A COMPARISON BETWEEN THE
SOUTH AFRICAN AND KENYAN
LABOUR LAW SYSTEMS

by

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SUMMARY

Labour law is a system of rules regulating the labour force in the society. These rules of labour are legal rules and are legally enforceable which means that if there is a breach of rules a party may approach a court of law or any other institution to obtain relief in respect of the breach of the rules. As a large percentage of the population at any given time in the world is involved with employment relationship, the labour relationships between employer and employee cannot be ignored as it affects both socio-economic and political factors in our society.

Labour Law in general focuses on various relationships, including the relationship between the employer and employee, between the employer and a trade union or a group of employees, employers and employers’ organization. From the foregoing it can be deduced that there are two components of labour law which must be distinguished, namely individual and collective labour. The individual relationship focuses on the relationship between the employer and the employee while collective labour laws deal with matters such as legal nature of trade unions (and employers’ organization), the legal nature and enforceability of collective agreements, collective bargaining institutions and the legal consequences that flow from strikes, lockouts and other forms of industrial action. Collective labour law can therefore be said to be the body of rules which regulates the following collective relationships between:

- employees and the trade union they belong to
- employers and employers’ organization
- employers and /or employers organization and trade unions
- the government and trade unions
- the government and employers organization

However the collective labour law cannot be said to be absolute but is interdependent with individual labour law because the collectively agreed terms become part of the individual employment relation. This study mainly focuses on the collective labour aspect of the labour law system which shall be discussed in detail in the chapters to follow.
CHAPTER 1

1.1 INTRODUCTION

Proper systems of collective labour laws have been important in our modern day world for purposes of having a stabilized economy and to maintain labour democracy in our workplaces. The purpose of this thesis is to compare and look at the different functioning’s and labour law systems in place, specifically collective labour law of two different countries namely South Africa and Kenya for purposes of finding out what can be learnt or borrowed from the other in order to improve the labour system of the concerned country. I shall begin by giving a brief history introduction of both countries in order to understand the background of each country which has spearheaded the current labour laws practiced in the respective country.

The challenge that has faced collective labour laws is that trade unions have increased and become strong in the workplace and the employees are now aware of their rights and do fight for the same vehemently. Further globalization has also adversely affected both the needs of the employers and employees and therefore the challenge that faces our labour laws is that they are they able to address the various issues that arise within the workplace effectively? Further, the question that arises to our collective labour law systems is what structures and systems need to be in place for proper functioning of labour disputes and what other programmes or procedures need to be adopted in order to have an effective collective labour law system? The above will be considered and addressed in the following structure of the study and recommendations will also be addressed.

1.2 THE STRUCTURE OF THE STUDY

This study has five chapters. Chapter 2 discusses selected aspects of collective labour law beginning with the South African labour law and then the same on the Kenyan labour law. Chapter 3 deals with general findings and comparative analysis of collective agreement, collective bargaining, bargaining councils and workplace forums, strikes, labour dispute resolution mechanism. Chapter 4 discusses an overview analysis of what can be learnt from both countries and which can be considered to be the most effective labour law system. The discussion is concluded in Chapter 5.
13 HISTORICAL DEVELOPMENT OF LABOUR LAW IN SOUTH AFRICA

It is important to understand the concept of individual labour law briefly because collective labour law cannot be absolutely separated from its concept. In the ancient Roman system the employment contract as such did not exist but the term that was used was known as *locatio conduction operarum* where one person would lease his services to another person. The Roman law however did eventually play a substantive role in establishing of the modern contract of employment.\(^1\)

In the Roman-Dutch system the principles regulating the lease of things (*locatio conduction rei*) were also applicable to the lease of services and the Common Law position was that the employee as lessor leases his services to his employer who was regarded as the lessee of such services and the compensation of the employer was regarded as rent. However over the years the individual labour law has been developed by court decisions and principals of general laws of contract.\(^2\)

The individual labour law therefore relates to the conclusion of the contract by the employer and the individual employee, the contents of that contract, how the contract is enforced and how the contract is terminated.

13.1 DEVELOPMENTS IN SOUTH AFRICA UP TO 1977

In 1881 the first trade union was established in South Africa but this is believed to have been merely a branch of the English parent body. Thereafter a number of trade unions established branches in South Africa and in 1892 the first South African trade union was founded in Johannesburg. Due to the extensive labour unrest and strike action, especially in the mining sector on the Witwatersrand, the first Conciliation Act was passed in 1924. A consequence of this legislation was that trade unions were given statutory recognition and this resulted in an increase in trade union membership.

After 1948 a comprehensive review by Botha Commission of Inquiry\(^3\) led to legislation that had a far-reaching effect on the labour structure. Trade Unions were racially divided, job

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2 Grogan *Workplace* 317-318.
3 Grogan *Workplace Law* 319.
reservation was introduced, and blacks were precluded from joining registered trade unions. The Commission recommended that black trade unions should be dealt with in separate legislation, but the government went a step further and created an entirely separate legislative framework for black workers in general and implemented a system of work committees. These committees were in place from 1953 to 1973 where only about 20 of them were established. The Black Labour Relations Act\(^4\) made provision for the creation of a central black regional committees black labour officials and black workers committees. As a result of the report and recommendations of the Botha Commission a number of Acts were implemented amongst others was the Industrial Conciliation Act of 1956.

132 POSITION IN SOUTH AFRICA FROM 1977 TO 1990

The political and labour problems during the 1970s led to the appointment of a commission of enquiry (Wiehann Commission) during 1977 whose recommendation led to far-reaching legislative changes from 1979 onwards. Some of the most important recommendations include:

- Trade union rights be granted to black workers
- Job reservation be abolished
- Provision be made for legislation concerning fair labour practices
- Separate facilities in factories, shops and offices be abolished
- Basic labour rights be extended to the public sector
- Conditions of employment and working circumstances of female employees should be revised in various aspects

Most of these recommendations were accepted by the government and a number were contained in new legislation.\(^5\)

\(^4\) Act 48 of 1953.
133 POSITION IN SOUTH AFRICA SINCE 1990

During the 1990s the labour field was affected by socio-economic and political problems. Most of these problems were in the labour relations area which resulted to stay-aways, consumer boycotts and a sharp rise in the number of strikes. Employers realised that they could no longer exercise their management aggressively and that it was no longer possible to make decisions affecting workers in a one sided autocratic manner. This led to consultations and negotiations with trade unions and personnel associations to increase.

An agreement was therefore reached in 1990 between South African Employers’ Consultative Committee for Labour (SACCOLA), Congress of South Africa Trade Union (COSATU) and National Council of Trade Union (NACTU) (which shall be referred hereto as SACCOLA, COSATU & NACTU) regarding the amendment of the Labour Relations Act.

The Laboria Minute was established in 1990 whose members were SACCOLA, COSATU and NACTU and the State and it was agreed no labour legislation would in future be tabled in parliament before prior consultation between the various role players had taken place and consensus reached.

In 1994 a Ministerial task team was appointed and it was instructed to review legislation regulating labour relations. The Ministerial task team released its recommendations in early 1995 as a draft negotiating document in the form of a Labour Relations Bill and it recommended a new labour system. After collation of the comments from the public and negotiations in National Economic Development and Labour Council (NEDLAC) the Labour Relations Act, 66 of 1995 was passed by parliament and it came into operation on 11 November 1996.6

South Africa over the years has developed a sophisticated system of collective labour law. The new political dispensation in South Africa in the early 90s’ has brought a change in the way South Africa is now governed and the operation of the law in the society. The Constitution of South Africa which came into force during 1996 has enshrined certain fundamental rights which are enjoyed “by all people in SA”.

The South African Constitution has had a considerable influence on collective labour law in section 23 of the Constitution.

It is important to add that after the implementation and recommendations of the Wiehahn Commission the jurisdiction of the industrial court was initially limited to collective labour law but this was later extended to include the individual labour law. At present there is a healthy inter-action between individual labour law and collective labour law especially in the settling of disputes.

14 HISTORICAL DEVELOPMENT OF LABOUR LAW IN KENYA

The genesis of labour law in Kenya can be traced in the 19th century when the need arose for the colonial government to pass legislation to ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and service sector. The terms and conditions were regulated by statutes and the common law. The Kenya law contract was originally based on the Contract Act, 1872 of India. Kenya since then it is based on the English Common Law of Contract, under the Kenya Law of Contract.7

In the mid 20th century due to industrialization an organized trade union movement was well established. The first wage earners association in Kenya can be traced back to the early 1940s and soon after the Second World War and the first trade union regulation was made in the introduction of Ordinance No 35 of 1939 that required all crafts organizations to apply for registration which could be granted or denied.

In order to gain complete control on the wage earners organization the Government brought in a trade union labour officer to be with the Department of Labour with the duty to foster “responsible” unionism. In 1952 a more detailed piece of legislation was enacted but it had significant omissions and it lacked effective operations of trade unions. This rigid control of trade unions was maintained by the colonial Government until the end but this did not hinder the growth and strength of trade unions and at Independence there were fifty two trade unions and four centres formed and registered namely, East African Trade Union Congress (EATUC)

7 S 21 Chapter 23 of the Kenya Law of Contract.
Kenya Federation of Registered Trade Union Congress (KFRTU) Kenya Federation of Labour and Kenya Africa Workers Congress (KAWC).

In 1962 a landmark was established with the signing of the Industrial Relations Charter by the Government of Kenya, the Federation of Kenya Employers, and the Kenya Federation of Labour, the forerunner of the Central Organization of Trade Unions (Kenya) (COTU). Currently the charter is under review and the parties having a draft charter in 2001 and a taskforce was appointed to review the Labour Laws within an International Labour Organization Project.

The process of collective bargaining is not specifically provided for in law, but there are prerequisite conditions, which must be fulfilled before parties may proceed with bargaining process. Most if not all issues of the collective labour including collective labour dispute must be reported to the Minister of Labour. The Government of Kenya still holds great control of the collective labour however this study will focus in detail different aspects of this Labour Law and give a comparative study with the South African collective labour law.

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CHAPTER 2

2 1 COLLECTIVE AGREEMENTS

2 1 1 DEFINITION

“Collective agreement” means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and on the other hand:

- One or more employers
- One or more registered employers’ organization or
- One or more employers and one or more registered employers’ organization

2 1 2 REQUIREMENTS FOR VALID AGREEMENTS

- It must be in writing
- The trade union concerned must be registered in terms of the Labour Relations Act of 1995
- The agreement must deal with conditions of employment or any other matter of mutual interest to the parties concerned and their members

2 1 3 LEGAL CONSEQUENCES OF COLLECTIVE AGREEMENT

A collective agreement is binding on:

- The parties to the agreement as well as their members.

- The members of the registered trade unions and employers organization that are parties to the agreement.

- It is also binding to non-members of trade unions who are party to the agreement if the employees in the undertaking are identified and bound and also if the trade union concerned has a majority support in the ranks of the employees.
The agreement is also binding for the whole period. It further binds members of trade union irrespective of when they have become members.\(^9\)

Further if the terms of a collective agreement are amended by means of an employment contract or other agreement, the legal consequences will be that:

- The amended agreement or provisions are invalid; and
- The amendment or breach may constitute unfair labour practice.

Further no provision in a contract of employment or any other contract may:

i Permit an employee to be paid less remuneration than that prescribed in a collective agreement.\(^{10}\)

ii Permit an employee to be treated in a manner or receive a benefit that is less favorable than that stipulated in a collective agreement.

iii Waive any of the benefits in a collective agreement.

2 1 4 AMENDMENT OF A COLLECTIVE AGREEMENT

A collective agreement may be amended by the High Court if the application or effect of the said agreement would be unfair. A collective agreement may be terminated by agreement between the parties involved but not automatically by provisional liquidation.

