reduced. More fundamentally, the differentiation made above between small firms (which employ between 20 and 50 employees) and micro-small firms (which employ less than 20 employees), confirms a claim that was made in the literature. More specifically, it was documented that labour costs tend to be high in small businesses because these businesses are more likely to be labour-intensive (Hirschsohn, 2008). It may therefore be established from this that small firms will acquire more labour costs than micro-small firms. This is so because if labour costs are related to labour intensity, then they will also relate to the number of labourers. Consequently, lesser costs are associated with a lesser number of labourers.

So far, it has been argued that labour laws impose great costs on small firms (to a lesser extent on micro-small firms) and the emphasis was on the recovering of these costs. Small firms (similarly to any other firms) have to make profits in order to survive, therefore cost-recovery will always be a priority for employers in these firms. However, there is some differentiation in the ways in which these costs are recovered. As research has shown, one of the ways to distinguish neo-liberals from neo-corporatists is through the methods they employ to recover costs (Wood and Harcourt, 2000). Furthermore, existing research has shown that the methods employed by employers in recovering costs depend on the employers' perceptions of labour laws or the extent to which they accept state intervention in industrial relations (Collins, 2001). These findings of previous research were confirmed in the current research. This can be shown through firstly focusing on the employers' perceptions of the costs imposed by labour laws as was discussed in previous chapters. This is a view that was highlighted by a minority of the employers that were interviewed across the sectors who

argued that labour laws did not impose unnecessary burdens or costs on their businesses. In support of this view, they argued that labour laws only provided guidelines on how they (employers) and employees should act in the employment relationship. Thus, for these employers, unnecessary costs were only recognised by non-compliance with labour laws. In other words, complying with labour laws ensured that no unnecessary costs would be incurred by these firms. For example, when asked about methods they use to offset the increasing costs of labour laws, an owner of a salon in Grahamstown stated that

There aren't really costs involved except for the fact that you are guided by the minimum wages. I try to make sure that I put stuff into the book and the staff are paid according to, you know to the guidelines ... and that's all I can do. Also, my staff, they've been here for so long so it's a difficult question to answer, and it depends actually on the person whether you hire an inexperienced person, that comes out in the interview and if you think that person has got potential (Madelaine).

Although this view was common among some of the employers interviewed, other employers extended it by arguing that there are instances where employers cannot comply with the labour laws. In such cases, they argued that it was essential that they found loopholes in the existing legislation, which could be of benefit to their small businesses. One of the owners of a small firm in the hospitality industry in Port Elizabeth exemplified this view when asked about the confidence in her knowledge of labour law:

One of our customers actually helped us a few times with knowledge of labour law. He's a labour law consultant and my husband's an attorney. So, between the two we gathered a lot of information that we actually never knew but also because of the complications. Essentially, what they taught us was how to get around certain things, how to circumvent certain laws because of the difficulty in having to uphold them, how to get around them without having to act against the law. So, in other words, finding loopholes through the system (Fiona).

Small employers attempt to find ways around the legislation that may allow them to avoid labour laws or at least certain provisions within the labour law framework. It can be seen from the above that finding loopholes or gaps in the legislation may affect the relationships between the employers and employees within the workplaces. More importantly, complying with the legislation may reduce other costs that could have gone unnoticed prior to complying with the law. For example, the same employer asserted:

We actually are trying to stick where we can and we make time to sketch off everybody and you come to work at 8 and you leave at 3. You pack your lunch and you have to go. It's forced us to be a lot stricter; it's forced to follow 'the law'. Before, we were very friendly to them. You know, the girls would cook their lunch in there, you know we'd have big lunch in the kitchen. Now you have to bring your own food. We're still a happy kitchen, but it took a long while to get used to those changes. We are now forced to act like bosses and now the workers wonder what they did wrong. What the labour department did was create a division between us. Now we have racial division. We were a big, happy family that all ate together, but now we don't. Now there's another division, now there's a boss and workers. Workers must eat outside at the back there where the staff eat and use the staff toilets, and they also change when you tell them 'you've got to sign out now, if you're not cooking and cleaning sign out and go'. In their minds, they're thinking: 'if I can have five more minutes I'll make more money' (Fiona).

Therefore, in the example provided above, it can be seen that complying with the legislation came with more formality. This formality came with eliminating a friendly, family-like environment; replacing it with a more formal one in the workplace. It is important to note that the 'friendly' environment was enhanced by supporting staff through providing them with food (for example, cooking lunch in the workplace). In this case, complying with labour laws (or finding loopholes within this framework) was paralleled with a reduction in financial costs (that could be associated with the lunch that was provided to the staff). Moreover, it can be seen in the view above that the employer relates a family, family-like environment to benefits or privileges that are given to employees. However, as mentioned in preceding chapters, the friendly, family-like environment is often paternalistic and authoritarian. As a

result, employees may also benefit from more formal procedures rather than the informal, friendly-like environments.

Although employers have different views on how much and in what ways labour costs shape their cost structures, one view that they all maintain is that it is important for firms to respond to labour laws in some way as to allow their firms to compete. Existing literature has highlighted two ways in which firms may compete: the first involves neo-liberal (low-road) methods, which allow firms to compete through costs. The second involves neo-corporatist (high-road) methods, which allow firms to compete through other factors such as quality and service. The next section will explore the means that the employers in the current study utilized as responses to labour laws and as means of allowing their firms to compete. It will be perceived from these whether employers utilize the low-road or high-road approach.

6.3 USING TEMPORARY WORKERS

In looking at the different approaches of responding to labour laws, it is important to instigate this subject by revealing that many employees in the small businesses that were studied indicated a separation between core and non-core workers. That is, although some workers had worked on a permanent basis in the researched firms, many worked on a temporary or 'need' basis. Most of the workers that were utilised for such temporary terms were students. Rhodes University in Grahamstown was the main source of these part-time or temporary positions. This was particularly common in the hospitality industry. For example, in many restaurants that were investigated, most permanent positions were for the cleaners and cooks or chefs. These workers made up a small number of the workers. The majority of the staff was made up of waiters and waitresses, and they were the ones that were employed on a need basis. For instance, waiters and waitresses were needed the most on a peak, seasonal basis (during festivals, graduations, conferences or during the festive season).

This trend was also evident in the construction industry. For example, an owner of a construction firm in Port Elizabeth emphasized the linkage between the costs of labour laws and the casualization of employment. This employer complained about complications she faced with her employees and how it was difficult to dismiss them. She was then forced to employ labour experts to resolve most of the problems she faced (her views are captured in

Chapter 4). Because of the ‘difficulty’ in dismissing employees, this employer argued that it was better to employ casual rather than permanent workers. In particular, she asserted:

Within the past year, I actually think it was a lot of money that was used to employ a labour lawyer to handle all the situations in the company. I think the labour law has actually caused us to follow a path of rather employing casual workers than permanent staff. So, as a result, some people lost their jobs because of the strict labour laws (Elizabeth).

6.3.1 Temporary Employees and Evading Labour Legislation

In relating the above to the responses of small employers to labour laws, there are certain factors that need to be highlighted. It is important to address the question of whether this method of casualization or hiring on a temporary basis reduces the costs imposed by labour laws. Firstly, it is vital to recall the fact that persons who work more than 24 hours a month are included under the Basic Conditions of Employment (BCEA). In this case, it becomes obvious that even the temporary employees, who work more than 24 hours in a month (mostly students) in hospitality businesses, are eligible for some of the protections in the BCEA. Thus, some may argue that it is not correct to assume that employers seek to reduce or avoid the costs of regulation through hiring temporary employees because either way they are forced to adhere to labour laws (more precisely, the BCEA) whether employees are temporary or permanent. For example, an employer of a small restaurant in Grahamstown admitted or showed knowledge of this fact:

Temporary staff are treated as permanent if they work 24 hours in a month (Miles).

Therefore, proponents of the view that small employers do not use temporary workers to evade regulation as discussed above may claim that many small employers (especially in the hospitality industry) utilize temporary employees to respond to market forces (for example, competition). For example, it may be claimed that it is feasible to employ several waiters/waitresses in a restaurant during peak periods and level out the staff during plateau periods (when the business is not doing well or when there are fewer customers to serve).

More specifically, it is more feasible to employ these employees on a temporary basis when the business is booming (which is on a seasonal basis). This can be related to an argument as outlined in Chapter 2 where it was shown that sometimes utilising temporary workers does not necessarily involve an intentional strategy on the part of the employers to evade regulation. Rather, regulation may change the behaviour of firms even if the firms are not actively trying to avoid regulation (that is, indirectly). For example, if regulation increases the costs of firms without increasing the productivity, then firms will be less efficient. This means that they will be less able to compete in both domestic and international markets. Thus, in response to factors such as global competition and technological advances, firms restructure their operations (by, for example, employing on a temporary basis) (Theron, 2005).

Opponents of this view may relate the employment of temporary workers as strategies that are aimed at filtering the 'costs' of labour laws through avoiding certain provisions. For example, using temporary workers allows the employer to gain access to workers with specialized skills for a short period, according to the needs of the business and at a fraction of the cost of permanent employment. This is so because, firstly, temporary employees are in a vulnerable position as individuals as they are rarely in positions to negotiate for better working conditions or more favourable terms in their contract of employment. Secondly, even though the BCEA applies to temporary workers (those who work for 24 hours and more a month), it becomes significant to highlight that employers who use temporary employees are able to circumvent the unfair dismissal provision as these workers only work for a short period. As Botero *et al.* (2004) argued, there could be a reduction in regulation costs in hiring through temporary contracts; as such practices reduce termination costs. It can be recalled from previous chapters that many employers attach considerable costs to this provision and therefore it would make sense to find ways to avoid it.

Another area that was recognized as a method of bypassing the unfair dismissal provision in relation to the utilization of temporary employees was that of fixed-term contracts. As noted in Chapter 2, a fixed-term contract is a contract that is entered into by an employer and employee for a specified period of time or in a case of an unknown period, a specific project (Department of Labour, 2013). It was evident for the firms that were investigated in this

study that employers misused the provision of the fixed-term contracts. Many employers and some of the employees that were interviewed (especially in restaurants) indicated that they (employees) were called to work on a need basis. Furthermore, it was evident that the same employees would be called to work every time they were needed (which could be for numerous times a year, for several years). As indicated in Chapter 2, this involves an exploitation of the provision because continually renewing a fixed-term contract may lead to a legitimate expectation from the employee that there will be a renewal in all instances upon the expiry date of the contract. This may also be recognised in the doctrine of legitimate expectation as provided in section 186(1)(b) of the LRA. In this section it is indicated that a 'dismissal means that- an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it'. Therefore, an employee can file for an unfair dismissal should the employer terminate the contract after numerous renewals. Thus, although the doctrine of legitimate expectation has closed any loopholes in the fixed-term contracts provision the employers included in this research (especially in the hospitality industry) showed that they dismissed their employees in the name of fixed-term contracts. This may be against the law should the employees recognise this and file for unfair dismissal.

