THE CONSTITUTIONALITY OF SECTION 32 OF THE LABOUR RELATIONS ACT

by

MICHAEL HEMSLEY

Submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM

(LABOUR LAW)

in the Faculty of Law

at the

Nelson Mandela Metropolitan University

SUPERVISOR: PROF JA VAN DER WALT
JANUARY 2015
DECLARATION

I, MICHAEL HEMSLEY, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

..................................................

Michael Hemsley
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUMMARY</td>
<td>iii</td>
</tr>
<tr>
<td>CHAPTER ONE: INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER TWO: THE CONCEPT AND HISTORY OF COLLECTIVE BARGAINING</td>
<td>4</td>
</tr>
<tr>
<td>2.1 The concept of collective bargaining</td>
<td>4</td>
</tr>
<tr>
<td>2.1.1 Development of the concept</td>
<td>5</td>
</tr>
<tr>
<td>2.1.2 The socio-political context</td>
<td>6</td>
</tr>
<tr>
<td>2.1.3 Collective bargaining and the law</td>
<td>7</td>
</tr>
<tr>
<td>2.1.4 Institutionalised collective bargaining</td>
<td>8</td>
</tr>
<tr>
<td>CHAPTER THREE: THE HISTORY OF COLLECTIVE BARGAINING</td>
<td>12</td>
</tr>
<tr>
<td>3.1 The advent of collective bargaining</td>
<td>12</td>
</tr>
<tr>
<td>3.2 The Industrial Conciliation Act of 1924</td>
<td>12</td>
</tr>
<tr>
<td>3.3 Developments in South Africa from 1937 to 1979</td>
<td>14</td>
</tr>
<tr>
<td>3.4 The Wiehahn Commission</td>
<td>16</td>
</tr>
<tr>
<td>3.5 Post-Apartheid</td>
<td>17</td>
</tr>
<tr>
<td>3.6 The impact of globalisation</td>
<td>19</td>
</tr>
<tr>
<td>3.7 The history of agreement extension</td>
<td>21</td>
</tr>
<tr>
<td>CHAPTER FOUR: THE CURRENT LEGISLATIVE FRAMEWORK</td>
<td>25</td>
</tr>
<tr>
<td>4.1 The collective-bargaining framework</td>
<td>25</td>
</tr>
<tr>
<td>4.2 The operation of bargaining councils</td>
<td>26</td>
</tr>
<tr>
<td>4.3 The mechanics of section 32</td>
<td>28</td>
</tr>
<tr>
<td>4.4 The amendments to section 32</td>
<td>31</td>
</tr>
<tr>
<td>CHAPTER FIVE: THE CONSTITUTIONAL CHALLENGE</td>
<td>33</td>
</tr>
<tr>
<td>5.1 Background to the Free Market Foundation</td>
<td>33</td>
</tr>
<tr>
<td>5.2 Alleged constitutional violations</td>
<td>34</td>
</tr>
<tr>
<td>5.3 The heads of argument</td>
<td>35</td>
</tr>
<tr>
<td>5.3.1 Bargaining councils are “private” actors</td>
<td>36</td>
</tr>
<tr>
<td>5.3.2</td>
<td>The majoritarian principle is violated</td>
</tr>
<tr>
<td>-------</td>
<td>--------------------------------------</td>
</tr>
<tr>
<td>5.3.3</td>
<td>The economic arguments</td>
</tr>
<tr>
<td>5.3.3.1</td>
<td>The negative economic impact of extending agreements</td>
</tr>
<tr>
<td>5.3.3.2</td>
<td>David versus Goliath</td>
</tr>
<tr>
<td>5.3.3.3</td>
<td>An unlikely liaison</td>
</tr>
</tbody>
</table>