2 1 5 COLLECTIVE AGREEMENTS CONCLUDED BY BARGAINING COUNCIL

It is important to note that other than the parties to both the bargaining council and the collective agreement, the collective agreement also binds the employees who are not members of a trade union that is party to agreement, if:

\(^9\) S 23(2). See also Mazibuko v Hotels, Inns & Resorts (SA) (Pty) Ltd t/a Holiday Inn Garden Court, Johannesburg Airport 1996 ILJ 263 (IC); it also binds former union members: Vista University v Botha [1997] 5 BLLR 614 9 (LC).

\(^{10}\) S 199(1)(a).
the employees are identified and bound by the agreement; and
that the trade has as its members the majority of employees.

Further it is important to note that the employer may request the minister in writing to extend a collective agreement concluded by the council to any non-party.

2 3 BARGAINING AND STATUTORY COUNCILS

2 3 1 INTRODUCTION

Bargaining councils may be established in a sector and area and the provisions that form the basis and are applicable to bargaining councils are the provisions of the Labour Relations Act of 1995.\(^{11}\) It consists of representatives of one or more registered trade unions and one or more registered employers organizations. The bargaining council system is a manifestation of the policy objective of establishing self government within a wide framework of labour relations.

2 3 2 ROLE AND FUNCTIONS

In South Africa bargaining councils were previously called industrial councils traditionally and were the most important statutory collective bargaining mechanism in South Africa and the legislature intended to maintain this position. However the importance has been restricted by developments in the trade union movement itself in that the trade unions are a key component of the bargaining council system and any union reluctant to participate will influence the importance of the bargaining council system. Due to the fact that trade unions have increased along with union membership, the unions have concluded recognition agreements with employers resulting in direct and more favorable employment agreements with employers, thus obviating the need for more bargaining councils.

2 3 3 FUNCTIONS OF BARGAINING COUNCILS

The functions of bargaining councils are multifarious by nature and some of them include the following:

\(^{11}\) See s 27(1).
• to conclude collective agreements;

• to enforce those collective agreements;

• to prevent and resolve labour disputes;

• to perform the dispute resolution functions referred to in section 51;

• to establish and administer a fund to be used for resolving disputes;

• to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;

• to develop proposals for submission to NEDLAC or any appropriate forum on policy and legislation that may affect the sector and area; and

• to extend the function and services of a council to employees in the domestic and informal sector.

Generally it can be stated that the principle aim and function of a bargaining a council as a collective bargaining body is to maintain labour harmony in the sector over which it exercises jurisdiction.

234 CONSTITUTION OF BARGAINING COUNCILS

Its constitution must provide for at least the following:

• The appointment as members of the council, of representatives of the various parties, namely the employees and the trade unions on an equal basis, as well as the appointment of alternates to the representatives.
- The appointment, election, dismissal, duties and powers of officials and office bearers.

- The procedure for settling disputes between parties of the council.

- The admission of other parties to the council.

- Further the Constitution should be accessible to any person for inspection and anyone may obtain a copy or extract from the registrar on payment of the prescribed fee.\textsuperscript{12}

2 3 5 STATUTORY COUNCIL

During the period of June and July 1995, the organized trade union movement, in particular COSATU, exerted pressure on the negotiations parties to implement a central collective bargaining system for the whole country. The employers opposed such a system because they feared compulsory collective bargaining and any legal compulsion to negotiate in such a manner. A compromise was therefore reached in that a system was designed providing for the compulsory institution of statutory councils in certain circumstances, but the scope and powers of these councils to bargain collectively is limited.

2 3 6 ESTABLISHMENT

A statutory council may be established in sectors and areas where bargaining councils have not been registered where either a representative trade union that is a trade union or more registered unions acting jointly, whose membership comprises at least 30 per cent of the employees in a sector and area or employers organization in a sector or area, may apply to the registrar for the establishment of a statutory council.

2 3 7 POWERS AND FUNCTIONS

A statutory council has the following powers and functions:

- Dispute resolution.

\textsuperscript{12} S 110(2).
• The establishment and promotion of training and education schemes.

• The establishment and administering of pension provident, medical aid, sick pay, holiday, unemployment schemes and funds.  

The conclusion of the collective agreement in order to give effect to the above mentioned activities.  

It is important to note that a statutory council may resolve to register and function as a bargaining council and the registrar must deal with such an application as if it were an application for registration of an ordinary bargaining Council.

2 4 COLLECTIVE BARGAINING IN SOUTH AFRICA

The aim of collective bargaining is to reach a perceived equitable settlement on matters of mutual interests through the process of negotiations and the terms of this settlement are then recorded as a collective agreement signed by the parties and this agreement is then applied uniformly across a specified group of employees.

2 4 1 THE MAIN OBJECTIVES OF COLLECTIVE BARGAINING

• The provision of institutionalized structures and processes where potential conflicts over matters of mutual interest may be channeled and resolved in a controlled manner thus reducing unnecessary disputes.

• The creation of conformity and predictability through the development of and commitment to collective agreements which establish common substantive conditions and procedural rules.

• The promotion of employee participation in managerial decision-making that concerns the working lives of employees.

13 S 43(1)(c).
14 S 43(1)(d). See also s 43(3).
• The enhancement of democracy, labour peace and economic development at a national and even international level.

2.4.2 LEVELS OF COLLECTIVE BARGAINING IN SOUTH AFRICA

Bargaining levels may range from a decentralized position involving a single trade union and employer in a particular workplace to a centralized national position, incorporating trade union and employer federations in a centralized bargaining forum.

Centralized national bargaining in NEDLAC in South Africa, is not formally described as a collective bargaining forum but rather as a consensus seeking body promoting employee participation in socio-economic decision-making. NEDLAC does provide a forum where peak employer confederations namely Business South Africa (BSA) and the peak trade union federations, Congress of South African Trade Union (hereafter referred to as COSATU), Federations of Unions of South Africa (hereafter referred to as FEDUSA) and National Council of Trade Union (hereafter referred to as NACTU) meet and attempt to come to an agreement over labour legislation and other social policy matters.

2.4.3 CENTRALIZED SECTORAL BARGAINING IN BARGAINING COUNCILS

In South Africa centralized bargaining within a specific sector of the economy generally takes place in regional or national bargaining councils e.g. the largest and most comprehensive national bargaining council exists in the metal industry namely the Metal and Engineering Industries Bargaining Council. At the end of 2007 there were a total of 73 registered bargaining councils in the private sector in South Africa. These registered councils only cover approximately 10% of people in employment; however there are several other unregistered bargaining councils.15

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244 THE STRUCTURE AND FUNCTIONING OF A BARGAINING COUNCIL IN THE PRIVATE SECTOR

A bargaining council is an organization, registered by the department of labour, comprising one or more registered employer organizations and these organization are termed as parties to the council.

Some functions of the bargaining council include:

- Negotiate wages and working conditions.
- Prevent and resolve dispute.
- Promote and establish training schemes.

The composition of the bargaining council is 50% employer and 50% employees.

245 REGISTRATION

The parties of the bargaining council must submit their constitution which they have agreed upon to the registrar together with appreciation forms indicating the specific industry or service sector and geographical area for which the bargaining council should be registered.

246 THE PERCEIVED ADVANTAGES OF THE CENTRALIZED BARGAINING COUNCIL SYSTEM

- It gives protection to non-unionized employees who would otherwise be exploited in small companies.

- The uniform wages prevent undercutting of wages by smaller competitors who offer lower wages and poorer working conditions and benefits. Thus the reason why the employers would favor the extension of agreements because this means that the employer would compete on management skill and not by means of lowering wages.

- There are consistent conditions of employment because common conditions are set for a specific sector and acceptable minimum wages and fair procedures are established.
therefore employees who change jobs within an industry will find the same working conditions.

- Because of large scale, it offers better benefits schemes such as medical aid and provident funds organized on a sectoral basis.

- It offers comprehensive training programmes and facilities may be developed on a cost effective basis.

- The disputes settling procedures established by bargaining councils offer an opportunity for an unbiased hearing of alleged unfair dismissals or unfair labour practices.

- The number of strikes is likely to decline due to the serious nature of such strikes and this greater effort is usually undertaken to avoid them.

2 4 7 CRITICISM OF THE CENTRALIZED BARGAINING COUNCIL SYSTEM

The council agreements restrict the operation of market forces. The minimum wage and conditions then become binding on them, whether they are members or not. This is seen contrary to the promotion of the free market system and it is argued that it hinders employers from competing internationally with lower wages of other countries. Further it is argued that the extension of agreements to non-parties nullifies the principle of voluntary membership of such councils and the goal of economic growth. Centralized bargaining council agreements may inhibit small business.

It has been suggested that numerous small business have been liquidated due to failure to comply with agreements and payments of industrial council levies, even in spite of provisions to apply for exemption from agreements. Bargaining council agreements limit flexibility in employment practices including pay systems.

The foregoing shows that there are many pressures and tensions surrounding bargaining councils even though they are constituted on a voluntary basis.
2.5 COLLECTIVE LABOUR DISPUTES

Introduction of strikes and lock-outs

Strikes and lock-outs are viewed as the expression of open conflict which is an important element in securing the balance of power within any labour relations systems whether based on a pluralist or societal corporatist perspective. Strikes and lockouts, other than being viewed as intolerable abuses of economic freedom and detrimental to economic growth, the functional view accepts their role as a means of pressure and power testing.

Strikes and lockouts are also important in that they enable the parties to reach an acceptable agreement over wages, working conditions and procedural arrangements.16

2.5.1 POSITION IN SOUTH AFRICA

In South Africa up to the early seventies relative labour peace was experienced in the industrial sector.17 The publication of Wiehahn Report in 1979, however, heralded an era of greater labour democracy and unrest. In 1979, 110 strikes occurred in which about 35 000 workers were involved. In 1981 these figures increased by 211 per cent. During 1994 approximately 800 strikes took place with an estimated loss of 2.2 million man-days and R148.2 million in wages18 while during 1998 a loss of 2.3 million man-days was suffered. The majority of these strikes were concerned with claims for higher wages and other wage related problems. It can be noted from above that the strikes continued to increase year after year hence a high labour unrest. However the recommendation by the Ministerial Task Team19 was that although the right to strike or lock out was guaranteed in the interim Constitution, the result was that strikers were often dismissed and not able to regain reinstatement and no protection was afforded to the participants in legal strikes and lockouts and this was an issue that was to be addressed. However it is important to note that currently in South Africa the

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16 Finnemore et al 363.
17 During 1970 there were 76 strikes, in 1977 90 strikes, whilst the exception was 1973 when 370 strikes caused widespread labour disruptions; see also Finnemore et al 310.
right of employees to strike is fully recognized, provided the prescribed requirements are complied with.\textsuperscript{20}

252 STATUTORY DEFINITION OF A STRIKE

The Labour Relations Act defines “strike” as follows:

“The partial or the complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory”

It is important to note that in South Africa primary work stoppage remains the most visible aspect of collective action.

253 DIFFERENT FORMS OF STRIKES INCLUDE

(a) Go-slows

This is when the employees resort to slow down their work as a pressure tactic which is less risky than a full strike. The go-slows often occur where relationships between management and union are poor or have deteriorated. Where these kinds of strikes are concerned lucrative contracts maybe lost where delivery dates cannot be met.

(b) Overtime bans

Overtime bans in South Africa are used in a wide variety of contexts. These kinds of strikes are seen as part and parcel of Congress of South African Trade Union (COSATU’s) strategy of job creation. The new Labour Relations Act explicitly states that overtime bans are strikes, whether overtime is voluntary or part of the employee’s contract.

\textsuperscript{20} S 64(1)(a) and (b). See also Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU (2) 1997 ILJ 671 (LAC).
(c) Primary strikes

These are strikes that are full blown and most powerful form of collective action that are mounted by the employees in order to promote their own interests and the following are types of primary work stoppages with their objectives:

- Offensive economic strikes

This type of strike demands for better wages, hours of work, annual leave and working conditions than the employer is willing to grant at the bargaining table. These strikes are strategically planned and are more likely to adhere to the requirements of the Labour Relations Act than defensive strikes. A benchmark example of a successful offensive strike is the wage strike at Volkswagen which occurred during 1980. The strike was organized by the National Automobile and Allied Workers’ Union (NAAWU) (now NUMSA) and termed as the living wage strike. The strike lasted for three weeks and was settled after the company agreed to a 45 per cent increase in wages. This strike was largely successful and it eradicated differences in pay between white and black in workers certain grades. John Gomomo, then senior shop steward at Volkswagen described the outcome succinctly:

“After all the bad treatment and banning of trade unionists and the struggles with employers, workers were amazed at what they achieved by standing together. Membership of the union went from 60 per cent to 90 percent overnight.”