Hence, flexibilisation of the workforce through utilising temporary or casual workers is important to mention as it differentiates those who are protected by labour laws, that is, it differentiates employees from independent contractors. In explaining this, scholars have shown that labour laws have traditionally extended protection only to permanent, full-time employees in a 'standard' employment relationship. These limits in the protections provided by labour legislation created a legal vacuum that some employers sought to exploit by hiring part-time or temporary workers on 'non-standard' employment contracts. Because of these practices, workers who are essentially the employees of a firm are excluded from collective bargaining and statutory protective measures. In other words, through these practices employers can evade labour laws. Although employers have attempted to bypass labour laws, the legislation has been created in a way to forbid such actions (Klerck, 2009). For example, it was noted that some employers have attempted to bypass protective statutory legislations by persuading their employees to sign contracts which designate these employees as 'independent contractors', although their employment relationship fundamentally remains unchanged (Department of Labour, 1997). In a number of judgements, the Labour Court has

shown non-acceptance of such a contract at face-value, rather, the Labour Court considers a range of factors to determine whether the person is an independent contractor or an employee.

This matter was further reinforced in the 2002 amendments of the LRA. These amendments provided that, where a particular factor in the relationship between a worker and the person for whom he or she works, the worker is presumed to be an employee unless the employer proves the opposite. A person who works for, or provides services to, another person is presumed to be an employee if: his or her manner or hours of work are subject to control or direction; he or she forms part of the employer's organisation; he or she has worked for the other person for at least 40 hours per month over the previous three months; he or she is economically dependent on the other person; he or she is provided with his or her tools or work equipment; or he or she only works for, or renders service to, one person (Section 200A (1)). These amendments therefore prevent employers from developing work arrangements in a manner designed to deny certain persons the rights accorded to 'employees' in the labour laws. By allowing the Minister of Labour to deem certain workers to be employees, the scope for avoiding statutory protections through 'disguised' employment relationships is significantly reduced (Klerck, 2009).

6.4 USING YOUNGER STAFF

Another method for recovering costs that was highlighted by the employers was the differentiation between younger and older employees. More precisely, employers in the hospitality industry indicated that they mostly employed younger employees rather than older ones. Employing younger employees meant that they could work for longer hours; as well as work several, unsocial shifts. For example, an employer of an entertainment business in Grahamstown stated that

We also try to employ the younger people and we provide them with training and thereafter we can see if they can be permanent. It depends on the shifts they can work in. We used to outsource services, but they were also stealing from our company (Mariane).

Younger employees often do not have their own families and therefore are free to work for longer hours. This method of responding to labour laws may also have unintended or indirect consequences. For example, labour laws have been shown to negatively affect the employment levels of the older generation in small firms. Another aspect that can be recognized from the above quote relates to the training of the younger employees. This will be discussed below.

6.5 LOW TRAINING AND TACTICAL TRAINING

It is obvious that the above illustrates the low-road approach to competition, as the main aim of these employers is to reduce or recover any costs associated with labour, through introducing some of flexibility in the workforce. As indicated in Chapter 2, this is not the only approach that may allow firms to compete. Firms may also compete through investing in the quality of their employees through training them. Even though employers trained their employees, it was evident that this was merely done for the employees only to know the tasks they were employed to perform. Virtually all of the small employers that were interviewed argued that they utilized in-house, on-the-job training in their firms. For example, in the hospitality industry (restaurants) new waitresses and cooks would be taught their jobs by existing employees. This was the same throughout the industries that were included in this research. This data confirms the typology provided by Kitching and Blackburn (2002), as outlined in Chapter 2, that small firms are usually included under ‘low trainers’, whereby training is seen as a last resort and/or as unimportant to their businesses. Low trainers lack training budgets and train informally.

Even though this was a common practice across the sectors, there was some variation which was recognized between employers in micro-small firms and employers in small firms. In this regard, it was evident that the former exclusively used in-house training while the latter claimed that they utilized different levels of training for different employees. Thus, although small firms (as opposed to micro-small firms) also utilized in-house, on-the-job-training for their new staff, they also committed to other forms of training for certain employees. It was obvious that these kinds of training were generally meant for employees that had been with the particular firms for longer periods and who the employers deemed as being committed. This often involves providing training that will assist a specific employee to advance or

develop in the position he or she already holds. An example of this kind of training involves an employer sending a manager to a tertiary institution for further education, or referring an employee to a driving school to achieve a driver's license (and then using that employee as a driver). In other words, the kind of training that is provided in these firms is of an advantage to both the firm (and employer) as well as to the employee. An employer of a restaurant/club in Grahamstown summed up this when he noted that

There are various ways and levels of training: there's specific training into a position, so if you come in basically off the street you apply for a position and have an interview and you wanna be trained, a pizza maker or a waitress or whatever, we have internal training processes that train you specifically for that purpose. So, a waitress is trained to be a waitress; she's taught the menu. They do language ability tests, and how to approach people, that sort of thing ... So we try to train people specifically for a job in the business. Then there are other forms of training whereby people who generally want to improve themselves, not necessarily in a position. For example, I've got a stock controller, he's involved in counting stock and he didn't have a driver's license and we, over a period of six months, taught him how to drive then we put him on lessons with one of the driving schools. He passed his license and now he drives the vehicles for the company. Then there are people who do courses at university or other institutions. We've got two managers who are busy doing MBAs at Rhodes. I've got another administrative assistant that's studying at Unisa. So, there's various training. We take a case on its own merit, and we see whether what the person applies for. People apply to the superior for training, and we then make a decision that ties in with that area of the business. So, for example, if a pizza lady comes and asks me to do a business management course at Rhodes University I will not send her to do that course. But if she wants to improve herself in the field that she is in then it will be fine, you know that sort thing is fine (Brian).

It is important to mention that even for the firms that made use of other forms of training, this was only for a small number of firms. Furthermore, when focusing on the typology for training provided by Kitching and Blackburn (2002), these firms form part of the tactical trainers. They hold a clear and coherent view of the necessity of training, particularly initial

training for new recruits. However, they tend to operate in the absence of a dedicated training budget or clear training policy and rely heavily on in-house training, primarily on-the-job, with limited provision of external training.

Furthermore, when focusing on training by the small firms that were included in this research, it was evident that training was generally used on an individual basis. That is, it was not a uniform standard. More importantly, employers did not train consistently; rather, they trained in exceptional cases. In other words, it becomes obvious that training did not occur often in these firms. The only time training was done regularly was for the newly employed, who were usually trained for the positions they were employed in or the tasks they were employed to perform. This was confirmed by an employer from in the entertainment industry who asserted that

The training system is first of all ... how to operate the machines, and how to be a bar lady, how to be a cashier ... how to be a manager ... how to be a security guard ... how to work in the kitchen, how to be a chef. So, there are quite a few different forms of training ... We've got a qualified chef in the kitchen, so she trains newcomers, and then we've got my daughter and two other managers who will train the newcomers ... There's not really a budget set aside, but when the need arises we provide the training and also train the people on First Aid, St John's First Aid courses, where they can earn valuable points and they can grow to the next level (Mariane).

6.5.1 Constraints on Training

Although the existing research outlines the different training orientations for different kinds of firms, it does not give details on why these firms adopted different orientations to training. More precisely, there was no clear indication of why small firms provided minimal training for their employees. This aspect was recognized from this research. According to the employers interviewed, one of the constraining factors is a 'lack of commitment from the employees'. Employers argued that they are often reluctant to train their employees because of this 'lack of commitment' from them. They claimed that training tends to be a big cost to their businesses because employers invest in the employees through training them, but there

is no return on this investment as the employees may quit at any time. More specifically, when asked about the constraints they face as employers of small firms, one employer stated:

There are two sides to this ... There are various levels of skill of labour. Obviously, in South Africa we have incredibly high unemployment, so I think one of the biggest problems we face is commitment from people and it's very difficult to find committed people who you can train, put an effort into and grow. People don't seem to be committed. It's an on-going struggle. Unfortunately, we have a very high staff turnover. Although some people have been with us for a very long period of time, for like 10-15 years plus, many people resign out of the blue, we invest a lot of effort into training people. We try to be as good a workplace as much as we can. We try to train workers as much as we can, but unfortunately it doesn't always work (Brenden).

It was also revealed through the interviews that employers viewed this lack of commitment from the employees as being because of labour laws favouring employees (an area that is explored in detail in the following chapter). In particular, the employers interviewed explained the 'lack of commitment' as being demonstrated by the fact that the employees could terminate their contract of employment without notice. This may be linked to findings of previous research where it was argued that training employees may be costly to employers as high levels of skills may also mean that workers may have a chance of obtaining a better job with another employer (Kraft, 1998). However, the argument by the employers in the current research may either be a misconception by the employers or may be related to informality (lack of written agreements) in small firms because notice periods are normally governed by the contract of employment. Hence, if employers are able to resign without giving notice the blame lies with the employers and not labour laws.

Moreover, the claim that employees 'lack commitment' may be questionable. Often, employers regard any behaviour that does not suit them as showing 'a lack of commitment' because of the fear of losing power in the employment relationship. For example, in Chapter 2, it was argued that many of the South African employers are determined not to allow any redistribution of wealth and power to their detriment (Bramble and Barchiesi, 2003). In the example provided above, the high staff turnover does not suit the employers and therefore the

employers label it as a lack of commitment from the employees. However, employees often resign because they have often found jobs with better wages and better working conditions. Therefore, in some cases this 'lack of commitment' the employers interviewed referred to may be a consequence of the employers not providing employees with good working conditions.

Certain firms within the hospitality industry were prone to employees resigning without notice. An employee would pitch up for work one day and tell their employer that it will be their last day at work. Moreover, the employees would demand remuneration for the period worked until that specific day. The owners of a restaurant in Port Alfred provided the following example:

We had an incidence that occurred in December. Just before season started, two of our staff just decided to say they were leaving to better jobs. They just came to us and said: 'well, we're going and we're not coming back tomorrow; so can we have our money please'. We were like: 'no, you've worked here for five years; we've looked after you for five years, what about us? The season starts tomorrow on the 16th' ... So, I lost one of my cooks the day before season started and I couldn't force her to give notice or anything. I couldn't say to her 'work your notice' because that would have benefitted us and them at the end of the day. In actual fact, the silly thing is that yesterday we found out she's not even working there anymore. She's now just sitting at the location looking for a job. So she left this job thinking she could make a future elsewhere for R15 an hour. I don't know if she lost the job or left; I'm not sure, but now she's got no job... [She can't come back here?]. Well we would take her back, but then we've filled her space. Now we have ten and we can't take her on (Laura and Danny)

From this, it can be seen that, although employers may have power in the labour relationship (as they own the means of production), they may also feel that this power is weakened by labour law (which the employers feel favours the employees). However, as mentioned in previous chapters, reducing the power of employers is the main objective of labour laws. More importantly, although the employers that were interviewed blamed labour laws for the

low levels of training in their firms (for example, labour laws encourages a lack of commitment from the employees), it becomes evident that this lack of commitment can also be blamed on the employers. Firstly, employers do not recognise the importance of employment contracts to limit employees to do as their please (for example, resigning with an immediate effect). Secondly, employers need to be competitive enough to recognise the standards or conditions offered by competing firms.