**CHAPTER SIX: RESPONSE FROM THE METAL AND ENGINEERING INDUSTRY**

<table>
<thead>
<tr>
<th>6.1</th>
<th>Background to the MEIBC</th>
<th>52</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.2</td>
<td>The response from the MEIBC</td>
<td>53</td>
</tr>
<tr>
<td>6.2.1</td>
<td>Introduction</td>
<td>53</td>
</tr>
<tr>
<td>6.2.2</td>
<td>The first front</td>
<td>55</td>
</tr>
<tr>
<td>6.2.2.1</td>
<td>The exemption defence</td>
<td>55</td>
</tr>
<tr>
<td>6.2.2.2</td>
<td>Access to the courts</td>
<td>59</td>
</tr>
<tr>
<td>6.2.2.3</td>
<td>Inclusion of small business</td>
<td>60</td>
</tr>
<tr>
<td>6.2.2.4</td>
<td>The impact on unemployment</td>
<td>60</td>
</tr>
<tr>
<td>6.2.3</td>
<td>The second front</td>
<td>61</td>
</tr>
<tr>
<td>6.2.3.1</td>
<td>The democratic foundation and achieving the objectives of the LRA</td>
<td>61</td>
</tr>
<tr>
<td>6.2.3.2</td>
<td>Constitutional limitation would be justified</td>
<td>63</td>
</tr>
<tr>
<td>6.2.4</td>
<td>The third front</td>
<td>64</td>
</tr>
<tr>
<td>6.2.4.1</td>
<td>Bargaining councils: the bastion of sectoral bargaining</td>
<td>64</td>
</tr>
<tr>
<td>6.2.4.2</td>
<td>The council benefits</td>
<td>64</td>
</tr>
<tr>
<td>6.2.4.3</td>
<td>Bargaining councils are not private actors</td>
<td>65</td>
</tr>
<tr>
<td>6.2.4.4</td>
<td>The real objective of the FMF</td>
<td>65</td>
</tr>
</tbody>
</table>

**CHAPTER SEVEN: CONCLUSION**

BIBLIOGRAPHY

<table>
<thead>
<tr>
<th>BIBLIOGRAPHY</th>
<th>72</th>
</tr>
</thead>
<tbody>
<tr>
<td>Books</td>
<td>72</td>
</tr>
<tr>
<td>Articles</td>
<td>73</td>
</tr>
<tr>
<td>Journals</td>
<td>73</td>
</tr>
<tr>
<td>Academic Papers</td>
<td>73</td>
</tr>
<tr>
<td>Interviews with the Author</td>
<td>73</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>74</td>
</tr>
<tr>
<td>Websites</td>
<td>75</td>
</tr>
<tr>
<td>Legal Documents</td>
<td>75</td>
</tr>
<tr>
<td>Table of Statutes</td>
<td>76</td>
</tr>
</tbody>
</table>
Collective bargaining is the process whereby employees act as a collective unit whilst negotiating terms and conditions of employment with employers. The collective unit typically takes the form of a trade union, mandated by its members to negotiate on their behalf. By negotiating collectively the inherent imbalance of power between employer and individual employee is seen to be neutralised.

The process of collective bargaining enjoys legal status in South Africa and around the world. The Industrial Conciliation Act of 1924 institutionalised collective bargaining for the first time in the form of the Industrial-Council system. This sectoral bargaining system stood firm throughout the pre-democracy period but initially excluded non-white employees. Industrial unrest in the 1970s was the catalyst for the Wiehan commission which ultimately brought all employees into the fold.

By the dawn of democracy in South Africa the bargaining system enjoyed widespread support and legitimacy. This was particularly so amongst the COSATU-led labour movement which enjoyed a position of political strength. This support and strength were reflected in the contents of both the Labour Relations Act and the Constitution which enshrined the constitutional right to engage in collective bargaining.

Possibly the most debated aspect of the Council system has been the question of extending agreements to non-parties. Those in favour argue that the Council system cannot function in the absence of extensions. This is so because what would then effectively be a voluntary system would not attract sufficient volunteers. Those against argue that extensions act as a barrier to economic activity, particularly for small and new businesses.

Legislation has, since 1924, facilitated the extension of agreements as long as certain criteria are met. Section 32 of the Labour Relations Act is the current
extension vehicle. The extension criteria have vacillated over time and especially so in recent history with section 32 being subject to change in every post-democracy amendment to the Act.

Possibly the most serious challenge to the extension status quo has come in the form of a constitutional challenge by the Free-Market Foundation. The Foundation advances old economic arguments but links these to an alleged impingement of constitutional rights. The challenge comes at a time when the country is experiencing the most significant socio-political turbulence since democracy. This includes the most enduring strike in our history, a landmark-employer lock-out and a parliamentary facelift.