- Defensive frictional strikes

These types of strikes do occur as a response to perceived unfair management action such as the dismissal of an individual or group of employees, unilateral change to existing work practices, problems of supervision, failure to deal with employee grievances or pending entrenchment, plant relocation or closure.

- Solidarity strikes

These may arise out of a need to promote the aims of the trade union in a workplace in order to achieve recognition from the employer or implementation of a closed shop or agency shop.
(d) Secondary strikes

This kind of strike occurs when the employees who are not employed by the same employer, while the primary strike is in progress they strike in support of the employees who initiated the action. The workers who are undertaking the secondary strike action may be employees of companies that are customers, suppliers or close associates of the primary company involved. It is important to note that the employees who are involved in the secondary strike do not themselves benefit directly from their strike action.\(^{21}\)

254 REQUIREMENTS FOR STRIKES AND LOCK-OUTS

An employee or an employer is only entitled to exercise the protected (legal) strike or lock-out respectively if the following conditions are complied with.\(^{22}\) These requirements include:-

The issue being disputed must have been referred for conciliation to the Commission for Conciliation, Mediation and Arbitration (hereafter referred to as CCMA) or a bargaining council and

- a certificate has been issued stating that the dispute is unresolved or;

- a period of 30 days has elapsed since the dispute was referred to the Council or the CCMA;

- further a written notice of the intended strike has to be given 48 hours before its commencement to the employer, or bargaining council or employers association and in the case of a lock-out the same 48 hours notice has to be given to the trade union or employees or the bargaining council.

\(^{21}\) Rensburg Contemporary Labour Relations 2\(^{nd}\) ed (2002).

\(^{22}\) The purpose of procedural requirements has been described as compelling employees to engage in negotiations before exercising the right to strike; see \textit{CWIU v Plascon Decorative (inland) (Pty) Ltd} 1999 \textit{ILJ} 321 (LAC) 316 Principles of Labour Law (2005).
The above requirements of a protected strike or lock-out are not applicable if

- the parties to the dispute are members of the bargaining council and the dispute has been dealt with according to the constitution of the council; \(^ {24} \)

- the strike or lock-out complies with the procedure prescribed in a collective agreement; \(^ {25} \)

- the strike is in reaction to an illegal lock-out by an employer;

- the employer refuses to accede to a request of his employees or a trade.

255 REQUIREMENTS IN CASE OF REFUSAL TO NEGOTIATE

When the dispute concerns a refusal to negotiate, an advisory award should be made before a notice is given to the employer or conciliation council about the proposed strike. \(^ {26} \) The refusal to negotiate according to the Labour Relations Act include: a refusal to recognize a trade union as a bargaining agent or to agree to establish a bargaining council, \(^ {27} \) the withdrawal of the recognition of a bargaining agent or any dispute about bargaining entities, bargaining levels or bargaining subjects. \(^ {28} \)

256 LIMITATION ON STRIKES AND LOCK-OUTS

The participation of a strike or a lock-out may be limited due to various reasons and one of them being that, the issue in dispute is such that in terms of the Labour Relations Act it could be referred to arbitration or the High Court. Therefore this means that no strike may take place in respect of the following matters:

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\(^ {23} \) S 64(3) of LRA.
\(^ {24} \) S 64(3)(a).
\(^ {25} \) S 64(3)(b). See also *North East Cape Forests v SAAPAWU* 1997 ILJ 729 (LC); *North East Cape Forests v SAAPWU* (2) [1997] 6 BLLR 711 (LAC).
\(^ {26} \) In terms of s 135(3)(c) of LRA.
\(^ {27} \) S 64(2)(a).
\(^ {28} \) S 64(2)(d).
• Dismissal on account of misconduct, incompetence, incapacity or constructive dismissal.

• Retrenchment, automatically unfair dismissal or unfair discrimination.

• Acts of unfair conduct constituting an unfair labour practice a breach of freedom of association and so forth. The reason being that these disputes can be referred to the High Court or to the arbitration bodies for settlement.

257 CONSEQUENCES OF STRIKES AND LOCK-OUTS

Herewith are some of the legal consequences that result from protected strikes and lock-outs in South Africa:

• The employer is not obliged to remunerate an employee for services that an employee does not render during a protected strike or lock-out but if the remuneration includes payment in kind in respect of accommodation, food and other basic amenities of life the employer would at the request of the employee may not discontinue payment in kind during the strike or lock-out.29

• An employee may not be dismissed for participating in a protected strike, if such a dismissal occurs it will become a nullity and automatic unfair dismissal30 however the employer may dismiss the employee for misconduct while participating in a strike or for reasons based on the employer’s operation requirement. Further the failure of a trade union or an employer’s organization to comply with the provisions of its constitution regarding strikes and lock-outs does not affect the legality of a strike or lock-out.31 Even if the strike action is suspended by employees, an employer is not obliged to allow them to resume work or to pay those wages.32 It is interesting to note that the Act provides that any act in contemplation or in furtherance of a protected strike or a lock-out that is a

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29 S 67(3)(a).
30 See s 187(1)(a).
31 S 67(7). Regarding ballots, see MAWU v BTR Sarmcol - A Division of BTR Dunlop Ltd 1995 ILJ 83 (IC); Kwazulu Natal Furniture Manufactures Association v NUFAWSA (1996) 8 BLLR 964 (N).
32 Transportation Motor Spares v NUMSA 1999 ILJ 690 (LC).
contravention of the Basic Conditions of Employment Act does not constitute an offence.33

258 SUBSTANTIAL FAIRNESS OF DISMISSAL

When looking at substantive fairness attention is focused on the reason for dismissal, the legality, the purpose and consequences of the strike including the following: the consequences of the strike action will be taken into consideration, especially if the strike was intended to inflict widespread damage and disruption upon the employer. Also the duration of the strike may be of importance considering the nature of the business of the employer. The conduct of the striking employees may also be regarded as unfair when the employees refuse to return to work until a co-employee has been reinstated, refusal to conduct bona fide negotiations, or even refusal to accept an offer of re-employment.34

259 DISCIPLINARY HEARING

The employers must also afford the employees with a disciplinary hearing depending on the circumstances of the case and such a hearing if possible should precede the ultimatum. The employer has to issue a fair ultimatum to striking employees before dismissing them35 that is, the ultimatum must be in writing and clearly formulated, it must also indicate to the employees the sanction of dismissal and it must allow sufficient time to employees to consider it and to consult with their union. The purpose of the ultimatum is to attempt to persuade the striking employees to return to work.36 It is important to note that in one of the remedies of striking employees, the High Court may, however reinstate or award compensation to employees participating in an unprotected strike but who were dismissed unfairly.

33 S 67(9).
35 Nelspruit Drycleaners (Pty) Ltd v SACCAWU 1994 ILJ 283 (LAC).
25 10 PICKETING

The Labour Relations Act has permitted picketing and allowed that a trade union may permit its members to demonstrate peacefully in support of any legal strike or in opposition to any lock-out, the following requirements must however be applied:

i Authorization for the picket must have been granted by a registered trade union.

ii Only members and supporters of the union may participate in the picket. The purpose of the picket is to encourage non-striking employees and the public to support protected strikers and to oppose a lock-out peacefully.

25 11 OTHER CASES OF COLLECTIVE ACTION IN SOUTH AFRICA

Overtime bans

If there is no contractual obligation that is in existence concerning overtime work, the overtime shall be regarded as voluntary. In terms of the Labour Relations Act 1995 a ban on overtime work in all cases whether the overtime is compulsory or voluntary, any ban of such overtime would be considered as a strike.

26 LABOUR DISPUTE RESOLUTION MECHANISMS IN SOUTH AFRICA

The Labour Relations Act seeks to promote an effective dispute resolution of labour by encouraging voluntary and orderly collective bargaining between labour and management with a view to reaching collective agreements by democratizing the workplace to infuse policy decisions with greater legitimacy, and by conferring rights which ensure individual and collective justice.

The LRA discourages strikes action over breaches of rights disputes with the exception of the organizational rights conferred by sections 12,13,14 and 15 (that is access to the workplace,
stop order rights, election of trade union representatives and leave for union officials. The LRA denies those involved in them, protection against dismissals.37

The LRA contains three-dispute resolution procedures for rights disputes namely conciliation, arbitration and adjudication. The disputants are not compelled to use them. The Act offers two institutions for the performance of these functions and equips them with the power to guide management and labour and to correct the effects of illegal and unfair practices. The CCMA (commission for conciliation, mediation and arbitration) assumes many of the arbitral function of the former Industrial Court. The Labour Court which has High Court status, deals with other matters that were once arbitrable by the Industrial Court under sections 43 and 46(a) of the 1956 LRA.

There is also a specialized Labour Appeal Court which has assumed the appellate jurisdiction formerly exercised by the Appellate Division of the Supreme Court (now the Supreme Court of Appeal) in labour matters. Further it is important to note that the Supreme Court of Appeal and the Constitutional Court have asserted their right to hear appeals from the Labour Appeal Court. The LRA also permits the parties to settle certain disputes by private agreed procedures and the institution primarily responsible for dealing with disputes between parties to collective agreements are bargaining councils – bodies formed by agreement between labour and organized industry in various industrial sectors.

261 THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)

It plays a central role in the statutory dispute resolution process. All disputes not handled by private procedures or accredited bargaining councils or agencies must be referred to the CCMA for conciliation before they can be referred to arbitration and adjudication. The CCMA is state funded but independent body with jurisdiction throughout the republic. The CCMA may also accredit private agencies or bargaining councils to perform any or all of its functions. Its main Quasi-Judicial functionaries are commissioners and senior commissioners.

Since CCMA is a creature of statute, it has jurisdiction only over those disputes referred to it in terms of LRA. Should the CCMA attempt to resolve any other dispute, it would act ultra

37 S 65(1)(c).
vires. The CCMA has also the following functions in addition to its disputes –resolution functions and these include:

- The overseeing of union ballots where requested
- The publication of guidelines
- Assisting employers and employees with establishing collective bargaining structures
- Internal disciplinary procedures
- Affirmative action programmes
- Dealing with sexual harassment
- Workplace restructuring. The CCMA may also publish rules

Further the CCMA is the central institution in the statutory labor dispute resolution established by the LRA. The LRA provides that the CCMA is independent of the state, any political party, trade union, employer or employer organization, federation of trade unions or a federation of employers’ organization. If a dispute which has been referred to the CCMA remains unresolved after conciliation the CCMA must arbitrate the dispute if the LRA requires it and any party to the dispute has requested that the dispute be resolved through arbitration.

262 CONCILIATION

Parties to a dispute of mutual interest may refer a matter to the CCMA. A commissioner is then appointed to resolve the matter through conciliation which may include mediation, fact finding and advise in the form of advisory arbitration award.

Conciliation proceedings are conducted on a “without prejudice” basis and are confidential. This means also that the commissioner may not be subpoenaed to testify on issues that arise during conciliation meetings. Only the parties themselves (which may include directors and employees of a company) or officials of the party’s trade unions or employers’ organization may attend conciliation meetings. Legal practitioners have no right of appearance at such

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40 S 134.
meetings. The dispute is certified as unresolved; the parties may give notice of a strike or lock-out, or refer the matter to the Labour Court or for arbitration, as the case may be.

2 6 3 CON-ARB

This provision has been made in order to expedite procedure in the case of a limited range of disputes, for example in cases concerning the dismissal of an employee for any reason relating to probation or any alleged unfair labour practice relating to probation.