6.6 CONCLUSION

In concluding this chapter, it becomes significant to note that the small firms that were investigated seem to be following the low-road approach in responding to labour laws. This was associated with the findings, which illustrated that the firms mostly employed on a temporary, needs basis (especially in the hospitality industry) and provide low levels of employee training. When looking at the subject of temporary workers, on the one hand, it was recognized that the utilization of temporary staff does not necessarily constitute a response to labour laws. Rather, it is a means that is adopted in responding to market pressures (such as an economic downturn). This claim was substantiated through focusing on the BCEA legislation. More precisely, it was shown that employees who work for 24 hours and more in a month are included under this legislation. Thus, it would be incorrect to argue that employing on a temporary basis (for example on a seasonal basis) is a strategy to bypass legislation as these employees are covered by the BCEA. On the other hand, it was shown that the utilization of temporary employees was indeed a strategy to avoid legislation. Substantiation for this claim includes, firstly, the fact that, unlike permanent staff, these employees do not have much power to negotiate better working conditions. Thirdly, it was shown that employers could easily bypass the unfair dismissal provision by employing temporary employees. One of the ways they do this is through continually renewing fixed-term contracts, irrespective of the legitimate expectation, which may arise. In this case, it is evident the employers that were interviewed unlawfully circumvent the unfair dismissal provision. Furthermore, it was illustrated that many small employers use young employees who are able to work for longer, unsocial shifts.

Another factor, which showed that small employers followed the low-road approach, was the low levels of training provided to the employees. In this regard, it was shown that many of

the small employers utilized in-house, on-the-job training. Although small businesses with a large number of employees showed that they used other forms of training, it was obvious that this training was not associated with a specific budget set aside for the purpose, it was not of a uniform standard, and it occurred largely on an individual basis. This is the reason why the firms that were investigated were referred to as low trainers and, in some cases, as tactical trainers. One of the reasons for the low levels of investment in the training of workers involves the lack of 'commitment' that the employers observed from the employees. The employers based this claim on that employees in their firms can easily resign without notice. However, the view of the 'lack of commitment' from the employers was questionable. This is so because firstly, notice periods are normally governed by the contract of employment. Secondly, often employers regard any behaviour that does not suit them as showing 'a lack of commitment'

The methods adopted by the employers that were investigated may affect the impact of labour laws on these firms. One may argue that the claim that South African labour laws are too rigid and encourage employers to compete on the basis of quality and reliability rather than labour costs may be disputed. This is so because it has been shown that most firms can resort to temporary or casual labour, in particular, employers that were included in this research established different contractual regimes for different workers (referred to as temporal flexibility). Furthermore, establishing these different contractual regimes (such as employing temporary employees) may lessen the 'negative' impact of labour law because this method may allow employers to circumvent the unfair dismissal provision (which many employees that were interviewed deemed as being burdensome). However, the extent to which employers can evade labour laws must not be over-estimated. This is so because the scope for avoiding statutory protections is significantly reduced because the Labour Court does not accept contracts which designate employees as independent contractors at face value. The 2002 LRA amendments clarify the issue of the defining an employee (and hence who can be statutory protected). This provision therefore prohibits or limits employers from developing work arrangements in a manner designed to deny certain persons the rights accorded to 'employees' in the labour laws.

7

THE ‘FIT’ BETWEEN LABOUR LAWS AND SMALL FIRMS

7.1 INTRODUCTION

Labour law in South Africa, as elsewhere, originated as a response to the exploitation of employees by the employers, which resulted from the power imbalance in the employment relationship. More precisely, labour law in the country was an intervention by the state, which was meant to protect or provide security to employees in the employment relationship. Even though the democratic government in the country felt obligated to protect the vulnerable employees, it also faced an increasingly globalized economy that demanded some form of flexibility. This is the reason why the government sought to pursue a framework that provides a balance between security and flexibility, referred to as regulated flexibility. It was shown in Chapter 2 that the commitment to regulated flexibility requires a continuous evaluation of the extent to which the balance between flexibility and security is attained. More importantly, it was highlighted that this evaluation can take place by (among others) assessing the burdens imposed by regulation, especially on small firms. When focusing on assessing these burdens, it becomes important to look at the extent to which regulation is suitable for the unique characteristics of small firms. As was revealed in the previous chapters, the question of the fit between labour laws and small firms is a crucial one as these firms should be nurtured and accommodated for purposes of creating employment and reducing poverty. This question will be the core of this chapter. It will be looked at from different positions, ranging from whether employers feel that small firms should be exempt from certain provisions to whether employers feel that labour laws favour employers or employees.

7.2 ROLE OF THE STATE AND THE UNIQUE CHARACTERISTICS OF SMALL BUSINESSES

As mentioned in the introduction of this chapter, in gauging the burdens imposed by regulation on small firms it becomes important to look at the views of the employers of whether or not labour laws are suitable for these firms. From this, it can be recognized that there is a shift from what was discussed in Chapter 5. In that chapter, the onus was left to the employers and it was shown that employers do not comply with labour laws. In this chapter, there is a focus on the employers. Conversely, there is another perspective that employers reveal, which is that labour law is just a theory that is not followed up on by the state. In other words, a large part of the responsibility shifts from the employers to the state. For example, it was stated by an employer of a construction company in Port Elizabeth that

I feel there's a lot of theory in terms of what needs to be done, and what the law is, but when it comes to actually the regulation I don't think it's been followed as should from the government's side. All the structures are there in theory, but I don't think it's practical, everything I mean I just don't feel that it's actually realistic, in terms of what's going on in small businesses. I can understand for the larger firms, but for small businesses you're working with ... It's more personal and that actually makes it difficult to operate (Elizabeth).

It is shown from the above that for employers in small firms, labour law is only realistic on paper but not for implementation. In other words, labour laws are formulated without the consideration or realisation of capacities of the different firms. More importantly, the view that comes across is that a line should be drawn between small and big businesses in terms of labour laws. That is, the state (through labour laws) should intervene differently in small firms as compared to large ones. The role of the state will therefore be discussed through exploring whether South African labour laws are suitable for small firms. The extent to which there is a fit between labour laws and small firms was shown in Chapter 2 as being crucial in determining the extent to which these laws can be burdensome on these firms, and ultimately shaping the framework that provides a balance between security and flexibility (regulated flexibility).

As indicated above, it is important to focus on the suitability of labour laws to small firms. Thus, it is crucial for the focus of this chapter to shift to the question of the characteristics of small firms (compared to those of large firms) before focusing on the fit between labour laws and these firms. The unique characteristics of small firms were highlighted in Chapter 2 and were confirmed in the present research (in preceding chapters) where it was shown that, firstly, small firms tend to be more labour intensive and thereby require a greater deal of flexibility than larger firms. Secondly, labour laws are more likely to pay lower wages than large firms. This is so because these firms often lack financial records and thus stand a lesser chance of accessing capital and because small firms often have employees with low levels of skills.

Thirdly, their small size may prevent these firms from being able to deal with certain legislations such as those related to leave. For example, small firms exist of a small number of employees and leave provisions mean that there is a reduction in the already small number of employees. This may be detrimental for small firms, especially considering their labour-intensive nature. Fourthly, small firms tend to lack personnel departments that provide information on new laws and generate procedures for dealing with labour laws in areas such as discipline and dismissal. Because of these characteristics, labour laws tend to be very onerous on small firms. Furthermore, because of these specific characteristics it is important to establish the extent to which labour laws address these limitations of small firms. The following sections will provide a discussion on the extent to which labour laws address these limitations.

7.3 THE OVERALL BALANCE OF ADVANTAGE IN EXISTING LABOUR LEGISLATION

As noted above, the main aim of the government is to provide a framework, which promotes a balance between security and flexibility. Specifically to South Africa, this will ensure a rectification of past injustices while also according some form of flexibility to businesses or employers to ensure an integration of the South African economy into the global economy (Torres, 1998). Moreover, this flexibility has been indicated above to be crucial to small businesses. However, in the present research many employers revealed that this balance did not exist. More precisely, employers perceived the overall balance in existing labour laws as

being oriented on one side. In this case, it is important to note that regulated flexibility is not defined merely as the balance between flexibility and security, but rather as a framework that provides this balance. Before exploring this framework however it is important to begin with a focus on the balance itself. It was obvious from the views of the employers in the current research that the security-flexibility balance was not in equilibrium or was disrupted; employers that were interviewed across all the sectors included in this research claimed that this balance did not exist. In other words, the employers that were interviewed claimed that their flexibility needs were not met. Instead, they argued that South African labour laws favour the employees through all the focus being on the security of the employees. Although this was a common perception, there was a variation in how they viewed this imbalance. That is, some complained that it was detrimental to the employers while others had no problem with the fact that labour law ‘favours’ employees.

In discussing these two perceptions, many employers argued that the unfair dismissal provision largely reflects this view that labour laws in South Africa favour employees only. Moreover, there was a sense of disconcert with this idea. In other words, employers expressed this view, and more importantly, were unsettled by it. Most of them, across the sectors, interpreted this perception of labour laws ‘favouring’ employees as being unfair to them as well as to their businesses. For example, when asked whether the overall balance of advantage in existing labour legislation leans towards employers or employees, one of the employers of a small restaurant in Grahamstown asserted:

It leans towards employees, and no, I don’t regard it as being fair (Miles).

An employer of a butcher shop in Port Elizabeth claimed that

The laws look after the workers, definitely ... The labour laws are built around the workers. It doesn’t really protect me as the employer so much, but it definitely protects the workers. It makes it very difficult to me; it makes it easier for the workers (Mohammed).

It can be seen from this view that the employers that were interviewed regarded labour laws as being built around the employees. However, this is a false perception. As it was indicated in Chapter 2, the BCEA provides provisions that provide flexibility to the employers. These provisions may relate to, among others; overtime and compressed week. It was also shown in Chapter 5 that the employers interviewed recognised these provisions that provide flexibility as the employers admitted that their employees worked overtime. In spite of this, other employers were not unsettled by labour laws ‘favouring’ employees. They claimed that there was nothing wrong with the fact that South African labour laws favour employees. They saw this as a way of correcting the injustices of the past. More specifically, they argued that the fact that labour laws presently favour employees is a good thing as it brings about fairness to everyone (which was non-existent during the apartheid era). This view can be summed up by a response from an employer in the hospitality industry, who stated:

Labour laws are there to protect the rights of the labourer and essentially try to bring a level of fairness into the workplace, which I think 15 to 20 years ago and probably in the apartheid era there were no such things. You know, people would get fired at a whim; there were no rules in place, there was no fairness, there were no pleadings, etc. ... So, I mean that's the purpose of the Labour Relations Act or labour law ... to protect labourers and to ensure a fair set of conditions within our place of work (Brian).

It is evident from this claim that some employers that were interviewed supported the central function or objective of labour law, which involves protecting employees in the employment relationship. These employers implied that the importance of labour laws lay in their protection of employees and not necessary on meeting the flexibility aspirations of the employers. Some of the employers extended the argument above by arguing that the fact that labour laws provide fairness and security to the employees may be an advantage to the employers as well. As can be noted from Chapter 4, these employers implied that small businesses would either not exist or there would be no growth in these firms had it not been for the fairness or security labour laws bring to the employees.