The Metal and Engineering Industries Bargaining Council oversees the biggest manufacturing sector in the South African economy. This status prompted the Council to submit its own responding papers in the Free-Market case. Particularly fascinating is that an employer party to the Council not only supports the Foundation case but has also lodged its own proceedings against the extension of the 2014 Engineering agreement. Both these cases are still pending and the outcomes have the potential to transform the political and economic landscape of our country.
This dissertation examines arguments for and against the legislated extension of collective agreements and in particular whether they hold constitutional muster. The examination is based primarily on papers before the Gauteng High Court in the matter between the Freemarket Foundation and the Minister of Labour (1st respondent), the Minister of Justice and Constitutional Development (2nd respondent) and numerous registered bargaining councils (3rd to further respondents).

Particular focus is placed on the responding papers of the Metal and Engineering Industry Bargaining Council. This Council is the only one of the Council respondents to have submitted an individual response to the application. It is also the largest and most influential Council within our manufacturing sector and has been the subject of recent developments which render it an intriguingly relevant case study. Their 2014 collective agreement which followed a four-week industry-wide strike has not yet been extended. This is a consequence of a pending legal challenge from one of the employer parties to the Council.

An initial foundation to the treatise is established by outlining the concept and history of collective bargaining, including a history of agreement extension in South Africa. This is a logical starting point given the inherent socio-political context of the subject matter. It would indeed be improper to conduct this examination without first formulating a thorough understanding of the origins of collective bargaining, both nationally and internationally.

The national origins are of particular relevance, given South Africa’s unique political history and the role of the labour movement therein. The movement has, however, been forced to revisit this role post-democracy in the RSA. This is a consequence of the political alliance forged with the African National Congress. This changing
dynamic has played out within the context of a developing nation formulating policy responses to factors such as globalisation and economic recession. The impact of these factors is addressed by both parties in their respective arguments.

Attention is also given to the legal framework of collective bargaining. This sheds light on the specific question of constitutionality and also begs the question whether the courts are in fact the correct forum to adjudicate this issue.

The focus is then narrowed to those sections of the Labour Relations Act which govern the operations of bargaining councils and in particular the extension of agreements. This includes the proposed amendments thereto.

An analysis of the Freemarket Foundation application follows. The argument has both a legal and economic rationale. The legal argument tests the constitutionality of extensions on various fronts. There are two primary arguments. The first is that bargaining councils are “private actors” and as such should not be afforded the authority to impose their agreements on non-parties. The second is that current legislation governing extensions violates the principle of majoritarianism.

The economic argument is founded on the allegation that agreement extensions retard economic growth and employment with an especially negative impact on small business and the unemployed. It is alleged further that the system effectively amounts to collusion between big business and organised labour so as to protect their respective interests at the expense of fringe players and society as a whole.

The Metal and Engineering Bargaining Council submission stands juxtaposed - defending the status quo. The Foundation’s economic arguments are refuted, primarily on the basis of a lack of evidence. The Council leans heavily on the exemption system as evidence of sufficient flexibility. It is also pointed out that affected parties have access to the courts to address any grievances.

The Council strongly advocates the purported social benefits arising from a system that enjoys political legitimacy within a democratic framework. Having reference to the objectives of the Labour Relations Act it is suggested that, should there be any
constitutional violation, this can be justified in terms of section thirty-six of the Constitution.
2.1 THE CONCEPT OF COLLECTIVE BARGAINING

Collective bargaining involves employees negotiating with employers as a collective rather than as individuals. Grogan identifies this as the defining characteristic of collective bargaining, noting that it involves negotiations between parties representing groups of individuals.\(^1\) Grogan goes on to refer to collective bargaining as “a process by which employers and organised groups of employees seek to reconcile their conflicting interests and goals through mutual accommodation”.\(^2\) Whilst employers may prefer to negotiate contracts individually, employees are able to attain greater bargaining power through collective action. This collective is achieved through trade-union organisation which is the foundation upon which collective bargaining is built.\(^3\)

Employees, represented by their trade union, may act as a collective in terms of their employment with the same employer or as a collective in terms of their employment in the same industry. The process where the collective engages with a singular employer is called plant-level bargaining.\(^4\) Engagement with multiple employers on a sectoral level is referred to as centralised bargaining.\(^5\)

Grogan identifies the process of “bargaining” as the second defining characteristic. This process has been distinguished from consultation in that the latter does not

---

\(^1\) Grogan *Collective Labour Law* 8.