2 6 4 ARBITRATION

The CCMA must appoint commissioners to arbitrate a matter if the dispute is not settled at conciliation. Labour consultants are not legal practitioners and therefore cannot appear in any conciliation or arbitration proceedings, unless they are bona fide officials of union or employers organization or unless the parties agree otherwise. Arbitration constitutes a complete rehearing of the matter.42 The Labour Court set aside an award in which the commissioner based his finding on the record of the disciplinary inquiry which was not admitted as evidence.43

2 6 3 RESOLUTION OF DISPUTES BY BARGAINING COUNCILS AND PRIVATE AGENCIES

It is important to note that once the bargaining councils are accredited by CCMA they may perform most of the dispute resolution functions of the CCMA. Bargaining council may also through collective agreement establish its own procedures to resolve disputes over which it has jurisdiction. Further the bargaining council awards also assume the status of order of the Labour Court once certified by the CCMA director. If a council fails to secure a CCMA accreditation and does not nominate an accredited agency such council lacks the capacity to perform its statutory duty to resolve disputes within its registered scope and the CCMA must assume jurisdiction.44

44 S 147(3) - (4).
264 PRIVATE DISPUTE RESOLUTION

Although conciliation and arbitration is available at no cost, parties remain bound by existing collective agreements which designate private arbitration because agreed procedures override the relevant provisions of the Act.\textsuperscript{45} A wider range of issues is referred to private arbitration than the jurisdiction of CCMA and the Labour Court. Whereas the CCMA may not arbitrate dispute matters of mutual interest other than in essential services, private arbitration is permissible. Mandatory arbitration of disputes by private agencies in terms of collective agreements does not violate the constitutional right to have justifiable rights settled by a court of law or where appropriate, another independent and impartial forum.\textsuperscript{46} The award is binding on the parties. The award need not be but usually is written, although the arbitration is under no statutory obligation to give reasons, parties invariably require them.

265 LABOUR COURT

The Labour Court is a court of law and equity with authority with inherent powers and standing in relative to matters under the jurisdiction equal to a provincial division of the High Court as is established in section 151. The Labour Court has national jurisdiction in all nine provinces\textsuperscript{47} unlike the CCMA which must establish offices in each of the nine provinces. The Labour Court may perform its functions at any place in the republic. The court has no jurisdiction over issue covered by collective agreements and disputes about the interpretation and application of collective agreement must be directed to the CCMA or the agency designated in the agreement.\textsuperscript{48} The Labour Court has concurrent jurisdiction with the High Court\textsuperscript{49} in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution which arises from:

- employment and labour relations;

- the application of any law for the administration of which the minister is responsible.

\textsuperscript{45} See \textit{Vista University v Botha} (1997) 18 ILJ 1040.
\textsuperscript{46} S 34 of the Constitution which entitles everyone to have a legal dispute resolved by a court or “another independent and impartial tribunal or forum”.
\textsuperscript{47} S 156(1).
\textsuperscript{48} \textit{Denel Informatics Staff Association v Denel Informatics (Pty) Ltd} (1999) 20 ILJ 137 (LC).
\textsuperscript{49} S 157(2).
One of the most important functions of the Labour Court is to review decisions and arbitrations of CCMA commissioners.

2 6 6  FUTURE OF THE LABOUR COURTS

The Labour Courts have failed to live up to expectation. They have become prone to the problems very similar to those experienced by the old Industrial Court in terms of the old Labour Relations Act of 1956. There is often no consistency in the judgments by the Labour Courts with the result that it has become difficult for disputing parties to anticipate the probable outcome of their dispute. In addition the parties frequently have to wait for months before their cases are heard or for decisions to be handed down. The general consensus among the role players (unions, employers’ and state) was that the situation has become intolerable and that a re-evaluation of the adjudication of labour matters had become necessary. The Judicial Service Commission subsequently created a task team to investigate the matter. The task team’s proposals are contained in the Superior Courts Bill of 2003.

“The Bill proposes that the court should be absorbed by the high court and that every division of the high court should have a panel of judges to hear the matters in additions to other matters. They also suggested that appeals against high court decisions in respect of labour matters will go directly to the supreme court of appeal and not first to a full bench of the high court. The Bill further proposes that the labour appeal court should be absorbed by the supreme court of appeal. In terms of the Bill a second deputy President will be appointed who will have the primary responsibility for managing appeals in regard to labour matters.”

The Bill was tabled in Parliament for consideration in August 2003 and will be considered further by it during the course of 2005. It is important to note that there is an overlap between the Labour Court and the High Court, making it difficult to decide which is the appropriate forum, for instance in one case the High Court held that the Labour Court would only have exclusive jurisdiction in respect of those issues that the LRA has explicitly afforded the Labour Court with jurisdiction. In all other matters that have a bearing on the employment relationship, the High Court’s jurisdiction would not be excluded. In accordance with this decision, the Labour Court would, for example, have exclusive jurisdiction to consider the fairness of a dismissal for operational reasons. But in another case the High Court held that

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51 *Eskom Ltd v National Union of Mineworkers* (2001) 22 ILJ 618 (WLD).
the Labour Court did not have exclusive jurisdiction regarding alleged unfair discrimination under the Employment Equity Act\textsuperscript{53} notwithstanding that the Act affords the Labour Court with jurisdiction in section 10 (6).

2 6 7 LABOUR APPEAL COURT

The Labour Appeal Court (LAC) has jurisdiction to hear and determine appeals against any final judgments and orders of the Labour Court (section 173(1)(a))\textsuperscript{54} and to decide questions of law reserved for it in terms of section 158(4) section 173(1)(b).

2 6 8 LABOUR APPEAL COURT AS A COURT OF FIRST INSTANCE

The judge president may direct that any matter which is before the Labour Court may be heard by the LAC sitting court of first instance (section 175). The reason for this provision is presumably that where in the opinion of the judge president, important matters require to be determined or there are conflicting Labour Court judgments and possibly even when there is conflicting jurisprudence between the CCMA and the Labour Court which require finality and clear precedent it may be inappropriate to delay final determination. The first sitting of the Labour Court as a court of first instance was \textit{BSA v COSATU}.\textsuperscript{55}

2 7 TRADE UNIONS IN SOUTH AFRICA

2 7 1 DEFINITION OF TRADE UNION

The LRA defines the term “trade union” as follows:

“ ‘Trade union’ means an association of employees whose principle purpose is to regulate relations between employees and employers including any employer’s organization.”

\textsuperscript{53} 55 of 1998.

\textsuperscript{54} The LAC has jurisdiction to hear appeals from the Industrial Court \textit{Khoza v Gypsum Industries Ltd} (1998) 19 \textit{ILJ} 53 (LAC) and the Agricultural Labour Court.

\textsuperscript{55} (1997) 18 \textit{ILJ} 474 (LAC).
27.2 RIGHT TO ASSOCIATE

In 1994 the interim Constitution came into effect granting a right to freedom of association which remained unchanged in the final Constitution. The content of the right has been elaborated in a number of international human rights instruments and in the conventions and recommendations of the International Labour Organization (hereafter referred to as ILO) which maybe referred to for purposes of interpretation. Expressly stated in South Africa the right of employees to associate freely is acknowledged in the Constitution and in the Labour Relations Act where every worker is entitled to:

- participate in the founding of a trade union; and
- join a trade union of his choice.

27.3 RIGHTS OF EMPLOYEES AND WORK SEEKERS

Further any member of a trade union is entitled to:

- participate in the activities of the trade union;
- be appointed as an office-bearer, official or trade union representative. No person may require an employee or work seeker not to or not to become a member of a trade union or, to terminate his membership of a trade union. Furthermore, no person may prejudice an employee or a work seeker because of his membership of a trade union, failure or refusal to act illegally, exercising of any rights or participation in any proceeding in terms of the Labour Relations Act.

27.4 RIGHTS OF TRADE UNIONS

Certain rights have been given to the trade union and some of this include:

- to participate in the establishment of a federation of trade union and to join one; and
- to affiliate with international workers organization and international labour organization.
The erstwhile prohibition on political affiliation was omitted. This opens the door to lawful association between trade unions and political grouping and allows them to address social issues through involvement in elections for political office, including local government. These rights can be traced back to Article 3 of the ILO Convention concerning freedom of association and protection of the right to organize.

No distinction is made in this context between registered and unregistered unions except as far as chapter VI of the LRA impacts on the powers and duties of registered organizations.

275 CLOSED SHOPS AND AGENCY AGREEMENTS

Closed shops agreements are agreements between an employer and a majority trade union requiring all employees covered by the agreement to be members of such union(s). Agency shop do not require employees to join the majority union(s) but typically authorize the employer to deduct an agency fee from the wages of the employees who are not union members and pay it to the union which is acting as their bargaining agent. (This is for employees who enjoy the benefits of collective bargaining without paying union dues or participating in union activities.) However the LRA does not force any employer to enter any such agreements.

276 LIMITATIONS

Closed shops have limitations which include:

(i) Prior union membership cannot be required of work seekers, thus establishing a “post-entry” form of closed shops.

(ii) Employees who are already employed at the time that the closed shop agreement takes effect may refuse to join the union and may not be dismissed.

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56 S 8(6)(c) and (8) LRA of 1956 (referred to as the previous Act) prohibited both registered and unregistered unions from affiliating with any political party.
58 S 26(3)(c).
A trade union party to a closed shop agreement may not refine an employee membership or expel an employee from the trade union.

2.7.7 CONSTITUTIONALITY OF THE CLOSED SHOP

This provision of the LRA is probably the most vulnerable to constitutional attack on the grounds that it constitutes a limitation of the freedom of employees to associate in terms of section 23. It has been that any limitation of freedom of association arising from a closed shop agreement is outweighed by other basic rights contained in the Constitution, notably the right to engage in collective bargaining (section 23(5)). It can therefore be argued that it does not limit the right to freedom of association in the constitutional sense. If the closed shop indeed constitute a limitation the question is whether it can be justified in terms of section 36 of the Constitution and to pass the test it must be shown that the law limiting the constitutional right is one of general application (which the LRA clearly is) and that the form of the closed shop is “reasonably and justifiably” in an open and democratic society based on human dignity and equality to freedom, taking into account all relevant factors.

The International Law which has to be considered in constitutional interpretation is inconclusive of the issue. Closed shop provisions have been successfully challenged under the European Convention for the protection of human rights and fundamental freedoms in the landmark case59 the European Court of Human Rights accepted that the closed shop system held considerable advantages for both employers and employees (such as the fostering of orderly collective bargaining and the avoidance of the proliferation of trade unions) and found that the relevant article of the European Convention “neither prohibits nor allows the system of closed shops in general”.

2.7.8 ENTITLEMENT TO ORGANIZATIONAL RIGHTS

Only a representative trade union acquires certain organizational rights such as workplace, the right to conduct trade union activities, deduct union dues etc to which other trade unions are not allowed.60

60 See NUMSA v Bader Bop (Pty) Ltd 2003 ILJ 305 (CC) (minority trade union) SACCAWU v Speciality Stores Ltd ILJ 557 (LAC).
A trade union can acquire organizational rights in one of the following three ways:

(i) In terms of section 21 of the LRA.
(ii) In terms of a collective agreement between a trade union and an employer.
(iii) As a member of a bargaining or statutory council.

279 ORGANIZATIONAL RIGHTS IN TERMS OF THE SECTION 21 PROCEDURES

A registered trade union which intends to organize in a workplace may notify the employer in writing of its intention and must furnish him with a certificate of registration containing the prescribed information. The legislature refrained from defining sufficiently representative in order to allow for flexibility. The phrase sufficiently representative by implication suggests less than majority membership in the workplace. The 30% membership base required for unions wanting to establish statutory councils at sectoral level can be taken as an indication of a maximum numerical threshold that is necessary.61

2710 DIFFERENT ORGANIZATIONAL RIGHTS

• Trade union access to workplace.

• Leave for trade union activities.

• Deduction of union subscriptions.