The most important aspect that can be recognized from the above is that labour laws are actually needed in small firms. That is, they assist or contribute to the existence and prospering of these firms. The view portrayed above can be confirmed or supported by existing research, as indicated in Chapter 2, which shows that providing extensive protection to the employees may be good for the economy and, ultimately, small businesses. An example that was provided in Chapter 2 was related to the unfair dismissal provision, which many employers view as being detrimental to their businesses. More precisely, it was revealed that the strict unfair dismissal provision may be good for business by creating more incentive for employers to train workers, which may result in an efficient workforce (Benjamin and Theron, 2007). This is therefore a similar view that was held by some of the employers that were interviewed in the current research. Although these employers felt that labour laws favoured employees, they saw this as a way to improve their businesses. More importantly, it can be argued that the fairness of labour laws does not necessarily depend on who these laws favour or support, but who these laws benefit. For these particular employers, they attached fairness to labour laws because although they felt that they mostly protect employees they also felt that their businesses ultimately benefit from labour laws protecting employees.

Although many employers expressed the view of labour laws favouring employees, others disagreed with it. Instead, they argued that labour laws in South Africa favour neither the employers nor the employees. They expressed a critical view of South African labour laws by arguing that these laws are of no help or benefit to any of the parties in the employment relationship. For example, a Port Alfred small business was visited by inspectors during the previous year. This is what the employers had to say about the visit:

I [the employer] told them [inspectors] that people will lose their jobs and they went 'that's not our problem' ... He said: 'it is the law'. I said: 'so your law doesn't actually care for employers or employees' ... He said: 'it is the law' (Laura and Danny).

It can be noted from the above that this particular employer regarded regulation as something that is formulated without consideration of the parties involved. For example, the view that

comes across from the above quote is that labour laws are formulated without the consideration of the impact they may have on unemployment. Moreover, employers who held this view supported it by arguing that labour laws are beneficial to employees only in terms of financial compensation, but above that, the employees also do not benefit from labour laws. Instead, they would be left without personal growth. For example, when asked about his views on the benefits of labour laws, the owner of a firm in the hospitality industry in Port Alfred noted:

The labour law at this stage only protects the labourer. It only benefits those ladies working for us in the kitchen, but it only benefits them to a certain point. It doesn't give them freedom for growth or expansion within their own lives. All it does is it guarantees them a certain amount of Rands per hour and that's all it does. It doesn't encourage them to grow; it doesn't encourage them to help themselves. It's a limitation ... It's communist basically. It doesn't encourage them to capitalise for themselves; it is a form of communism. I know this country's foundation is based on a lot of that, but it doesn't help the people (Matthew).

In other words, the employers who held this view brought to the fore the argument that labour laws may be detrimental to the employees as they create a dependency syndrome amongst them. That is, they create an atmosphere where the employees are dependent on their employers for economic means, rather than allowing these employees liberty to develop in their own personal lives. More fundamentally, these views can be interpreted as meaning that the labour laws allow money to be the only concern of the employees, which would not necessarily guarantee their growth in their personal lives. Related to this view is the issue of time, which may be related to short-term and long-term. The viewpoint of labour laws favouring employees only for financial means rather than growth may be interpreted as relating to the idea that labour laws only benefit employees in the short-term. In other words, current financial freedom does not guarantee future protection if these employees do not possess personal growth. That is, although these employees may be receiving financial remuneration there is no guarantee that they will progress into better jobs. Thus, even though they are favoured by labour laws, this is for the short-term and not the long-term.

Some might argue that this is a flawed view for a number of reasons. Firstly, the minimum wage provision is the only provision that the employers deem as benefiting the employees. Such provisions as unfair dismissals, working time, leave, discipline, and so on are not regarded as important on this view. Secondly, the dependency of employees on employers is not a consequence of labour laws. The dependency of employees on employers lies in the fact that employees sell their labour power to employers in exchange for a wage. Hence, employees are dependent on their employers for a wage rather than because of labour laws.

Thirdly, when focusing at the personal development of employees it is crucial for one to refer to existing research where it has been shown that labour laws cannot be looked at in isolation (rather, they depend on the national context of the country) (Bhorat and Van der Westhuizen, 2008). Therefore, although labour laws may focus on the employment relationship it is important to note that they also affect the political and economic aspects of the employees. While the political and economic spheres in South Africa may affect labour laws, labour laws differentiate between employees and citizens. Specifically, employers with this view that labour laws affect the personal development of employees do not recognise that the main objective of labour laws is to protect employees in the employment relationship. The definition of an 'employee' was extracted from the LRA and discussed in Chapter 6. From the definition, it is important to recognise that labour laws are concerned with employees rather than the broader society within the country or the citizens. Thus, personal development of the employees outside of the employment relationship is not dependent on labour laws.

From the above it is evident that objectively; labour laws do not favour employees. Labour laws provide some forms of flexibility to the employers. However, the employers that were interviewed provided a subjective perception, which is that labour laws favour employees. This is an anticipated subjective perception from the employers because it has been shown from previous chapters that employers perceive labour laws as a burden on their firms. However, the employers that were included in this research have been shown to have contrasting views in their claim of labour laws favouring employees. The extent to which the employers felt at ease with labour laws 'favouring' employees largely depended on their perception of how this could benefit their firms. That is, the employers that were interviewed

were contented with labour laws ‘favouring’ employees as long as this would result in a positive impact on their firms.

7.4 LABOUR LAWS AND THE RELATIONS BETWEEN SMALL FIRMS AND BETWEEN SMALL AND BIG FIRMS

The preceding section dealt with how labour laws affect employees and employers, but a more important aspect of this chapter is the extent to which there is a fit or the suitability of labour laws to small firms. In looking at the extent to which labour laws address the needs of small firms, certain aspects or areas were highlighted from the responses of the employers that were interviewed. More specifically, when asked about the fit of regulation to small firms, several employers argued that South African labour laws were problematic and were not necessarily suitable small firms. They supported this argument by claiming that labour laws act as a blanket that covers all firms, irrespective of their size or location, in the same way. In other words, this perception of labour laws referred to the fact that labour laws are applied in the same way to all firms, without the consideration of the firms’ location or size (which may ultimately affect the resources these firms can attain).

From the onset of this claim it can be recognized that small employers perceived labour laws as not being suitable for their size, and therefore these employers are forced to comply with all legislations (including provisions related to leave as well as minimum wages, which were referred to above as being burdensome on small firms) regardless of their size. This claim by the employers can indeed be substantiated by certain provisions within South African labour laws. For example, although the minimum wage provision differs according to the different sectors it does not take into cognizance the size or location of the different firms. As can be seen in Chapter 4 (Tables 4.1 and 4.2), the minimum wage in the hospitality sector is differentiated between firms employing a maximum of ten employees and those with more than ten employees. It can therefore be anticipated that this will make little to no difference to many small firms in South Africa. This is so because small firms in the country are defined in the National Business Act as those that employ a maximum of fifty employees (International Labour Office, 2006). In other words, every firm with more than 10 employees is treated as any other large firm in terms of this provision.

To explain or unpack this perception further, most employers that were interviewed argued that small businesses should not be treated the same as large firms because of, firstly, their location. They revealed that small businesses in small towns do not operate the same way as in bigger cities; they argued that this is related to the fact that there is a larger customer base in bigger towns. Thus, a lot of money is made all year round. In contrast, these employers argued that businesses in small towns (such as those in Grahamstown and Port Alfred) depend on a smaller customer base and on certain seasons during the year. Consequently, they argued that in formulating such provisions as the minimum wage, these factors should be considered. This view was summed up by one of the owners of a restaurant in Port Alfred, when he asserted that

They must have categories of the labour laws. They must say seaside town with say 25 000 inhabitants must be a certain category, and not in the same category as a capital city with 6 million inhabitants. That can't be right because if I have this cafe in Johannesburg, and I was paying these wages I would be a millionaire...I really would. For example, if I was in that situation in Johannesburg with this cafe, with this restaurant, I would be paying R11, 49 per hour and I personally would be making over R200 000 a month, what good is that. There's a wrongness in both aspects of it ... How can a Jo'burg cafe only have to pay R11. 49 an hour? He should be paying R40/R60 an hour for staff, and then by the same token why am I forced to ... because what happens is that when we start making money (which is December, it's the only time that we make money as owners) and that's got to pay until June/July. During June/July we have to reduce the hours by so much because there's no business and we can't expect the company to run on nothing ... So we've still got to pay the rents, the electricity, we've got to pay everything. The only thing we can reduce is staff wages and so they are the ones that suffer, and because it's so difficult to get through the year we don't increase the wages for the season term where they work pretty much 10 hours a day, they don't get lunch and they don't get a day off, they work six days a week during the season term ... I promise you by the end of the season we are like zombies walking around, you work so hard during season but it is literally just four weeks, and that's all it is. But the thing is, they should be earning R20 to R25 an hour but they're not, because we have had to pay them R11.49 all year...all the money that we've got in the bank now from the season so I think from that the labour department

should have categories. There should have category for P.E. and East London and those sizes of town, and a category for Johannesburg and Cape Town, the two big capital cities...and they should have the little sub-categories for places like Port St, Johns, for Port Alfred and there should be another category for places like Knysna, and Plettenburg Bay (Laura and Danny).

Certain factors can be highlighted from the detailed response illustrated above. Firstly, it becomes apparent that the provision that is said to be problematic or that is a concern in treating small firms similarly to large firms is the minimum wage provision. More precisely, it is evident that small employers involved in this study believed that their financial needs as small employers in small towns are not addressed by labour laws. Secondly, there is an assumption that small firms are not similar. More precisely, small firms differ according to their location, and in respect to the above quote small businesses in Port Alfred are different to small businesses in Port Elizabeth and Johannesburg. The key to this differentiation relates to the fact that small businesses in bigger cities such as Johannesburg have a large customer base than small businesses in smaller towns such as Port Alfred. Moreover, related to this is the assumption that a large customer base equates to more revenue. However, this is a flawed argument that was brought forward by the employers that were interviewed because although there is a larger customer base in bigger towns, there is also more competition.

Thirdly, this employer points out or suggests that minimum wages should be determined by the revenue made by the business. This is evident when the employer states that during peak seasons, the employees should be *'earning R20 to R25 an hour'* (instead of the established minimum wage of R11.49 in the hospitality sector). Therefore, it is evident that, according to the employers interviewed, labour laws (especially the sectoral minimum wage provision) should apply differently to small businesses in small towns than to those in bigger cities.