\(^2\) Grogan *Collective Labour Law* 86.


\(^4\) Grogan *Collective Labour Law* 8.

contain any element of agreement. The distinction between the two was drawn by a member of the old Industrial Court in the case of MAWU v Hart⁶ as follows:

“To consult means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term negotiate is akin to bargaining and means to confer with a view to compromise and agreement.”

The process of “bargaining” therefore involves an element of compromise from both sides. This implies a shift from the natural balance of power that stems from an employer’s capacity to provide (or destroy) livelihoods.⁷ This shift in power towards equilibrium is achieved by arming employees with the right to withhold their labour in pursuit of their demands. This right, along with employers’ recourse to lock-out, is described by Grogan as the “fuel for collective bargaining”.⁸ This is because the execution of these rights has the consequence of collateral damage to both parties and in this way serves as a catalyst for compromise.

As an actual process collective bargaining can be triggered by a number of events. This can be upon the expiry of an existing agreement, or when existing conditions are no longer satisfactory or as a means to resolve any new dispute or grievance.⁹

2.1.1 DEVELOPMENT OF THE CONCEPT

The concept of collective bargaining emerged with the advent of a minority of skilled or “craft worker” unions during the nineteenth century. Faced with initial capitalist government efforts to discourage labour collectives unions managed to achieve widespread recognition over time. The scarce skills they possessed as a collective enabled them to engage in meaningful negotiations with employers. In South Africa the first trade unions can be traced back to the skilled printers who produced our first newspapers.¹⁰ The discovery of gold and diamonds in the latter half of the 19th century caused the influx of engineers and skilled artisans, mainly from the United

---

⁶ (1985) 6 ILJ 478 (IC).
⁸ Grogan Collective Labour Law 12.
Kingdom. They brought with them not only their skills but their close ties to trade unionism. It is important to emphasise that the membership of these trade unions were actively restricted for purposes of protecting against the dilution of the skills base. This strategy was aimed at protecting the living standards of the skilled artisans. Africans specifically, were viewed as a potential threat because they were seen as cheap labour which could be used by employers to undercut their higher wages.

2.1.2 THE SOCIO-POLITICAL CONTEXT

However, the social significance of collective bargaining was truly felt only after the growth of unions that also represented the mass of unskilled workers. This development in the constituency of trade unions to higher proportions of unskilled labourers was largely a consequence of a parallel transition from “manufacture” to “machinofacture”. This latter term was coined by Marx to describe the progressive introduction of machinery into the production process which tended to dilute the significance of the traditional craftsmen. This was because of the sheer numbers of persons involved and because of the reduced capacity of unskilled workers to lever higher standard of living with the tool of wage-bargaining alone. Instead the tool box was expanded to include access to social benefits and political rights. In this way the labour movements became entrenched within the political arena as well.

In this way the institutions of collective bargaining became inextricably entwined within the socio-political framework of society. This has the consequence that these institutions cannot be divorced from the structures of political and social power around them. A clear example in South Africa’s early history was the formation of the South African Labour Party which drew the majority of its support from white trade union members. Kahn-Freund highlighted this insight noting that it is far simpler to transfer labour relations rules that relate to individuals from one country to another.

---

than it is to transfer rules relating to collective issues.\textsuperscript{15} In South Africa for example the high level of racial heterogeneity would be a distinguishing feature from most European countries. The presence of ex-slaves and indentured labourers of both Chinese and Asiatic origin has ensured a truly multicultural dynamic in South Africa.\textsuperscript{16}

Despite this political aspect resulting in cyclical fluctuations (in the fortunes of collective bargaining systems), the system has proved to be a resilient and enduring phenomenon. This has been the case even in instances where the political dispensation of the times has seriously curtailed workers’ rights.\textsuperscript{17}

The process of collective bargaining is by nature an adversarial one that involves negotiation between parties with conflicting interests. These parties, through this process, seek to achieve mutually acceptable compromises.\textsuperscript{18}