• An agency shop agreement, however this is only valid if it provides that:
  - no employee who is not a member of a trade union is compelled to join;
  - the agency fee is equal to or less than the trade union subscription;
  - the money thus deducted will be paid into a separate account of the trade union and no agency money will be paid to a political party as an affiliation fee or used for election purpose than the advancement of the socio-economic interests of the employees.

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28 WORKPLACE FORUMS

28.1 INTRODUCTION

The workplace forum system is believed to be an innovating aspect of the new labour law dispensation and a concrete manifestation of the concept of workplace democracy. In terms of this system employees obtain joint consultative powers in the management of the undertaking in regard to matters concerning them. In South Africa the concept is relatively new but the concept of work councils is well-known internationally. The Ministerial Task Team in South Africa expressed the view that in order for South Africa to compete successfully in international markets it was necessary to produce products of high quality and to improve productivity levels but this would mean that substantial restructuring was required. The team then suggested that the system of adversarial labour relations currently in force was unsuitable for such restructuring and the team further suggested that the above mentioned problems could be resolved by workplace forums. Workplace restructuring which provides for participating structures, has been successful in countries such as Japan and Germany.

The task team stated that workplace forums are designed to facilitate a shift at the workplace from adversarial collective bargaining on all matters to joint problem solving and participation on certain subjects. In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realization that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards. Workplace forums are designed to perform functions that collective bargaining cannot easily achieve the joint solutions of problems and the resolution of conflicts over production. Their purpose is not to undermine collective bargaining but to supplement it.

28.2 DEFINITION OF CONCEPTS

“Employee” in the context of a workplace forum means any person who is employed in a workplace except a senior managerial employee whose contract of employment or status confers the authority to do any of the following in the workplace:

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• Represent the employer in dealings with the workplace forum.

• Determine policy and take decisions on behalf of the employer that may be in conflict with the representations of employees in the workplace.

283 ESTABLISHMENT OF A WORKPLACE FORUM

There must be at least one hundred employees who must be employed by the employer in the workplace where the workplace forum must be established.

An application must be made to the CCMA and a representative trade union may apply for the workplace forum.

The commissioner of the CCMA then establishes the workplace forum by means of collective agreement once everything is okay. Further if a workplace has more than one thousand employees, members of a workplace forum may appoint from their ranks a full time member.\(^63\)

The LRA of 1995 does not state that the workplace forum acquires legal personality after establishment. As a result, workplace forums are entitled to any contractual rights and may not acquire any assets, debts, rights and obligations unless legal personality is acquired as a voluntary society through the common law.

284 FUNCTIONS OF A WORKPLACE FORUM

2841 GENERAL FUNCTIONS

It is to promote the interests of all employees in the workplace irrespective of whether or not they are members of the trade union and to increase efficiency in the workplace\(^64\) on the following matters:

\(^{63}\) S 92(1) of the Labour Relations Act 66 of 1995.

\(^{64}\) S 79(c). “A workplace forum is entitled to be consulted by the employer with a view of reaching consensus.”
• restructuring of a workplace which includes the introduction of new technology and new operational methods;

• changes in the organization of work;

• mergers and transfers of property, which could affect workers;

• exemptions from any collective agreements;

• criteria for merit increases or the payment of bonuses;

• education and training;

• product development plans; and

• the promotion of exports.

Further before any proposal is implemented by the employer, the employer must consult with the workplace forum and attempt to reach consensus and during consultations the workplace forum must be afforded the opportunity to make representations and to suggest alternative proposals to the employer. If consensus is not reached the employer must invoice the agreed procedures to resolve any differences before implementing his proposals.

2.9 COLLECTIVE AGREEMENTS IN KENYA

A collective agreement shall not be effective until it has been accepted for registration by the Industrial Court. The Minister shall furnish the Industrial Court with a copy of every collective agreement that has been lodged with him pursuant to this section and he may also furnish the court with such information and comments as he considers necessary. According to the Labour Relations Bill 2007 (by the task reform team) an employer, group of employers or employers’ organization and a trade union may conclude a collective agreement providing for:
The conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties and the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties. A party that has referred a dispute to conciliation in terms of an agreement contemplated above is not required to refer it to the Minister for conciliation.

An award in an arbitration in terms of a collective agreement contemplated above is final and binding and is subject to appeal on points of law to any court, may also be set aside by the National Labour Court on any ground recognized in law or may be enforced by the National Labour Court. A collective agreement shall continue to be binding on an employer or employees who are parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer associations. The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

According to the Labour Relations Bill of 2007 (the bill that was proposed by the task reform team) a trade dispute may be reported to the Minister in the prescribed form and manner by or on behalf of a trade union, employer or employers’ organization that is party to the dispute. Within twenty one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute unless the conciliation procedures in an applicable agreement binding on the parties to the dispute have not been exhausted or a law or collective agreement binding upon the parties prohibits negation on the issue in dispute.

291 TRADE UNIONS IN KENYA
2911 LABOUR IN PRE-BRITISH KENYA

In the coastal part of Kenya agricultural and domestic work, artisan assistance and such other labour was mostly performed by African slaves who worked on the property of slave owners. The slave was treated like domestic animals and could be purchased, sold, punished, beaten and killed at the whim of their owners. Whenever there was unbearable oppression the slaves resist it by becoming insolent, slow working and using such other methods. Occasionally they did run away and in extreme cases, rebelled against the slave owners and such runaway and
rebellious slaves had established their own stockades or fortified villages around which they had built strong fences and dug wide trenches.65

One such fortified village was at “Fuladayo”. This was a sign of defiance to the slave owners and their government. Other skilled jobs such as those of carpenters, masons and blacksmiths were generally performed by Arab artisans who had their own brotherhood organizations for different trades. There were also a few Indian artisans and some shop assistance who were also Indians employed by Indian shop-keepers.

However on the whole the economy on the coast was slave economy, in which African slave labour was predominant. On the other hand on the interior of Kenya the labour performed in the free African tribal territories was both in the interests of the individual and his family and of the community as a whole.

The individual was generally not employed by anyone for exploitation. There was mutual help in jobs which could not be performed single handed or by a single family. Common and communal tasks such as defense, “boma”66 building and road building were performed voluntarily and without remuneration. There was generally no exploitation of man or woman. This was done for the common interest of the community where everyone made a contribution in labour. This was sort of African socialism in which the economy was subsistence economy. Slavery as an institution did not exist in the free African tribal territories. They (free African tribal territories) were able to defend themselves against slave-raiders. The slave raiders were even afraid of passing through these areas. But with the advent of British Imperialist colonial rule, both the slave system of the coast and the voluntary labour system of the free African tribal territories were replaced by a system of forced wage-labour. In this system the slaves of the slave owner and the free tribe’s men all became forced laborers.

They were first deprived of land and then compelled to work under horrible conditions for a meager wage for a settler or another employer. Slave economy and free tribal subsistence economy were both replaced by colonial capitalist economy which was met with resistance

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65 Singh History of Kenya’s Trade Union Movement (1952).
66 House building.
right from the beginning. In the coastal area after the abolition of slavery the ex-slaves preferred the new forced labour system considering it a lesser evil than slavery in as much as they opposed it whenever they could. In the interior of Kenya the free peasants whose lands were seized and alienated to the colonialists, were compelled to become forced laborers. The choice placed before the African people at that time was either to live in complete subservience to the colonial rulers or due as a result of punitive expeditions organized by them but the African people chose the path of resistance.

In order to break the African resistance the imperialists had often previously used Africans of one tribe against Africans of another tribe. By bringing more Indians and other peoples from East Africa the colonialists were trying to use people of slave countries of theirs against people of another slave country of theirs. The Africans of different tribes, the Indians and the Arabs, after they had seen through imperialist game of “divide and rule” ultimately became united to defeat the imperialist colonial rule both in Asia and in Africa in order to fight against forced labour, against foreign accusation of the country, the African people wherever possible resorted to armed harassing of the British authorities, attacks upon laborers building the railway and boycott of work for settlers and other employers.

All this resistance was sporadic but secretly organized sometimes with the tacit consent of a patriotic chief. With the intention of breaking African resistance the Imperialist rulers occasionally resorted to punitive expeditions for example: direct statutory compulsion, imposition of hut and poll tax, use of chiefs to recruit their people as labourers, making use of the kipande (identity card) registration system for controlling movements of African labourers and for locating and identifying them. Many labour legislation promulgated during the initial period of the British rule, for example:

- Anti-slavery edict of 1891.
- Vagrancy ordinance 1896.
- Hut tax ordinance 1901.

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67 Singh *History of Kenya’s Trade Union Movement* (1952) 1.
• Labour rules 1907 (which laid down that officers should do their best to supply labourers to settlers and other employers amongst other conditions of employment.

The result of all this labour legislation was that the employment of every African employee whether forced or otherwise was a contract of service enforceable by penal sanctions, any infringement of which was a criminal offence punishable by fine and or imprisonment. The “kipande” was a big weapon in the hands of the authorities for enforcing the colonial system of forced labour. The Africans considered it a mark of new kind of slavery. By the middle of 1914 the British rulers by use of military and administrative force, by use of Indian and other foreign labour and by use of forced labour of the African people, were able to build and regularize the running of the railway and set up the administrative machinery.

It is important to mention that various strikes took place before the First World War which was between German and British Imperialists blocs. There was the railways workers strike in the 1900 in which certain privileges enjoyed previously by staff was withdrawn. The reaction was an immediate strike initiated by Indian and African workers. The strike began in Mombasa (Kenya) and spread to other centers along the line. The striking leaders were then dismissed and sent away from East Africa. However the dispute was settled by restoring most of the privileges. In December 1902 fifty African police constables went on strike in Mombasa for removal of their grievances, it lasted for 3-4 days and it ended on the assurance of the authorities that the demands of the policemen would be considered.

292 DEFINITION OF TRADE UNIONS IN KENYAN CONTEXT

According to Trade Unions Act Chapter 233.

“‘Trade union’ means an association or combination whether temporary or permanent, of more than six persons (other than a staff associations, employees association, or employees organization not deemed to be a trade union under section 3 the principle objects of which are under its constitution the regulations of the relations between employees or between employers or between employees and employees, or between employers and employers, whether such combination would or would not, if this Act or any Act thereby repealed had not been enacted have been deemed to have been unlawful combination by reason of same one or more of its purposes being in restraint of trade.”

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68 Identity card.
69 Singh *Trade Union Movement* 3-7.
70 Trade Unions Act Chapter 233.
The trade union in Kenya began in the 1900’s but it took almost 50 years before the first real trade union movement became a permanent feature of the industrial relations scene. A number of factors contributed to this and this include:

- The strong opposition of the elite settler employers.
- The small number of wage earners and their lack of technical know-how in the trade union organization.
- The authoritarian nature of the colonial political system.
- The restrictive labour laws.
- The high rate of illiteracy among the wage earners.

Important changes occurred which contributed to the emergency of trade unions between 1900 and 1946 and these include the impact of the two world wars, the enlistment of soldiers from East Africa and their intensive training not only in arms but also as carpenters, masons, drivers etc had its effects on the workers. Their experiences abroad in places like Italy, Egypt, India and Burma had shown them new ways of life and after the war they had to return home but after seeing the conditions of work in other parts of the world and with the intensive training they were given, these people could not be expected to come back and be content with the terms and conditions of work at home. Most of them became militant leaders of workers but the colonial government did not give them a chance to organize themselves. There was also increased concentration of wage-earners in the agricultural, manufacturing and other sectors which lead to a greater awareness amongst wage earners of their economic plight and this awareness led to the formation of the workers organization in the 1940s.
THE ENACTMENT OF THE FIRST TRADE UNION LAW

ORDINANCE NO 35 OF 1949

One of the stipulations of the Ordinance was that if no application for re-registration is made within one month from the commencement of this Ordinance by any trade union to which the Ordinance applies, the registrar shall cancel the registration of such trade union and thereupon the trade union shall be an unregistered trade union. It also provided that a cancellation of a registration under this section shall not be subject to appeal or be called to question in any court.