When looking at the view about the location of firms, it becomes important to note that employers in small firms suggest that labour law should be applied differently in small firms in small town as compared to those in big cities. In this respect, there is a perception of differentiation between small firms. However, there is another aspect that was emphasized by the employers: this involves the size of the firms. This aspect from the responses of the

employers when referring to the suitability of labour laws to small firms involves differentiation in how labour law is applied between small firms and large firms. This perception can be paralleled to that which was discussed in Chapter 2 from the existing research, where most employers of small businesses argued that small firms are treated as large firms with regard to labour laws. Although for this particular study, small firms were differentiated from larger firms only based on the number of employees employed by a firm, when referring to large firms some of the employers took into cognizance the turnover aspect in defining the different kinds of firms. While looking at their claims it becomes clear that even though these employers have accepted labour laws as providing some sort of standard for employment relations, they also highlighted a concern that in the formulation of labour laws in South Africa, there is not sufficient consideration of the turnover made by the different kinds of businesses (in this case, small and large firms). For example, a small employer in the retail industry in Port Elizabeth raised this concern:

I think they're a good guideline to get in the appropriate direction ... but again they're used as a big step because a small business should be more flexible and therefore labour laws should address this. The same laws that apply to a multi-billionaire business should not apply to a small business which has a R2 million turnover a year (Pam).

It can therefore be gathered from the above that there are certain constraints in small firms (which may not necessarily be constraints in big businesses) that prevent these firms from dealing with the costs associated with labour laws. One of these constraints involves the financial aspects of the business. As illustrated above, many small firms often cannot access finances from financial institutions and thereby many of them face financial complications. This is in contrast to big businesses, which can easily access finances from financial institutions. Hence, the argument from many employers in small businesses that labour laws should not treat small firms similarly to large firms. Another employer from the hospitality industry in Grahamstown extended this view when she noted:

I think it (labour law) immensely restricts flexibility in small industries. When it comes to big companies, I think it's a necessity and that's the guideline that it should be controlled by, but it is very restrictive for small to medium outlets (Miles).

It is obvious from the above response that some of the employers that were interviewed thought labour laws should be applied differently to small firms than to larger firms because of the greater deal of flexibility that is required by small businesses. This flexibility is important to small firms because in contrast to large firms, they mostly utilise labour rather than capital and they have access to limited resources. As exemplified above, small employers claim that labour laws exist as guidelines for big businesses but as a limitation for small firms by restricting flexibility. A large number of small business employers within the service sector (retail and hospitality industries) saw this as a problem or as hindering the progress of their businesses. This can be seen from a response of the employer of a laundry shop in Port Elizabeth, when he pointed out that

I think labour laws are prohibitive in allowing entrepreneurship. Big businesses and the big companies that hire 15 000 people at a time or contribute to the large volume are controlled by laws and operate their business in such a way that is acceptable, and they should be. However, the labour laws as applied to big corporate companies are very punitive to the smaller enterprises (Mike).

This section highlighted a view from the employers that there should be a differentiation in the application of labour law based on the location and size of firms. More specifically, although employers of small firms felt that there should be a differentiation between the treatment of small firms and that of large firms concerning labour laws, the matter does not end here. These employers also noted that this differentiation should not only exist between small and large firms, but also between small firms that are in different locations (small towns and metropolitan cities). More precisely, those firms that are expected to make a larger turnover from a larger customer base should be treated differently from those expected to make a smaller turnover from a smaller customer base. However, although the lines between small and large businesses might be clear, those within the small business sector (between small businesses alone) might be blurred. As a result, the argument that labour laws should be

applied differently within the small business sector is a poor argument because it is based on false assumptions that small businesses in metropolitan cities acquire more revenue. This may not necessarily be the case because small firms in metropolitan cities also face more competition.

7.5 EXEMPTIONS FOR SMALL FIRMS

As indicated above, labour laws should not be applied in the same manner to small firms in different locations, as well as that the treatment should be different in small firms as compared to big firms. The question that comes to mind is how this difference in treatment should be applied. In Chapter 2, outcomes from previous research addressed this question through employers viewing labour laws as being detrimental to small firms because of them not being exempted from certain provisions. Many of the employers from previous research have referred to the unfair dismissal provision in particular. More specifically, they argued that small firms should not be treated the same as large firms in terms of this provision and should instead be exempted from this provision. The following sub-sections will address the subject of exemption.

7.5.1 The Minimum Wage Provision

In addressing employers' views on exempting small firms from certain provisions, there were different views on the matter. Firstly, it was evident across the sectors that the employers felt that small firms should be exempted from certain statutory provisions. One provision that was prominent in this view was the minimum wage provision. Many employers felt that this provision restricted the growth of small businesses. This argument can be summarised by a quote from one of the employers in the hospitality sector. When asked whether she felt that small firms should be exempt from certain provisions, she stressed that

Most definitely, I don't know the whole laws inside-out, but I think the salary structure and the minimum wages that are there should be identified and any businesses under a certain turnover per annum (which can easily be monitored because you've got a SARS) should be excluded. As I said, if you're following the law it's an advantage than if you're not and the Labour Relations Act can be easily

monitored and with the consent of the workers. For example, I could employ 36 people at maybe a lower wage creating more employment, which would help the company grow faster thereby getting the wages back to the level. But I can't do that because there is a basic minimum wage that constantly goes up. According to me, I could create employment a lot quicker if it wasn't for the minimum wage (Mellanie).

It can be deduced from the above statement that, although employers understand the purpose of the minimum wage provision, it does not take away from their negative views of this provision. Even though they believe that it serves a good purpose for the employees, their focus is on the effects it has on their businesses. Similarly, the quote above represents a common view among the employers interviewed. This view implies that employees can only benefit from the growth of the businesses they are employed in. In other words, a business has to benefit first in order for the employees to benefit. In the example provided above, this employer emphasises that there would be greater employment levels if there was no minimum wage provision, which would ultimately result in the growth of the business as well as an increase in the wages of the employees. Therefore, the minimum wage provision does not benefit the employees if it does not benefit the business first. However, there has been little empirical evidence to show that the minimum wages limit job growth.

7.5.2 A Reduction of Power Accorded to Dispute-Resolution Bodies

With the exception of the minimum wage provision, other employers suggested that both the BCEA and the LRA could be deemed as being satisfactory. They extended this argument by pointing out that although these Acts are satisfactory, there should be a reduction in the power that is accorded to institutions such as the Commission for Conciliation, Mediation, and Arbitration (CCMA) as well as the Department of Labour. An employer from a laundry shop in Port Elizabeth emphasised this point when he stated:

I think the Basic Conditions of Employment Act is acceptable and I think what needs to be done is that the components that monitor the Labour Relations Act, for example, the CCMA and the labour department and things like that, need to address it to be seen as an independent, stand-alone not as a driving force. I think the tools that the

Labour Relations Act allows those departments are very towards or always against business owners or the employers, as opposed to the employees at this point (Mike).

It can be seen from the above quote that this particular employer (who has a common perception with many others included in this study) views the dispute resolution bodies (namely the CCMA and the Department of Labour) as favouring employees, rather than the employers in most instances. Thus, rather than excluding small businesses from certain provisions, the power provided to the above-mentioned dispute resolution bodies should be reduced. This perception can be aligned with findings of previous research where it was indicated that the CCMA and Labour Court have blunted the effects of regulated flexibility. This is so because it has been argued that these dispute resolution bodies have not followed the Codes of Good Practice and for example, have attached many procedures to pre-dismissal hearings (Cheadle, 2006).

The claim that these resolution bodies are biased towards employees may therefore stem from this. However, the claims by the employers of the current research are contrary to findings of previous research. In particular, in its analysis of a sample of 1750 awards it was noted in the Tokiso Report that two thirds of awards favoured the employer party. These findings indicated that the widely held perception amongst employers that the CCMA is biased in favour of employees has no foundation. It was argued that it is the merits that generally dictate the outcome of a case (Cheadle, 2006).

Furthermore, it becomes important to recognise that several factors have been implemented to ensure that the CCMA remains unbiased. One of the ways to ensure the neutrality of the CCMA involves the fact that this body is made up of a governing body that consists of representatives from the government, business and labour (Section 116). In other words, there is partnership which, as discussed in Chapter 2, is reinforced by neo-corporatism. Therefore, some may argue that it would be hard for this body to intentionally favour employees as there are also representatives of the employers and the government that form the governing body of the CCMA. However, research has shown that although the governing body in these labour market institutions is formed by representatives of employers, employees and the state. It has also been argued that representation in the CCMA and Labour Court proceedings may be a

concern. This is so because recognised categories of representatives include officials of registered trade unions and employer organisations, both as a measure to encourage recognition and to give effect to the rights of worker and employer representatives. Therefore, those who can least afford it (dismissed workers and small employers) are not represented in these institutions. As a result, dismissed employees and small employers become the objects of scams that not only fuel perceptions about the nature of South African labour laws, but also incur significant and unwarranted costs for the parties concerned (Van Niekerk, 2006). Thus, one may argue that the concern of the employers should not lie with the bias of these institutions in favour of employees in small firms; rather, it should lie with the bias in favour of large firms with officials of registered trade unions and employer organisations.

The employers that were interviewed provided a poor argument in claiming that the CCMA is biased in favour of the employees. This is so because the CCMA applies the provisions of the law, that is, it resolves issues strictly according to the LRA of 1995 and its amendments (section 115). Therefore, as mentioned in the above sub-sections it is anticipated that many employers will argue that labour law favours employees. As can be seen from above, a more suitable argument lies in the biased nature of the CCMA in favour of large firms rather than the claim that employees are favoured.

7.5.3 Small Firms should not be Exempted

Many of the employers interviewed insisted that there is some kind of transformation within the labour law framework, which needs to take place in order to assist small firms (whether this involves exempting small firms from certain provisions or reducing the power of certain bodies). A contrasting view was discerned during the discussions with employers. Some employers insisted that labour law should not treat small firms differently from large firms or any other kinds of firms. They argued that being more lenient to small firms with regard to labour laws would turn out to be a disadvantage for these firms. One of the employers, who is in the retail industry in Port Elizabeth, brought forward this view when asked about the exemption of small firms from certain statutory provisions:

I don't think so; I think everyone's got to abide by the same rules. I think there are those that transgress the rules unfairly, which I'm sure there are plenty. But those that abide by the rules, I think have a distinct advantage because you can only disobey the rules for so long and then it will backfire on you and your business. So I think those that follow the rules are at a distinct advantage to those that don't follow the rules (Mohammed).

When scrutinising the view above, it is evident that some employers regard labour laws as rules that may lead to the development of small firms (if followed properly). Likewise, these employers claimed that exempting small firms from certain provisions would ruin or destroy these firms as there would be no guidelines for their success. More importantly, it can be noted that these employers attach the success of small firms to following or complying with every provision within the labour law framework. This view correlates with a view by Mollentz (2002) that, while many factors may be responsible for the expansion of the small business sector, the introduction of the Labour Relations Act and the Basic Conditions of Employment Act correlates with the expansion of the sector.