\subsection*{2.1.3 COLLECTIVE BARGAINING AND THE LAW}

Collective Bargaining as a concept and process is recognised and legitimized through labour law. Kahn-Freund viewed the law as a secondary force in the industrial relations environment emphasizing the fundamental inequality between employer and employee. He suggested that the law could do little to equalise this imbalance.\textsuperscript{19} Instead the law is viewed as a mechanism to protect the institutions of collective bargaining so as to ensure the roleplayers may engage on an equal footing notwithstanding this “natural” imbalance.\textsuperscript{20}

The courts have been inclined to refrain from direct involvement in the collective-bargaining process itself. Instead the view is held that the roleplayers themselves are best positioned to shape the outcomes. It was suggested in \textit{Delisle v Canada (Deputy Attorney General)}\textsuperscript{21} that the courts should show “a degree of deference”

\begin{flushleft}
\textsuperscript{15} Bean \textit{Comparative Industrial Relations: An Introduction to Cross-National Perspectives} (1985) 5.

\textsuperscript{16} Nel \textit{South African Employment Relations: Theory and Practice} 37.

\textsuperscript{17} Godfrey \textit{et al Collective Bargaining} 1

\textsuperscript{18} \textit{Ibid}.

\textsuperscript{19} Godfrey \textit{et al “Collective Bargaining} 4.

\textsuperscript{20} \textit{Ibid}.

\textsuperscript{21} [1999] 2 scr 989 par 126.
\end{flushleft}
based on conscious recognition of the complexity and the balance sought to be struck by legislation among the interests of labour, management, and the public.

This autonomy of the collective bargaining system has been viewed as a fundamental principle in legal systems around the globe, giving rise to classic concepts such as “collective laissez-faire” in Britain, “Tarifautonomie” in Germany and “L’autonomie collective” in France.\textsuperscript{22} It appears as though the democratic South African Government, notwithstanding its legislative duty to promote and encourage collective bargaining, has adopted a similar philosophy. This is evident by the absence of any programmes to assist statutory and bargaining councils.\textsuperscript{23} Section 1 of the LRA, which outlines the purpose of the Act, provides a further clue in support of this angle. This is evidenced in the wording of “providing a framework” for collective bargaining which is indicative of a voluntarist approach where the rules rather than the outcome are dictated by Government.\textsuperscript{24} This “hands-off” approach by Government has, however, been tested in times of economic pressure and in particular as a consequence of globalisation. A good example of state interventionism that pre-dates globalisation occurred during the economic depression of the 1930s which changed public opinion towards greater state intervention. In fact, an underlying assumption of the New Deal was that the imbalance in power between employers and employees was not only the cause of labour unrest but also served to aggravate the economic conditions by reducing the spending power of workers.\textsuperscript{25}

2.1.4 INSTITUTIONALISED COLLECTIVE BARGAINING

The process of collective bargaining takes on an institutionalised form when it occurs within the scope of a country’s legal framework. In South Africa this framework begins with the Constitution, where the right to bargain collectively has been entrenched and where it is stipulated that national legislation may be enacted to

\begin{itemize}
\item \textsuperscript{23} Godfrey \textit{et al Collective Bargaining} 125.
\item \textsuperscript{24} Grogan \textit{Collective Labour Law} 7.
\item \textsuperscript{25} Bean \textit{Comparative Industrial Relations: An Introduction to Cross-National Perspectives} 106.
\end{itemize}
regulate collective bargaining. Typically such legislation would be designed to govern the manner in which the major industrial stakeholders, capital and labour, interact with each other on issues where there is mutual but conflicting interest. The Labour Relations Act 66 of 1995 is this enabling legislation in South Africa and has as one of its primary purposes the provision of a framework for employees and employers to bargain collectively.

It is at the sectoral level (rather than plant level) where governments have seen fit to facilitate formalised legal institutions through which the bargaining process can be properly managed. In South Africa these institutions were initially known as industrial councils but in terms of current legislation are referred to as bargaining councils. The primary objective behind the establishment of these industry councils is to secure a measure of stability and efficiency in key engine rooms of the country’s economy and includes dispute resolution. This is a central objective of all modern industrial relations legislation. The establishment of bargaining councils is on a voluntary basis but once they have been formally registered these councils acquire regulatory functions in terms of the LRA. They also acquire a corporate identity in that they can sue and be sued.