Thus in 1949 a trade union registration ordinance, Compulsory Labour Act and a Deportation Ordinance were introduce to give the government strong powers of control over unions and workers. The government was overtly following a policy of union recognition but only with a limited and well controlled sphere of activity. In order to discourage the development of the trade unions and limit their political power during the early 1950s, the colonial government:

- sponsored the establishment of staff associations and work committees;
- provided close control over internal activities of the unions through the registrar of trade unions with the powers to de-register the unions; and
- establish statutory wage determination machinery by forming wage councils for various industries.

In spite of restrictive labour laws trade unions developed steadily and between 1949 and 1964 a total of 4 trade union centers were formed and registered:

- East African Trade Unions Congress (EATUC) in 1949
- Kenya Federation of Registered Trade Unions (KFRTU) in 1952
- Kenya Federation of Labour (K.F.L) 1955
- Kenya Africa Workers Congress
Because of the absence of the necessary machinery for consultation, the wage earners resorted to strikes and other forms of civil disorder and all these strikes throughout the country were organized by groups of workers without formal unions.

In 1947 the workers in Mombasa demanded increased wages and better working conditions and the demands could not be put to any particular employer and so they were presented as though they were political demands to the government and as a result there were riots and looting in Mombasa. As a result, the colonial government appointed a commission of inquiry to look into these strikes. The finding of the commission were that the cost of living around the port had risen sharply without a corresponding rise in wages and there was no machinery for consultation and recognition and the commission recommended an increase in wages and that immediate steps be taken to create the necessary industrial relations machinery.

In the later part of 1950, Kenya Federation of Registered Trade Unions (K.F R.T.U) was formed and its aims were to fight for an increase in wages, better terms and conditions of service and complete freedom of Association. Further Kenya Federation of Labour (KFL) was formed in 1955. After the declaration of emergency in 1952 the major political party Kenya African Union (KAU) was banned but the trade unions were allowed to function. KFL took the role of substitute for the persecuted nationalist party as soon as the emergency was declared. During the emergency which lasted six years KFL was the spokesman politically and in the Industrial field.

Kenya African National Union (hereafter referred to as KANU) party later formed the government and the KFL secretary general was appointed as Minister of Labour and immediately started warning unions that their independence may be curtailed in the interests of economic growth. Therefore in 1962 the government, the employers and the unions met and drew an industrial charter. According to this charter management re-affirmed that it would recognize and bargain with the unions and the unions committed themselves to following the established machinery. This charter assisted in the spread of unionism in Kenya and the continuation of the system of industrial relations which had already been established.

In 1962 a confrontation developed in the elections which preceded independence and this confrontation concerned the question of trade union sponsorship of its own political candidates and the result of the decision that the unions would not enter candidates or behave
like political parties and this marked a clear departure of unions from the political scene in favour of the economic sphere of activity. KFL remained the only true national organization for almost a decade. However in the early sixties a fierce rivalry emerged in the labour movement and it was caused by those opposed to KFL leadership who wanted KFL to disaffiliate from International Confederation of Free Trade Unions (hereafter referred to as ICFTU) because (ICFTU) was pro-west movement.

They did not like the KFL’s proposal on economic planning. Eventually the rivalry led to the formation of the Kenyan African Workers Congress (KAWC) in 1964. Rivalry between KFL and KAWC intensified. In an effort to reduce the friction and negate international union influence the government de-registered both KFL and KAWC in 1965. The government also cancelled all affiliations of the unions with bodies outside Kenya. In their place, the government established a single organization, the Central Organization of Trade Union (COTU) by 1996 which is still in operation as at today the year 2007. COTU had twenty nine affiliated unions representing almost over 400,000 workers. The main functions of COTU are:

- To assist, service and coordinate the activities of its affiliates.
- To represent the affiliates interests before government and other outside bodies.

COTU has not been very effective over the years mainly as a result of tribal rivalries and other internal problems. Most of the trade unions do not consider COTU as an effective source of assistance, particularly in the areas of collective bargaining and the settlement disputes. Whereas the individual trade unions have been growing in size, strength and maturity, the same cannot be said for COTU itself.71

2 9 4 ORGANISATIONAL RIGHTS IN KENYA

Organizational rights may be described as “a floor of legal rights extended to trade unions to enable them to function more effectively and to build up support in the workforce”. The purpose of extending these rights to registered trade unions is to:

- level the playing field between employers and trade unions;

promote the right to freedom of association;

eliminate some causes of unnecessary workplace conflict;

promote and protect majoritarianism; and

in South Africa, these rights are upheld so as to assist trade unions to participate in the LRA’s collective bargaining regime.

The Trade Unions Act (Cap.233) outlines the organizational rights and liabilities of registered trade unions in Kenya. These rights and liabilities of registered trade unions are outlined in part V of Cap.233 and they include:

- Immunity from civil suit in certain cases. Trade unions may not be sued or engaged in legal proceedings against them over actions not directly related to an employment relationship.

- Immunity from legal suits in any court in respect of any tortuous act alleged to have been committed by or on behalf of the union.

- Liability on any contract entered into it or by its agent unless the contract is void or unenforceable by law.

- The objects of a trade union that are in restraint of trade shall not be deemed to be unlawful so as to render any member of the trade union liable to criminal prosecution for conspiracy or otherwise; or so as to render void any agreement or trust and.

- The right to sue and be sued and be prosecuted under its registered name.

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72 S 22(1) of the Act states that “no trade union shall enjoy any of the rights, immunities or privileges of a registered trade union until it is registered”. 

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The current industrial relations practice in Kenya has been very much the product of post independence developments. At independence the legislation was remodeled to accommodate the needs of an independent country, thus the system that is now in operation could rightly now be described as a blend of voluntarism and government concern for development. Owing to the nature of the union organization in Kenya, i.e. emanating from top to bottom, the unions felt that groups were easier to organize because they had already been organized. The only problem was the recognition by the management and to overcome this hurdle they sought some form of compulsory machinery.

It should be understood that recognition rights is a very sensitive issue in Kenya industrial relations. Even after recognition rights have been settled, there is always infighting within unions, culminating in new groups which continuously seek recognition rights. The infighting is mainly caused by greed for power and material wealth amongst union officials, desire to enter into national politics thorough labour movement by some union officials. It is interesting to note that the real power struggle that causes the infighting in the labour movement is to be found in COTU for instance in 1986 in an effort to silence his opponents within COTU the then Secretary General fired his deputy and later the government stepped in and reversed the decision. It is a pity that it has not been possible to resolve the recurrent infighting within the labour movement through the union structure because it also emanates from top to bottom.

Another important feature of the industrial relations is that section 6 of the Trade Disputes Act provides for compulsory third party arbitration. Casual observers of the Kenya Industrial relations scene feel that compulsory arbitration has denied the employers and the unions the opportunity to voluntarily settle disputes, in that there is a tremendous pressure on trade unions from the employees to refer nearly all trade disputes to the Industrial Court. However there is still a problem in view of the fact that the court is already with inundated with dismissals cases and other issues thus the effectiveness of the court in disposing of cases with speed would be seriously impaired if more cases are referred to the court. The Kenya government has continued to support compulsory arbitration for two purposes which include to guarantee equity for all parties and industrial peace, as a form of government control over wages. The government income policy is being enforced through the Industrial Court.
Collective bargaining in Kenya is mainly carried out either on single plant basis or in a multi-employer approach. Though the process of collective bargaining is not specifically provided for in any particular comprehensive law we have to look elsewhere for the actual procedures. There are two main sources of rules of procedure in collective bargaining, namely customs derived from the practices of those involved in contracts of employment and the principles of industrial relations. The later are contained principally in the Industrial Relations Charter which is a tripartite memorandum of understanding signed on behalf of employees, employers and government. However the Trade Unions Act (Cap.233), Trade Disputes Act (Cap.234) and the Industrial Relations Charter provide some conditions which parties must fulfill before engaging in collective bargaining.

The conditions as stated in section 5(2) of the Trade Disputes Act (Cap.234) include:

- a requirement that the trade union must be registered;
- the trade union must have a simple majority of 51% of unionisable employees in the company which it seeks to negotiate with; and
- there should be no rival union.

Collective bargaining if successful, usually results in a collective agreement defined in the Trade Disputes Act as “an agreement made between a trade union and an employer or organization of employers which relates to terms and conditions of employment, whether or not enforceable in law and whether or not concluded under machinery for negotiation”.

Collective bargaining has developed as central feature of industrial relations system which operates essentially on voluntary basis. The present practice of collective bargaining in Kenya was established under the industrial relations charter of 1962 amended in 1980, It outlines responsibilities of the union and management, has a model recognition agreement, establishes
the procedure to be followed where there is a disagreement between the unions and the management without resort to strikes and the principles of redundancy.73

Over the years, FKE has spearheaded the negotiation and signing of various collective bargaining agreements on behalf of its members at all levels vis-à-vis, company, industrial and sectoral levels. Due to its strong financial base and reliable government support at all times, the federation has had the upper hand in collective bargaining over the trade unions.

2 9 7 FORMS OF COLLECTIVE BARGAINING IN KENYA

(a) Wages Councils

This is the first form of bargaining council. This is where the employers and the workers are equally represented, normally with three independent members representing other interests appointed by the Minister of Labour. The wages councils are essentially intended to establish the minimum statutory terms and conditions of employment for the workers who may not be represented by trade unions, the terms and conditions of employment fixed through this form of bargaining are referred to the Minister for labour before they are gazetted in a form of a government legal notice. In addition there is a regulation of wages (general) order which applies to all industries and trades with exception of agricultural and plantation industries. The general wage order and other orders for specific industries provide for the minimum terms and conditions of employment which generally includes wages, hours of work, overtime and housing allowance, safari allowance, gratuity etc.

(b) Joint Negotiating Committees or Councils

This is the second form of collective bargaining where the representatives of the union and management negotiate and reach an agreement on terms and conditions of employment at their own level meeting as a committee or council. Voluntary collective bargaining may be organized and conducted at company/organizational level or through a registered association or an informal group of employers who recognize a particular union for the purposes of negotiations. Negotiations through the employer associations or groups are fairly common in Kenya today.

These associations or groups have the following advantages: Promotes the application of the agreed terms and conditions of employment across a wide section of a particular industry or trade, it stabilizes not only the wage development but also discourages an adverse or unnecessary labour mobility within the industry. It further reduces the negotiating workload for the union officials as it enables them to achieve a wider coverage of workers within a small number of collective agreements. Presently there are thirteen employer associations which negotiate directly with relevant trade unions on terms and conditions of employment on behalf of their members with the assistance of the federation of Kenya e.g. Kenya bankers (employers) association. Some of these associations are registered as trade unions and others are registered as societies or companies.74

The process of collective bargaining is not provided for in any particular comprehensive law, the actual procedures have to be looked elsewhere. There are two main sources of rules of procedure in collective bargaining, namely customs derived from practices of those involved in contracts of employment and principles of industrial relations. The later are contained principally in the industrial relations charter, which is a tripartite memorandum of understanding signed on behalf of employees, employers and government.75 In as much the collective bargaining system in Kenya is fairly free from the Government interference, there are many good reasons why the Government must directly be involved in the determination of terms and conditions of employment through collective bargaining. Some of these reasons include:

- The Government being the largest single employer with a huge expenditure taken up by the wages/salaries of its employees and is also a large investor in or through the parastatals organizations.

- It must see through the economic planning that the wage development does not have negative effects on the generation of employment opportunities for the growing population.

74 Aluchio et al Trade Unions 85.
75 Aluchio et al Trade Unions 86.
• It must ensure that healthy industrial relations are maintained in order to avoid any possibility of industrial unrest that may threaten the security and economy of the country. It is the above reasons that the government amended the trade disputes Act in 1971 to empower the Minister for finance to issue from time to time wages guideline to the Industrial Court depending on the state of the economy. The guidelines are used to ensure as much as possible that wage increases granted through collective bargaining do not hamper the growth of wage employment in a country like ours (Kenya) where the age earners form a very small part of the population.