The question that comes to mind therefore is of whether the employers who hold this view regard regulated flexibility as not being blunted (without the exemption of small firms from certain provisions). In attempting to answer this question, it is important to refer to previous chapters where regulated flexibility is discussed. In Chapter 2, regulated flexibility was defined as a framework within which a balance is achieved between employers' interest in flexibility and employees' interest in security. It becomes crucial to understand that many perceive the two elements of flexibility and security as being associated in a trade-off (the more you have of one, the less you have of the other or vice versa). For example, research has shown that for many employers increasing flexibility in the labour market is the same as decreasing security in the labour market. This is so because many employers associate flexibility with a relaxation in the regulation of hiring and firing and in flexible forms of employment, such as fixed-term jobs, temporary agency jobs and other forms of non-standard jobs yielding less security. This is a reason why many of the employers in the current study – as well as previous studies – strongly asserted that small firms should be exempted from certain provisions (especially those that they deem as excessively burdensome). So the

question that remains is whether South African labour laws (which are premised on regulated flexibility) address the needs of small firms. On the one hand, it can be seen that the employers who argued that small firms should be exempt from certain provisions do not think that South African labour laws address the unique circumstances of small firms. On the other hand, there are employers who dispute this view. It is evident that these employers hold the view that South African labour laws address the distinct circumstances of small firms by developing or improving small firms. Thus, for these employers labour laws should not treat small firms any differently from big businesses.

From these two views provided above based on the exemptions of small firms from certain provisions, it is important to recognise that firstly; labour laws already provide some distinctions between small and large firms. For example, section 189 (a) of the LRA excludes small firms (firms employing less than fifty employees) from the provision of dismissals based on operational requirements. Secondly, labour law provides a floor of rights on which the parties are free to devise their own arrangements. This can be seen with the regulation of working hours. Thirdly, exempting small firms from certain provisions will mean that employees in these firms will be left without security. Hence, the claim that employers should be exempted from certain provisions may be a flawed one as labour laws in South Africa already provide flexibility to employers of these businesses.

7.6 FACTORS AFFECTING ADHERENCE WITH LEGISLATION

Although some employers held that small firms should be excluded from certain provisions, such as the minimum wage provision, other employers held a different perspective. These employers argued that the problem does not lie with the provisions themselves; rather, it lies with the extent and complexity of legal regulation. Several employers insisted that South African labour laws did not accommodate small firms. Most of these employers regarded the overall extent and complexity of legal regulation as a distinct source of concern. Employers who had this view argued that South African labour laws were too complicated to follow. Moreover, they highlighted that this complexity resulted from the many changes that occur within legislation. For example, when asked about her views on the above, an employer of a construction firm noted:

Yes, I just feel that there are many changes that it's difficult to keep up with it and it's also, it's so intricate. There are so many intricate details within the legislation that the smallest thing, something that's actually supposed to be simple, becomes extremely difficult and extremely detailed; and if you miss one of the minor, sometimes less than fortunate details, you actually pay as a business or employer. So I think that is something that's not actually worthy (Elizabeth).

In support of the view above, employers argued that adhering to the rules and regulations in South African labour laws, specifically the Labour Relations Act and the Basic Conditions of Employment Act put small businesses in a difficult situation. These employers argued that the overall extent and complexity of labour regulation increases the financial burden on small businesses. This may ultimately result in these businesses making little or even no profit.

While the 'complexity of legal regulation' view was held by many employers across the sectors, other employers argued that legal regulation was dependant on how it was exercised. They viewed legal regulation as not being a great concern if applied 'correctly and fairly' by both the employers and the employees. For example, when asked of his views on whether the overall extent and complexity of legal regulation was a distinct source of concern, a small employer from Port Elizabeth stated:

If used correctly, no. If abused, yes ... and unfortunately it is abused, by both sides (the employer and the employee). But, if it is properly applied and monitored, then no (Ray).

From this view, one may draw a number of conclusions. Firstly, one could argue that some employers view the agents of labour relations (employers and employees) as not adhering to or even misusing the existing labour laws. The second conclusion that can be drawn from the above is one that was discussed in previous chapters of this study: namely, these employers put forward the view that the enforcement of labour laws may not be conducted appropriately. This raises a concern, while also corresponding to existing research that one needs to differentiate between what the labour law states and what is actually practised in

small firms (Godfrey, 2013). This is so because these two may not correspond. Thirdly, these employers highlight the view that employers as well as employees may take an unfair advantage of legal regulation. This view was substantiated by an owner of a small coffee shop in Grahamstown. While giving examples of her own encounters (from both an employer's and an employee's perspective), she asserted:

I think if you didn't have a good relationship with your employees, they can completely take you for a ride, just for the sake of getting that paid four-month leave. I've worked in places where that does happen, people just get tired of working so they have a baby so that they can miss four months of work and get paid. So, you know, like I said it goes back to basics, it goes back to the relations you've got with your staff. I do feel that sometimes, some of the laws are a bit unfair. The staff has more rights than the employer, but at the end of the day, the relationship employers have with their staff is very important. This is the reason that with the bigger shops employees can be a bit more nasty to the employers and vice versa (Mellanie).

Thus, the concern of legal regulation may also arise as a result of the relationship an employer has with his or her employees. However, it is important to note that the view of the overall extent and complexity of legal regulation as a concern depends on the number of employees in a particular firm. For example, employers of micro-small firms stated that they did not regard legal regulation as a concern. For example, when asked about his views on the statement that the overall extent and complexity of legal regulation was a distinct source of concern, a butcher, who had 'approximately eight employees', stated:

Not in my case, but it could be. If you've got a lot of people working for you, it can be ... But I only know my business and I don't really have a problem, except if you get a problem with your workers (Mohammed).

Related to the claim of the complexity of labour laws made by the employers was the view that the main difficulty lies in the processes that have to be adhered to in order to meet the requirements of these provisions. For example, when asked about whether small firms should

be exempt from certain statutory provisions, the owner of an entertainment business in Grahamstown pointed out that

I don't think so. I think they can maybe increase it more on an advanced technology and more e-mailing and stuff, where you mail your paper to the labour department ... So, maybe if they upgrade and do it via e-mail ... We're all on e-mail (Mariane).

It is obvious from the above that employers are seeking easier ways or channels of communication. In this case, the employer mentions faster and more technologically advanced methods. This view may be related to one of the themes discussed in Chapter 5, where it was noted that small firms have fewer administrative resources to deal with labour laws. Moreover, many employers that were interviewed in the current study emphasised the time-consuming nature of labour laws, which was a disadvantage to these small firms because of the few administrative resources these businesses possess. In other words, the view brought forward by the employer mentioned above, confirms this problem faced by many small firms. Furthermore, from this it can be concluded that some of the employers do not require their small firms to be excluded from provisions of the LRA of 1995 or the BCEA of 1997; rather, their concern is the time-consuming nature of these provisions. Thus, they support the idea that there should be easier and faster ways of dealing with labour laws for small firms (in this case, online methods).

Other employers provided some form of deviation from technological advances in the communication processes between small business and any institutions that can assist these firms with regard to labour laws. These employers highlighted the need of small firms to be assisted as they do not have access to extensive resources. However, these employers argued that communicating via online methods was not an advantage to all small firms, as some of them did not have access to such. In highlighting this, one of the employers from the retail industry in Port Alfred insisted that

I think they can be of more value if they come in ... Come to the people and say: 'listen, we are here to assist you. You didn't do this or didn't do that ... I think this is

what you need to have and this is the way if someone does this'. I think they should give us some proper guidelines because if we don't have a labour law guideline issued by the labour department, how can we ... Not everyone's got a PC, not everyone can go into the website and download 'this is for this and this is for that'. So, I think they need to give us a guideline and say: 'listen, this is the place you can contact us at and we can help you with the procedure' (Michael).

It can be seen from the quote above that this particular employer is highlighting or emphasizing that small firms are vulnerable and therefore need assistance. However, in this instance, it is neither financial assistance nor exempting small firms from certain provisions that is stressed; rather, assistance is required in carrying out or implementing labour laws. As was argued in previous chapters, many small firms do not have extensive administrative resources. Thus, it would be of great assistance to reduce the administrative burden of labour laws by getting practical help. In other words, for these employers, simply providing legislation on paper and expecting them to implement or abide by the provisions is of little help. Instead, these employers feel that the state should be more involved in the implementation of labour laws in small firms.

Lack of involvement in the implementation of labour laws by the state may prove to be a detriment to both the state as well as small businesses, as it limits the knowledge of small employers. For example, existing research has shown that many employers do not imagine that there can be a framework that promotes or provides a balance between security and flexibility (Stanford and Vosko, 2004). Many employers assume that increasing flexibility in the labour market is the same as decreasing security in the labour market (Stanford and Vosko, 2004). It was shown that this might be related to the fact that many employers associate flexibility with a relaxation in the regulation of hiring and firing and in flexible forms of employment yielding less security. This assumption may be related to the argument by the employers that were interviewed in the current research, which involves the claim that there could be a gap between law and practice (which means that employers are unlawful).

However, in contrast to the views that were explored in Chapter 5 (which involved that the unlawfulness of the employers could be blamed on the employers themselves); another

perspective emerges in this instance. This perspective blames the state for the employers' non-compliance with labour laws. The fact that there are no officials from the state, who go to small firms to provide guidelines for the implementation of labour laws (rather than labour inspectors going to the firms to 'punish' employers for non-compliance) may result in false presumptions on this bluntness of the regulated flexibility framework. Moreover, this may be the reason why money is misused on labour lawyers and consultants as was indicated in preceding chapters, because employers observe a lack of communication or practical assistance from the state.

Even though the employers that were interviewed in this research seemed to claim that the state should be more involved in assisting small firms, this may be not realistic for several realistic. Firstly, the state may be short of resources to do so. Secondly, it is the duty of every citizen in the country to understand the laws that apply to him or her. Therefore, it is not the duty of the state to go to every small firm in the country to educate them on the laws. However, as van Niekerk (2007) argued, consideration should be given to maintaining specialised independent bodies whose members have particular knowledge of the small business environment. This will ensure that the unique circumstances of small businesses are addressed.

7.7 CONCLUSION

This chapter offered an analysis of the extent to which labour laws address or are suitable for the unique circumstances of small firms. Whereas previous chapters highlighted the responsibility of the employers in complying with labour laws, this chapter shifted the focus to the state. One aspect that was prominent involved evidence of a disparity between the labour laws and the circumstances that are unique to small firms. Simply put, the employers that were interviewed indicated that South African labour laws were not suitable for small firms, because these firms have unique circumstances that may not necessarily apply to big businesses. This claim was substantiated on certain levels. The first of these involved the labour relations agents, namely the employers and employees. Many of the employers that were included in the research argued that the existing labour legislation benefits employees more than it does employers. Other employers claimed that as much as this notion of labour laws favouring employees is widely accepted, it is not the case. They argued that labour laws

are neither of benefit to the employers nor to the employees. However, the employers based this argument on personal lives of the employees. Consequently, this was a poor argument on the part of the employers. This is so because as much as labour laws are influenced by the political and economic aspects of a country, labour laws regulate the employment relationship and not the personal lives of the employees.

Moreover, in highlighting the impact of labour laws on small firms the employers that were interviewed claimed that labour laws should firstly; treat small firms in different locations differently. Secondly, they should treat small firms differently from big firms because of the unique circumstances of small firms. The employers based the former claim (on the different locations of the firms) on the ‘bigger revenue’ made by small firms in small towns in contrast to small firms in metropolitan cities. However, these employers failed to recognise that there was not necessarily more revenue in metropolitan cities as small firms in these cities also face more competition than in small towns.

The difference in treatment for different firms also generated a discussion on the exemption of small firms from certain statutory provisions. These include the sectoral minimum wage as well as the reduction of the power accorded to dispute resolution bodies such as the CCMA and Labour Courts. A contrasting argument was that small firms should not be exempted as labour laws provide guidelines to these firms, which may ensure the success of these firms. Instead, it was revealed that the main problematic aspect of regulation is its complexity. Therefore, some employers suggested easier ways of communication between the state and employers such as online methods.

8

CONCLUSION

8.1 INTRODUCTION

Small firms in South Africa are considered as employment creators, thus they play a great role in reducing the high unemployment rate in the country. Consequently, the government continuously seeks to protect these firms from any hindrance. Past literature has suggested South African labour laws (especially provisions within the Labour Relations Act of 1995 and Basic Conditions of Employment of 1997) as being highly burdensome on small firms, and therefore among other things, the government has sought to reduce the regulatory burden on small firms for their progress. Although many have put forward these claims of South African labour laws being burdensome on small firms, there has not been research including the perceptions of small firms' employers on these assertions. This research therefore sought to close this gap between such claims and the actual perceptions of those concerned (small employers) on the matter. More precisely, instead of referring to assumptions of how labour laws affect small firms; this research focused on the perceptions of employers on the extent to which labour laws undermine flexibility. It also focused on how employers respond to labour laws, whether they even comply with these labour laws, and whether they feel that labour laws are suitable for the unique circumstances of their small firms.

8.2 THESIS SUMMARY

The first chapter introduced the research through highlighting the main questions as well as the objectives that drove the research. The second chapter critically outlined the theoretical framework that underpinned this research; in particular, it focused on the neo-liberal and neo-corporatist forms of regulation. In the discussion, these two forms of regulation were identified as the two sets of perspectives that governments adopt as the role they play in the industrial relations system. Liberalism (which is supported by employers) was identified as a framework which maintains that the government should play a minimal role in the labour market, and involves only the facilitation of a framework for negotiations between employers and employees. Corporatism (which is supported by labour) maintains that there should be an

active role of the government in industrial relations; and that there should be a collaboration or tripartism between business, labour and the state. It was also indicated in this chapter that liberalism and corporatism are always presented as existing in opposite ends. This was firstly shown through the labour market flexibility debate. On the one hand, this debate involves views of neo-liberals that labour laws in South Africa are too rigid and that there should be deregulation. On the other hand is the view that labour laws in the country are not too rigid and that they compare well with international standards.

Secondly, this was shown through employer responses to labour laws where it was shown that neo-liberals respond through the low-road responses (utilisation of subcontracted or temporary employees), while neo-corporatists respond through the high-road response (focusing on up-skilling the employees). Thirdly, it was shown that when focusing on the impact of labour laws on small firms it becomes important to also focus on the employment relations within these firms. It was shown that small firms are often characterised by informality which may lead to the ‘small is beautiful view’ on the one hand, or to the ‘bleak house’ on the other hand. These emphasise internal regulation as rules for regulation originate from within the firms. However, it was also argued that rules regulating small firms might also originate from the external market (labour laws, economic market, and so on). This is referred to as external regulation. In this discussion, it was shown that the impact of labour laws on small are not readily predictable but depend on the interaction of the informality of small firms with the contextual factors.

Lastly, the discussion in Chapter two revealed that the presentation of neo-liberalism and neo-corporatism as existing in opposite ends is a false dichotomy. It was argued that instead of removing regulation, the focus should rather be on whether the legislation reflects an appropriate balance between the needs for economic growth and those for social justice. The framework through which this balance can be attained is referred to regulated flexibility, and it was argued that this balance can be determined by (among others) assessing the burdens imposed by regulation on small firms. Chapter three provided an outline of the objectives and the methodological underpinnings of the research and sought to indicate the significance of the thesis both empirically and analytically.

The next four chapters were the empirical chapters of the thesis. Chapter four focused on the employer perceptions of labour laws. It was evident in that chapter that although employers of small firms asserted that labour laws were very costly to their firms; these assertions were not substantiated by specific incidents within their firms. For example, they would argue that the unfair dismissal provision was extremely costly to their businesses because each employee is required to be given three warnings for the same misconduct for there to be a dismissal. However, when asked about specific incidents to illustrate this in their firms they would argue that there had not been incidents of a dismissal. In their perceptions of labour laws, many employers argued that labour laws were burdensome on their businesses for a number of reasons. These included labour laws reducing the power of employers in the employment relationship, and also negatively affecting the employer-employee relationships.

With regards to these perceptions, it was shown that employers may have a misconception or misunderstanding of the labour laws. Consequently, it was shown that there is a gap between the subjective perceptions of the employers and the objective impact of labour laws on small firms. Furthermore, employers argued that labour laws imposed unfair rigidities on their firms as they impose time costs, opportunity costs as well as financial costs on these firms. Under these negative perceptions, employers claimed that labour laws (especially the unfair dismissal, sectoral minimum wage, and working time provisions) resulted in the reduction of employment as these provisions negatively influenced their employing decisions. To counter these 'negative effects' of labour laws, employers argued that there should be deregulation in the labour market. Although these negative perceptions were declared by many employers that were interviewed, it was only a minority of the employers who claimed that labour laws did not impose unfair rigidities on their firms. Instead, they argued that these laws provide guidelines for both employers and employees.

Some may argue that the negative perceptions discussed above are not real because they have no substantiations within these firms; however, this is not entirely correct. Whether real or imagined, these perceptions may determine the effects of labour laws because they affect the compliance of employers with labour laws as well as how these employers respond to labour laws. These were discussed in Chapter five and Chapter six respectively. More specifically, in Chapter five it was shown that labour laws were treated by the employers that were

interviewed as external elements which were often avoided in their firms (especially provisions related to working time and disciplinary action). However, there was no total disconnectedness between small firms and labour laws. In other words, there were some cases in which labour laws were not avoided by employers. It was evident that labour laws were complied with only when these were corresponding with the internal arrangements of the firms. Furthermore, it was evident that labour laws are not integrated into the structures of these organisations.

Therefore, there would be little impact from legislation as employers only complied with it for individual incidents, and not consistently. In discussing employer compliance with labour laws, it was recognised that due to their corruptness as well as lacking education and skills for their job labour inspectors (which may also be related to the limited resources from the government) played a role in the avoidance of labour laws by the employers. It was also revealed in this chapter that the interaction of the internal and external environment mediates the influence of labour laws on labour practice within small firms. More precisely, decisions to avoid or comply with regulation were influenced by how employers respond to the external pressures, and it was shown that employers recognised that employers changed their behaviours in order to accommodate labour laws.

Chapter six was dedicated to how employers respond to labour laws. It was shown that many of the employers adopted the low-road approach to labour laws. More precisely, employers employed on a temporary, need basis (especially in the hospitality industry) and employed younger employees while investing in low levels of employee training. In this chapter, it was revealed that some may argue that these reflect the low-road approach labour laws, in other words, strategies to evade regulation. However, this may not necessarily be correct as temporary employees are covered by the LRA and BCEA as well as because of the permission given to the Minister of Labour to distinguish between employees and sub-contracted workers. Therefore it was argued that regulation may change the behaviour of firms even if the firms are not actively trying to avoid regulation (that is, indirectly). For example, if regulation increases the costs of firms without increasing the productivity, then firms will be less efficient and will restructure their operations (through employing temporary employees) to respond such factors as global competition and technological advances.

The final empirical chapter, Chapter seven dealt with the suitability of labour laws to small firms. In this chapter, the employers that were interviewed indicated that South African labour laws were not suitable for small firms, because these firms have unique circumstances that may not necessarily apply to big businesses. In substantiating this claim, the employers argued that labour laws favoured employees. Other employers that were interviewed falsely argued that labour laws benefit neither employers nor employees. As it was the case in Chapter four, this perception was based on a misconception of labour laws. Moreover, the employers that were interviewed claimed that labour laws would only be suitable to small firms if firstly; labour laws could be applied to small firms in small towns differently to small firms in metropolitan areas. Secondly, they argued that labour laws should be applied to small firms differently to big businesses. Thirdly, they argued that there should be a reduction in the power accorded to dispute-resolution bodies such as the CCMA and Labour Court.

8.3 THE REGULATORY FRAMEWORK AND THE IMPACT OF LABOUR LAW ON SMALL FIRMS

The main objective of this thesis was to explore and explain the impact of labour laws (LRA 66 of 1995 and BCEA 75 of 1997) on small firms. The particular focus was on small firms in Grahamstown, Port Alfred and Port Elizabeth. The theoretical framework this research was informed by involved neo-liberal and neo-corporatist forms of regulation. This framework also informed the four empirical chapters of this thesis.

In exploring the impact of labour laws on small firms, it was revealed in this research that similarly to claims that were made in past research many employers that were interviewed within the service and construction sectors perceived labour laws (especially those related to the unfair dismissal and minimum wage provision) as being burdensome on their firms. They claimed that labour laws imposed financial and administrative costs to their firms, negatively affected the employer-employee relationships in these firms as well as the employing decisions of the employers. It was only a small number of the employers that were interviewed that claimed that labour laws were beneficial to their firms. These findings therefore correspond with the views associated with neo-liberalism that labour laws undermine flexibility and impose unfair rigidities on small firms. However, even though many of the employers that were interviewed referred to labour laws as being burdensome, it

was evident that these subjective perceptions did not reflect the objective impact of labour laws on small firms. This was firstly related to the fact that many of the employers that were interviewed had negative views of labour laws but these views were not substantiated by particular events in their firms.

Secondly, it was revealed that the employers' perceptions of labour laws were based on their misconception or misunderstanding of labour law. For example, one of employers interviewed claimed that employees purposefully act inappropriately in the workplace with the knowledge that employers do not have the power to do anything about their behaviour. However, this was a misconception of labour law as section 188(1) of the LRA clearly points out that a reason for dismissal is a fair reason if it is related to the conduct of the employees. In the theoretical framework, it was also noted that given the commitment to regulated flexibility by South African government, there has to be a continuous evaluation of the extent to which a balance between flexibility and security is struck; in other words, whether the mechanisms intended to promote regulated flexibility are appropriate.

It was revealed that this balance can be determined by (among others) assessing the burdens imposed by regulation on small firms (Van Niekerk, 2006). In assessing these burdens, this research showed that the employers that were interviewed perceived South African labour laws as not addressing the unique circumstances of small firms. Similar to findings of previous research, the employers argued that labour laws treat small firms similarly to large firms. The employers interviewed indicated that small firms should be exempted from firstly; the minimum wage provision, and secondly; they claimed that there should be a reduction in the power accorded to dispute-resolution bodies such as the CCMA and Labour Court. It was shown how the latter may translate to the exemption of small firms from the unfair dismissal provision (which confirms findings of past research).

As it was revealed above that there is a discrepancy between the subjective perceptions of employers and objective impact of labour laws, it was important to explain reasons related to this discrepancy. In so doing, it was revealed in this thesis that similarly to past literature, small firms were not affected in the same way to big firms by labour regulation. This was related to the fact that many of the small firms' employers that were interviewed tended to be

less concerned by regulations. Specifically, although many employers that were interviewed claimed that labour laws were burdensome on their firms it was evident that regulation was avoided because of the informality that characterised these firms. The provisions that were mostly avoided related to the working time provision, minimum wage provision as well as disciplinary provisions in some of the firms (especially in the hospitality industry). In this regard, it can be argued that informality mediated the impact of labour laws on these firms, and labour laws imposed less 'costs' on these firms.