298 COLLECTIVE LABOUR DISPUTE IN KENYA

The Trade Dispute Act defines a strike as “the cessation of work by a body of persons employed in any trade or industry acting in combination or concerted refusal, or refusal under a common understanding of any number of persons who are or have been so employed, to continue to work or to accept employment and includes any interruption or slow down of work by any number of persons employed in any trade or industry acting in concert or a common understanding.

(a) Types of Strikes

These can be grouped into two:

1. Wild-cat strikes
2. Lawful strikes

The most common type of a strike in Kenya is the wild-cat strike which is illegal.

(b) Protected Strikes and Lockouts

According to the Labour Relations Bill 2007 a person may participate in a strike or lock-out if

(a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;
(b) The trade dispute is unresolved after conciliation, under this Act or as specified in a registered collective agreement that provides for the private conciliation of disputes and seven days written notice of the strike or lock-out has been given to the other parties and to the Minister. Further a party to a dispute that has received notice of a strike or lock-out may apply to the National Labour Court to prohibit the strike or lock-out as a matter of urgency if:

(i) the strike or lock-out is prohibited under this part or

(ii) the party that issued the notice has failed to participate in conciliation in good faith with a view to resolving the dispute.

The National Labour Court in granting relief in respect of any application made under section (1)(b) above, direct the parties to engage in further conciliation in good faith with a view to resolving the dispute. A person does not commit a breach of contract or a tort by taking part in a protected strike or a protected lock-out or further an employer may not dismiss or take disciplinary action against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.

According to the current Trade Dispute Act cap 234 where it appears to the Minister that there is an actual or a threatened strike or lockout arising out of a trade dispute in any section of industry and the Minister is of the opinion that there is a machinery for negotiation or arbitration for the voluntary settlement of disputes in that section of industry, the Minister may by order require the parties to that dispute to make use of that machinery and declare any strike or lock-out in that section of industry to be unlawful.

It is important to not that in Kenya where a strike does not break immediately a meeting is necessarily held between the local labour officer, the employer and the union. This would entail negotiating an agreement to break or end the strike. This agreement is commonly referred to as “a return to work formula”. At this stage the parties should be careful not to involve themselves with settling grievances. Note may be taken of the employees grievances/disputes but their resolution should be spared for another forum. The return to

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76 S 77(1) Labour Relations Bill 2007.
work formula re-establishes the parties’ machinery and brings back normality. Common contents of a return to work formula are:

- that all striking workers resume their duties immediately;
- that there will be no victimization;
- that in future, parties will adhere to the established machinery and the law;
- that the issues raised by the workers will be dealt with in accordance with the parties established machinery;
- that there will be no pay for the hours/days the employees were on strike.

299 THE MINISTRY OF LABOUR

The Ministry of labour is the agency responsible for the provision, elaboration and implementation of labour laws and the regulation of industrial relations generally. It is also concerned with the enforcement of labour standards as well as the provision of conciliatory services to employees and workers. Within the Ministry of labour there is an industrial relations division. When parties fail to resolve their differences, the labour laws require that such disputes be reported to the Minister of labour for any action he deems fit. It is after the dispute is referred to the Minister that the Industrial relations division steps in. The Ministry of labour Intervenes in industrial disputes in the following ways:

- Conciliation with a tripartite Committee.
- Arrangements for determining methods of conciliation.
- Arrangement to enforce recognition orders through fines against employers who fail to comply with recognition order.
• Arrangement for furnishing Industrial Court with a copy of every collective agreement that has been lodged with him by parties etc. In so far as the state is concerned, these arrangements are what ostensibly may appear as good intercession practice by the government in the industrial relations system. But it should be understood that the arrangements are not only powerful variables in the industrial relations process but also a dominant source of delay. Frustration and hopelessness on the part of other parties, effectively militated by concomitant “red tape” and apparent inexperience of some of those involved in the industrial relations process in the Ministry of Labour.77

The Ministry of labour employs officers who act as conciliation officers. The labor officers in their conciliatory role assist employers and trade unions to resolve their differences and give advice when needed. Normally in case of “interest” disputes the minister appoints a conciliator and in “rights” disputes he appoints an investigator only if conciliators fail or if the parties reject the investigators recommendations then will the minister refer the matter to the Industrial Court.

2 9 10 THE GOVERNMENT SERVANTS (NEGOTIATION PROCEDURE) REGULATIONS

According to Trade Disputes Act chapter 234 there shall be a council to be known as the Central Whitley Council, which shall carry out the functions set forth in regulation 4 in relation to senior staff. One of the main functions of the Central Council is to secure by means of regular discussion the greatest measure of cooperation between the government, in its capacity as an employer, and the senior staff in all matters affecting the civil service. Further they do also the negotiation of the general terms and conditions of service of senior staff, including salaries, allowances, pensions and other benefits.

The Central Council may also establish such standing or special sub-committees as may be required with appropriate terms of reference and may delegate to any such sub-committee any of the functions of the Council. There shall also be a Council to be known as the Civil Service Joint Industrial Council which shall carry out the functions set forth in regulation 8 in relation to subordinate council. Where any trade dispute comes before the Central Council or the

77 Aluchio Trade Unions in Kenya 58.
Industrial Council, and the Council cannot come into an agreement, either side of the Council may report the trade dispute to the minister in accordance to section 4 of the Act.

2911 THE LABOUR INSTITUTION BILL 2007

The Labour Institution Bill, 2007 awaits to be enacted as an Act. This Act shall come in force on such date as the minister may by notice in the gazette appoint. The bill provides for the National Labour Board which shall consist of a chair person and deputy person who have expertise in labour relations, the general secretary of the most representative federation of trade unions, the chief executive of the most representative federation of the employers organization which will include nominees and two other independent members.

Some of the functions of the board include:

They are to advise the minister on:

• all matters concerning employment and labour;

• legislation affecting employment and labour;

• any matter relating to labour relations and trade unionism;

• the appointment of wage councils;

• the general state of employment, training and manpower development in the country;

• may conduct research into labour, economic and social policy.

Further the Labour Institution Bill 2007 has established the National Labour Court (hereafter referred to as the NLC). Subject to the constitution the National Labour Court, is a superior court with the same authority inherent powers and standing in relation to matters under its jurisdiction as the High Court has in matters before it. The National Labour Court is a court of record with jurisdiction all over Kenya. The NLC may refuse to determine any dispute before
it other than an appeal or review if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation. The NLC is both its original and appellate jurisdiction and it has all powers of a subordinate National Labour Court under this Act.

2912 SUBORDINATE LABOUR COURTS

The bill also provides for a subordinate Labour Court which has jurisdiction throughout Kenya which has exclusive jurisdiction and powers in any criminal proceedings instituted by or on behalf of an employer or employee arising out of their rights and obligations in terms of their employment relationship or any Labour Act.

2913 COMMITTEE OF INQUIRY

The minister may by notice in the gazette, appoint a committee of inquiry to inquire into any matter which appears to the minister to be connected with or relevant to any trade disputes of any type or class, whether or not any such dispute has been reported to the minister under this Act. The committee will report any matter referred to it in the Act and shall submit to the minister. Subject to section 24 the minister shall order the publication of any report made by a committee of inquiry in whole or in part and in such manner and at such time as the minister thinks fit. The minister shall also establish a general wages council and an agricultural wages council.

2914 TRADE DISPUTES CAP 234

Definition of Trade Dispute

“Means a dispute or difference between employers and employees, or between employees and employees or between employers and trade unions or between trade unions and trade unions, connected with the employment or non-employment or with the terms of employment or with the conditions of labour of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements and it also includes apprehended trade disputes.”

Subject to subsection (4) any Trade Dispute Act, whether existing or apprehended disputes, may be reported to the minister by or on behalf of any party to the dispute. Further it provides that any trade dispute involving the dismissal of an employee or the termination of any

78 S 40(1) of the Labour Institution Bill (2007).
contract of employment shall be reported to the minister within 28 days of the dismissal or termination of employment. The minister shall consider any trade dispute reported to him and shall consult a tripartite committee and after such consultations may take any of the trade dispute one or more of the following steps as seem to him expedient for promoting a settlement.

2915 DISPUTE RESOLUTION

According to the proposed Labour Relations Bill of 2007, a trade dispute may be reported to the minister in the prescribed manner by or on behalf of a trade union, employer or employers’ organization that is a party to the dispute. Any trade dispute concerning the dismissal or termination of an employee shall be reported to them minister within ninety days of the dismissal or any longer period that the minister, on good cause, permits. The respondent may then file a replying statement in the prescribed form.99 Within twenty one days of a trade dispute being reported to the minister as specified under section 62, the minister shall appoint a conciliator to attempt to resolve the trade dispute unless he has other reservations not to do so. Where a party is aggrieved by a minister’s decision under this section, that party may refer the matter to the National Labour Court under a certificate of urgency. If a trade dispute is settled in conciliation the terms of the agreement shall be recorded in writing and signed by the parties. The bill further provides that a trade dispute is deemed to be unresolved after conciliation if the conciliator issues a certificate that the dispute has not been resolved.

2916 ADJUDICATION OF DISPUTES (THE LABOUR RELATIONS BILL 2007)

The LRB80 provides that if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the National Labour Court in accordance with the rules of the National Labour Court. The Arbitration Act shall not apply to any proceedings before the National Labour Court. Further the Labour Relations Bill provides that a trade dispute may only be referred to the National Labour Court by the authorized representative of an employer, group of employers, employers’ organization or trade union.

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80 S 73 of the Bill.
CHAPTER 3
FINDINGS AND COMPARATIVE ANALYSIS

3.1 STRIKES

Due to great labor unrest in South Africa before independence strike action continued to increase at an alarming rate. This resulted to the ministerial task team being formed and one of the findings among others, was that in as much as the strike action was provided in the interim Constitution the result was that most strikers were dismissed and were not able to be reinstated and no protection was afforded to the participants in legal strikes and lock-outs and this indicated a great flaw in the Constitution. However things have now changed after independence with proper laws being promulgated and the right to strike is fully recognized provided the prescribed requirements are complied with.

Further South Africa has various forms of strike action that are practiced as opposed to Kenya and the primary work stoppage remains the most visible aspect of collective action unlike strikes in Kenya which are of a wild cat in nature and these strikes are illegal. The overtime bans in South Africa are used in a wide variety of contexts which is a strategy mainly by the COSATU. The new Labour Relations Act has harshly stated that overtime bans are strikes whether overtime is voluntary or part of the employee’s contract. However this tends to interfere with the freedom of the employee because to work overtime should be at the free will of the employee and to take that right away is to interfere with the constitutional right of the employee.

Strikes in South Africa can be said to be growing in power and strength and this can be seen in the manifestation of the secondary strikes which occurs when the employees who are not employed by the same employer strike while the primary strike is in progress, in order to support the employees who initiated the action. These types of strikes show solidarity among the workers and a strong opposition to malpractices of the employers.

The ultimatum that is issued by the employers in South Africa to the striking employees shows effort and concern of the employers to avoid strike action at all costs. In Kenya the new National Labour Court Bill that was recommended by the task reform team, emphasis’s that
parties who are in dispute and are contemplating strike action must first conciliate and try to settle the dispute. The return to work formula that is embarked by the Kenyan labour law system shows a toughness and direct intervention by the government to force the employees to resume work. One can argue that this action interferes with the freedom of expression.

The current Constitution in Kenya does not provide for the right to strike explicitly, but Article 80 (1) protects not only the right to strike, but also activities serving the purpose of the union, such as all the activities designed to protect the individuals interest in which case the right to strike may be implied in its interpretation.

In September 2002 the “Constitution of Kenya Review Commission” appointed by the parliament and the president, submitted a draft bill of the Constitution of the Republic of Kenya to the National Constitutional Conference (NCC) and among major subjects of the debate includes the development from an individually defined European Human Rights tradition towards the recognition of collective and solidarity rights. If such rights are accepted the strike action in Kenya would be properly promulgated in the statutes.

Both South Africa and Kenya have the facility which offers the opportunity for conciliation for the striking parties before embarking into strike action and the striking parties participating in a protected strike are protected from dismissals unless they are both found with misconduct. However in Kenya the Trade Dispute Act cap 234 has provided that where it appears to the minister that there is an actual or threatened strike or lock-out arising out of a trade dispute in any section of the industry and the minister is of the opinion that there is a machinery for negotiation or arbitration for voluntary settlement of disputes in that section of industry, the minister may by order require the parties to that dispute to make use of that machinery and declare any strike or lock-out in that section of industry to be unlawful.

3 2 LABOUR DISPUTE RESOLUTION MECHANISM

South African Labour Relations Act encourages a voluntary and orderly collective bargaining between labour and management by democratizing the workplace to infuse policy decisions with greater legitimacy and confer rights which ensure individual and collective justice. However it is interesting that in South Africa, those granted organizational rights are not protected against dismissal according to section 65(1)(c) of the LRA. At ground level, the
LRA has provided for CCMA structure which assumes many of the arbitral function of the former Industrial Court. Then we have the Labour Court and a specialized Labour Appeal Court.

In South Africa there is also the con-arb provision which has been made in order to expedite procedure in the case of a limited range of disputes and this type of procedure should be adopted in Kenya to reduce the number of case loads in the courts.

In Kenya once the internal provided procedures have failed the dispute is then reported to the minister who shall then consult with a tripartite committee and advice the parties involved in the dispute accordingly. This shows that the government in Kenya is still controlling to a great extend the labour industry. However in the new Labour Relations Bill of 2007 that is yet to be enacted, it has provided for additional courts where disputes may be referred to if they are not resolved under the minister through conciliation.

Further the National Labor Board which has been advocated by the task reform team can be said to be equivalent or similar to the NEDLAC of South Africa because it involves experts of labour laws from both the trade unions and the employers’ organization and other independent members presumably from the government. This can be seen as positive steps undertaken by both countries to improve the labour relations of their own country.

Within the private sectors of South Africa we have institutions known as bargaining councils. These councils are usually accredited by the CCMA and do have jurisdiction to handle disputes within that sector. Whereas in Kenya we have no bargaining councils but disputes are resolved through the Minister of Labor failure to which matters are taken to the Industrial Court or parties may opt for private arbitration.

In Kenya the Trade Disputes Act does not exclude the right of litigants suing in open court. On the contrary section 14(9) excludes trade disputes in the public sector from the jurisdiction of the Industrial Court and as management staff is excluded from membership in trade unions, the Industrial Court does not deal with the white collar workers concerns.

Thus a significant number of labour cases in the broader sense is handled by ordinary courts, i.e. the High Court, either from the first instance onwards or in a few cases in appeal within
the ongoing general labour law reform. A task force to review the labour laws has adopted a draft act on labour institutions, introducing a National Labour Court, having the same prerogatives as the High Court on labour law issues.

Further the South African private arbitration deals with a wider range of disputes as opposed to CCMA and Labour Court. This diversion of dispute handling with limitation to different labor institutions enables the judges or the presiding officers to concentrate on issues at hand and be more effective in discharging their duties. In as much as there is organized labor dispute mechanism, the Labour Court system in South Africa has faced and is facing a lot of challenges. There is no consistency in the judgment and there are delays in delivering court decisions. However a task reform team has put together recommendations stating that the Labour Court should be absorbed by the High Court and the labor court of appeal to be absorbed by the Supreme Court of Appeal.

In my opinion there is a danger when these courts are merged together because it will not resolve the issue of congestion of cases but instead aggravate the same. Labour issues are wide and the society at large is formed up with working class people who need their own institutions to deal with labor matters. More learned and skilled officials should instead be given these Labour Court positions and intensive training of staff should be encouraged.

3.3 COLLECTIVE BARGAINING

Bargaining councils are very popular in South Africa and most of the bargaining councils registered are in the private sector. In South Africa centralized bargaining within a specific sector of the economy generally takes place in regional or national bargaining councils. The centralized bargaining will protect non-unionized employees who would have been exploited by companies and this gives the labour market security and stability and reduces high rate of unemployment. However a disadvantage of centralized bargaining in South Africa is that small businesses are left out and are liquidated due to not complying with agreements and this may increase unemployment. If this same system is applied in Kenya unemployment would be very high as there is a big percentage of the population in the labour market who are of small businesses in the informal sector. In Kenya this small businesses are not governed by the bargaining councils and most of them are not members of the trade union.
Kenya’s collective bargaining is mainly carried out on single plant basis or in multi-employer approach. It is important to note that the process of collective bargaining is not specifically dealt with in the Kenyan labour law. This indicates a lack of proper structure or machinery to deal with collective bargaining and the same needs to be provided for by the law. Further the infighting and lack of unity within the union structure creates an obstacle for effective collective bargaining and the fact that these problems arise from the top officials is a great concern.

3.4 COLLECTIVE AGREEMENTS

The South African collective agreement is similar to the Kenyan collective agreement in that they both deal with terms and conditions of employment or any other matter of mutual interest to the parties. The collective agreement in South Africa holds a greater value than the contract of employment in that no lesser terms provided in the contract of employment will be valid. This calls for a greater commitment for the parties making the agreement and would ensure that key issues affecting employment relationship have been thoroughly dealt with in the collective agreement. Another advantage for this is that it would discourage employers who want to exploit employees from providing lesser and unfair conditions of employment.

In Kenya if the agreed procedure in the collective agreement for settling disputes is not exhausted the minister shall appoint a conciliator while in South Africa in case of unresolved disputes, the same is not taken to the minister as there are other machinery in place to settle the disputes. This shows that in Kenya the government still controls labour movement a great deal. In Kenya the minister issues the Industrial Court with all collective agreements signed in the workplace by the parties concerned unlike South Africa where collective agreements are given to the bargaining council which is used as a binding legal agreement between the parties. When these collective agreements are given to the Industrial Courts in Kenya, this tends to overload the Labour Courts system with unnecessary responsibilities.

3.5 BARGAINING COUNCILS

The bargaining councils in Kenya include the wage councils and the joint negotiating committee or councils. These wage councils provide for the minimum statutory terms and conditions of employment for workers who may not be represented by the trade unions. The
joint negotiating committees are similar to the bargaining councils in South Africa and they occur at plant or regional level. Unlike Kenya the provisions of bargaining councils in South Africa are provided in the LRA while Kenya has no statutory procedures for bargaining councils. However in South Africa the need for bargaining councils has diminished greatly to the fact that union members have increased in trade unions and concluded recognition agreements with employers resulting in direct and more favorable employment agreements with employers.

The bargaining council in South Africa has however multifarious functions which include to establish and administer pension, provident fund, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members.

Further the bargaining council also extends its services of a council to employees in the domestic and informal sector. This later function can be seen as a great advantage to the domestic and informal sector in that they are not left out even if they do not join the trade unions. In Kenya the domestic sector is left at the mercy of the employer while the informal sector is an open market with no body structure to address its labor matters.

3.6 WORKPLACE FORUMS

The concept of workplace forums is still new in South Africa and it is projected by the task reform team to be appropriate for production of high quality and improve productivity levels in the workplace. It is also believed to be an innovating aspect of the new labor law dispensation and a concrete manifestation of the concept of democracy. These forums in South Africa are mainly seen to facilitate joint problem solving and participation between the employees and the management. Their purpose is not to undermine collective bargaining but to supplement it. Some of their important functions include: restructuring of a workplace which includes the introduction of new technology and new operational methods, exemptions from any collective agreements, mergers and transfers of property which could affect workers amongst other functions. This clearly shows that the workplace forum contributes to a great extend the work relationship.
They have been designed to facilitate a shift at the workplace from adversarial collective bargaining on all matters to joint problem solving and participation on certain subjects. This kind of structures should be encouraged because it creates a good and close working relationship between the employees and the managers hence the likelihood of increasing productivity and living standards.

Whereas in Kenya one of the fundamental rights and freedoms protected in the Constitution is that of association but there is no express provision for the workplace forum. However various associations have been formed in the workplace but do not have the function of the South African workplace forum.

Every Kenyan has a right to associate with any other person and for any purpose considered necessary. It is on the basis of this protection that Kenyans are free to associate in factories and agricultural enterprises, cooperative societies, women’s group, welfare associations, trade unions among others. These associations are both for the employees and the employers. The employees are however not familiar as such with these associations and the law does not state clearly the form in which the other associations should exist and the power that they should have. On the other hand the employers have generally formed associations rather than trade unions. Hence trade unions are more popular in Kenya but there is a great need for the introduction of the workplace forum in Kenya as well.
CHAPTER 4

4.1 RECOMMENDATIONS

Kenya needs to put in place labour structures that would address labour issues which would reduce the workload of the minister and would also be an avenue of creating employment and I believe matters will be quickly resolved. However as pointed out in Kenyan labour law system as a procedure for collective agreement to be lodged by the minister who in turn comments on the same and forwards the same to the Industrial Court for registration, one can agree with the author that the scrutiny of the collective agreement by the minister will ensure that the terms therein are realistic and within the economic budget of the country. It has its own advantages and disadvantages which must be closely considered and weighed and the appropriate procedure be adopted.

If Kenya adopts the project of enhancing and increasing the dispute resolution institutions and implements a voluntary and orderly collective bargaining system, the congestion at the Industrial Courts will reduce and complaints will be dealt with faster. These bargaining councils to be established in Kenya must be given autonomy like the ones in South Africa to enable them function independently without the interference of the State. The State or the Law should only interfere if they act contrary to any statute.

The recommendations should especially be applied in Kenya because it is here that the government controls a great deal of the labour relations systems, further this would encourage labour democracy. Kenya can borrow ideas from some of the statutes in South Africa that regulate strikes and also implement other measures of strike like go-slows and overtime bans. Other institutions like the bargaining council systems should be set up in Kenya to reduce the overload and congestion of court cases by the Industrial Court. Various bargaining councils should also be set up for different sectors for effective functioning.

4.2 CONCLUSION

It appears that strike action is the most viable aspect of collective action in South Africa and not in Kenya. In Kenya strikes are rare to occur and in as much they are legalized, the workers
are victimized or face dire consequences for participating in strike action. Unity and solidarity is visible in the South African labour movement, for example a secondary strike is one of the ways the unity is shown. The writer has noted that the LRA provides that any act in contemplation or in furtherance of a protected strike or lock-out that is in contravention of the Basic Conditions of Employment Act does not constitute an offence and this shows that so much importance and support has been given to strike action in South Africa. In South Africa with the establishment of workplace forums the labour system provides for high level of participation of employees and moving away from a labour system that is confined to settling issues on wages to a more advanced system where employees are trained at managerial levels with also an aim of competing with international markets. This self governing system brings autonomy and decentralization of power in the labour movement.

In Kenya trade unions are fighting for recognition rights and this infighting within the unions and the new groups causes them to seek for recognition and it does bring disunity among them and instability. Most part of the labour relations in Kenya is still in the hands of the government unlike South Africa. More structures should be in place in Kenya for dispute resolutions and more autonomy be given to the labour movement.

Strikes are important if procedurally followed and for a good cause because it is seen as an element in securing the balance of power within any labour relations systems and this should be allowed to be more prevalent in the Kenya labour system because it would oppose the exploitation of the employers and will create awareness of the rights of the working class and the employers would be careful not to under pay them as they would not want their business interrupted, further the working class would be exercising their constitutional right.

Finally, the importance of a bargaining council is to establish a self government within a wide framework of labour relations which must be encouraged in the labour movement in Kenya. This is also important in that with the current global competition in the labour movement, the needs of both the employer and the employee have increased and likelihood of frequent disputes may occur hence the need of increased bargaining council is necessary. The training schemes offered by the bargaining council in South Africa is something that can be adopted in Kenya because this would develop the skills of the employees and hence also improve productivity which would also help stabilize the economy of the country.
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