The minimal impact of labour laws on the small firms was also attributed to what the employers referred to as the ineffectiveness of labour law enforcers (labour inspectors). However, it is also important to note that the small firms that were researched did not practice full informality, rather they were semi-formal. Therefore, these firms were not isolated from labour laws. As was revealed in previous research, although informality was important it was always operated within an environment that is governed by regulation (Edwards *et al.*, 2003). Although these firms were governed by regulation, it was found that the extent to which employers complied with regulation depended on the extent to which organisational practice already reflected similarity with the legislative objective. Furthermore, it was found that the employers reacted to individual incidents, rather than integrating labour laws into their organisational structures.

All of the above therefore shows that the informality in the small firms that were researched allowed employers to determine the extent to which labour laws may influence their firms. For example, it was shown that some of the firms that faced intense competition (especially in the hospitality industry) often disregarded the minimum wage provision as well as working time provision. This is also the reason for the argument that labour laws imposed a minimal impact on small firms.

It was also shown in this research that the impact of labour law might be minimal on small firms based on the perceived 'burdensome' unfair dismissal provision. This was evident through employers employing on temporary basis, which means that they could easily evade the unfair dismissal provision. However, this was the only provision which could be evaded as labour law protects temporary employees and prohibits or limits employers from

developing work arrangements in a manner designed to deny certain persons the rights accorded to 'employees' in the labour laws.

8.4 CONCLUSION

In concluding this research, it is important to mention that this research did not only explore the impact of labour laws on small firms, but also accounted for why labour laws have a certain impact on small firms. Firstly, it was shown that although employers perceived labour laws (especially provisions related to unfair dismissal and minimum wages) as being burdensome, these perceptions did not reflect the objective impact of labour laws. Rather, it was found that labour laws had a minimal impact on these firms because of the informality that characterises these firms. Although small firms were not isolated from the regulatory environment, informality mediated the impact of labour laws through enabling employers to choose when to comply with legislations. Furthermore, the employers that were interviewed indicated that they utilised temporary employees; which mean that they could easily evade the unfair dismissal provision.

The above indicates that, to a large extent, it can be argued that the rules governing small firms are associated with the liberalism framework and this may have dire consequences for employees in these firms. Moreover, from the above it is evident that labour laws are not necessarily burdensome on small firms but the perceptions of the employers are a misconception of the laws. Thus, an area that may be looked into is that of the state playing a more active role specifically in the industrial relations systems of small firms. One area that was identified in this research is having a separate wing in the Department of Labour, which will focus exclusively on small firms. This may encourage employers to comply with labour laws (and thereby provide security to employees) while ensuring that labour laws fit the specific circumstances of small firms.

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Appendix 1: Interview guideline

- 1. Please provide a brief outline of the firm's history and context.** In your answer, include the following: Date of establishment? Rising or declining turnover? Customer base? Ownership of the company?
- 2. What are the labour market constraints faced by employers in small firms?**
[Availability of sufficient qualities and quantities of labour? How do you compensate for shortcomings in the labour market? Problems encountered when filling vacancies?]
- 3. What would you regard as the major barriers, in order of importance, to growth in small firms?**
[Explore particular problems that are experienced in the development of the business. How are these problems managed and what information is used to do this?]
- 4. Generally, do you feel that unemployment in South Africa can be attributed to labour laws? Explain**
- 5. Please list, in order of importance, the main difficulties you face in running the business. Explain**
[Market competition? Government regulation? Labour legislation?]
- 6. Do you agree with the following statement: 'the overall extent and complexity of legal regulation is a distinct source of concern'?**
[Provide reasons for your answer]
- 7. What are your overall impressions of labour laws in South Africa?**
[Do you feel that South Africa has high or low levels of regulation?
Is labour legislation reflected in business practice? Is flexibility restricted by labour laws?
How do the LRA and BCEA affect productivity in your firm?]
- 8. Please outline the extent to which you think labour laws have had a direct and/or indirect effect on the firm.**
[Evidence of specific events, such as a disciplinary hearing or a CCMA case, which led to changes in employment relations or a greater awareness of labour legislation?
Constraints on hiring and firing?]
- 9. What are your views on the costs of existing labour laws?**
[How does the firm think about costs? Circumstances under which legislation is perceived as imposing a disproportionate burden on business? Impact on competitive advantage? Impact on speed and nature of decision-making processes? Impact on management's time? Increased administrative workload? Specific increases in the

wage bill? Direct administrative and compliance costs? Costs of legal advice? Have labour laws forced the firm to hire more part-time and temporary workers?]

10. What are your views on the benefits of existing labour laws?

[How does the firm think about benefits? Does the firm see any value in making cost-benefit calculations? Does the law encourage firms to plan in a more efficient and long-term way? Does the law encourage innovation and a shift toward high value-added activities? Does the law encourage the firm to improve its decision-making processes? Do labour laws push the firm in a direction that it wishes to go? Does the law promote business modernisation? Has the law encouraged the firm to adopt formal labour relations processes and procedures?

11. Do you feel that the state should reduce or eliminate labour laws or certain provisions within the legislation framework? Explain

12. Do you regard any specific piece of labour legislation as affecting the competitive advantage of the firm to a significant degree?

[The effect of the law on the ability of management to pursue the firm's stated goals in relation to its competitive positioning? Which aspects of the law do you find most troublesome? Does the firm keep detailed records of the monetary costs of complying with specific pieces of legislation?]

13. Please provide an indication of the extent of your *experiences* with any of the following:

- (a) minimum wages;
- (b) working time;
- (c) annual leave, sick leave, family leave and maternity leave;
- (d) discipline;
- (e) unfair dismissals;
- (f) unfair labour practices

[Explore the extent to which there has been a significant impact on the firm by any of these legal provisions. Was the effect on the business positive or negative?]

14. How do you ensure flexibility in your firm? [Explore the different forms of flexibility that are utilised in the firm]

15. How confident are you about your knowledge of current labour laws?

[Confident, somewhat confident or not confident?]

16. Please provide an indication of the extent of your *knowledge* of any of the following:

- (a) minimum wages;
- (b) working time;
- (c) annual leave, sick leave, family leave and maternity leave;
- (d) discipline;
- (e) unfair dismissals;

(f) unfair labour practices

17. Rate, in order of importance, the various factors that shape cost structures in the firm.

18. What major shifts have taken place in the firm's cost structures?

[Nature of changes? Extent of changes? Reasons for changes?]

19. Please provide a breakdown of jobs in the company.

[Number of workers? Job categories? Gender breakdown? Full-time, part-time and casual workers?]

20. What would you regard as the firm's most important methods of offsetting the increased costs and burdens of labour laws?

[Explore coping strategies in relation to the legislation and the factors promoting positive and cost-effective outcomes. Focus attention on any actions either to moderate negative effects or to promote positive ones.]

21. Which of the following characterise the firm's response to labour laws?

REACTION	YES	MAYBE	NO
Employ more young/inexperienced staff			
Use more part-time/temporary workers			
Reduce training			
Reduce annual leave			
Reduce leave pay			
Reduce working hours			
Reduce pensions and medical aid			
Reduce bonuses			
Reduce the number of staff			
Reduce overtime			
Increase deductions from wages			
Introduce unpaid breaks			
Charge or increase charge for staff meals			
Apply for exemptions			
Get employees to work harder			
Employ more experienced/older staff			
Employ better quality staff			
Develop a more effective staff retention policy			
Increase training			
Reduce wage differentials			
Introduce new technology			
Get employees to work smarter			
Improve advanced planning on wages			
Use labour brokers or outsource services			
Increase prices			

Cut profits			

22. Do you feel that the costs of labour law are likely to increase, decrease or remain constant in the future? Explain

23. How would you explain the working conditions of the workers?

24. Please describe the training system in your firm. [How often do the employees of this firm get trained, what type of training takes place and what is the reason for such training? Is there a budget allocated for training of workers or is there a heavy reliance on in-house (on-the-job) training?]

25. Do you think the overall balance of advantage in existing labour legislation leans towards employers or employees, or is it broadly fair?

[Explore the links between the ‘public justice’ of the law and the ‘private justice’ of firms’ own internal arrangements]

26. Should small firms be exempt from certain provisions in labour legislation?

[Why? Which provisions?]

27. To what extent do you think labour laws in South Africa (specifically looking at the LRA and BCEA) are accommodative of small firms? Explain using specific examples to your own firm- specific examples relating to the procedures of a dismissal (pre-dismissal hearings), probation,

28. How much of your time would you say you spend on regulations?

29. What measures do you think can be implemented to introduce greater flexibility within the South African legislative framework?

30. What effect does legislation have on the ability of the organisation to respond to any product or labour market pressures? Explain

31. Do you feel that labour law in South Africa recognises or accommodates the changing nature and diversity of the labour market? Explain

32. How would you describe the product market in which the firm competes?

[Nature of competition? Potential for growth? Dynamics of the sector? Impact of the recession?]

33. Explain the relationship between your firm and its market context.[Is your firm dependant on large firms OR is it competing against large firms OR are you operating in sectors that are neglected by large firms OR is your firm operating in a high-risk sector?]

34. To what extent has labour legislation changed existing work and employment arrangements in the firm?

[Nature of changes? Extent of changes? Reasons for changes? Future plans for the business?]

35. Do you agree with the following statement: ‘the impact of labour legislation is hard to separate from other influences on the business’?

[Provide reasons for your answer]

36. Do you think the enforcement of labour laws is effective?

[Has the company been visited by labour inspectors? Are there known violations of labour laws? Are the penalties for non-compliance adequate?]

37. Which of these sets of conditions would you regard as most important in determining the effects of labour legislation: external factors (such as a firm’s product market position) or the internal organisation of the firm (such as the relations between managers and workers)?

[Provide reasons for your answer]

38. How would you describe management-worker relations in the firm: highly formal, fairly formal, fairly informal or highly informal?

[Explore the extent of ‘informality’. Is there a personalised and informal relationship between managers and workers? Does the firm avoid formal procedures in such areas as discipline and dismissal? Does the firm rely largely on face-to-face understandings with employees? Are explicit statements of rights and duties avoided? Are legal obligations ignored if they do not relate to the established set of informal rules in the workplace? Are the firm’s internal procedures largely based on unwritten custom and practice?]

39. What are the advantages and disadvantages of these relations?

40. Does the firm have any of the following:

- (a) formal recruitment and selection procedures;
- (b) formal appraisal and promotion system;
- (c) formal grievance procedure;
- (d) formal disciplinary and dismissals procedures;
- (e) equal opportunities policies;
- (f) formal training and staff retention schemes;
- (g) formal pay structures;
- (h) formal productivity agreements;

(i) formal employee motivation schemes?

[Explore the extent to which these are formalised or whether they are dependent on managerial discretion]