In South Africa there is a forum of institutionalised engagement between the three major social partners that exists at a level higher than mere industry bargaining. This forum is known as NEDLAC and it serves as a platform for seeking consensus rather than a process of bargaining in its purest form.

Trade unions are the conduit through which labour represents its interest at the council. Whether at plant level or industry level, trade unions provide the solidarity and power to the voice of the individual employee. This union power that is achieved as a balancing mechanism in response to the natural power of employers has an ironic and corollary impact on the other side of the labour equation. This impact is

---

27 S 1(c) of the Labour Relations Act 66 of 1995.
28 This change in name was effected in terms of the Labour Relations Act 66 of 1995.
29 Grogan Collective Labour Law 85.
31 Grogan Collective Labour Law 74.
that employers, and more specifically smaller, less resourced employers, are driven to seek solidarity (and indeed a measure of security) in the face of union power and militancy. This is achieved, in much the same way as by employees, by acting on a collective basis, and the vehicle through which this is achieved is known as an employer’s organisation.

Employers’ organisations and trade unions are referred to as the “parties” to the industry councils. The first-mentioned represent capital’s interests and the other labour’s interests on the council. Both trade unions and employer organisations are statutory bodies themselves and are required to be registered in terms of the LRA. The current process of establishing a council in South Africa requires an application to the registrar by registered trade unions and employer organisations. 32 This application together with any objections, is assessed by NEDLAC and, if necessary, the Minister of Labour. NEDLAC is empowered to decide on appropriate demarcation. The primary criterion is the representivity of the parties within the specific demarcated area. These demarcations occur along two major lines, namely the nature of the work or business and secondly, the geographic area of application. Together these two criteria form what is known as the scope of the council.

In the case of some industries there is no geographic demarcation in that a national council determines terms and conditions of service for the entire country. 33 In other industries geographically dislocated councils have the autonomy to determine different conditions of service within the same industry. 34

An application for registration of a council shall not receive consideration without the submission of a council constitution which conforms with section 30 of the LRA. 35 This statutory requirement is the means for ensuring the objective of good governance within councils and, by extension, the industry concerned. The

32 In terms of s 29 of the LRA.
33 The Metal and Engineering Industry is an example in South Africa where centralised negotiations determine conditions throughout the Republic of South Africa. There is decentralisation in terms of local councils but their role is to manage the affairs of the national council on a local level.
34 An example of decentralised geographically determined councils within the same industry in South Africa is the furniture industry.
constitution must include matters such as the appointment of party representatives and council officials, the procedure for handling disputes amongst parties and the financial management of the council. Importantly in the context of this treatise the constitution must provide for the representation of small and medium enterprises and a procedure for exemption from collective agreements.

Even more importantly in the context of this dissertation is the concept of “non-parties”. This status can occur on two levels. Firstly there are those employers and employees that are non-parties to the council in that the employers are not members of an employers’ organisation party to the council, or the employee is not a member of a trade union that is party to the council. This status as a non-party to the council does not exclude the possibility of being a member of a trade union or employers’ organisation – only, it would not be a representative body that is a party to the council. The second level of non-party status is being a non-party to a specific agreement. It can happen, for example, that an employers’ organisation might be party to a bargaining council but is not a signatory to a specific agreement. In this way any of the members of that employers’ organisation would be regarded as party employers in the context of the council but non-party employers in the context of any agreement. This is an important concept to understand when examining the key thrust of this treatise which is the extension of agreements to non-parties.

36 S 30(1)(b).
37 S 30(1)(k).
CHAPTER THREE
THE HISTORY OF COLLECTIVE BARGAINING

3.1 THE ADVENT OF COLLECTIVE BARGAINING

The term was first coined by British Labour-movement pioneer, Beatrice Webb, in 1891 but the practice itself had become commonplace in European countries before this date. The concept of workers combining on a collective basis can be traced back as far as the 17th century with the advent of the Industrial Revolution. This was a consequence of a process of labour-law liberalisation in the Western World that had followed the initial resistance to unions in the earlier half of the nineteenth century. Unfortunately for the labour movement the progress that had occurred in Europe was not mirrored in the colonies over which Europe ruled. By the end of the First World War there were no laws in the Union of South Africa that sought to regulate organised labour. The Masters and servant Act of 1841 was the first legislation that was introduced to govern employer-worker relations but this was on a bilateral level and did not address issues of worker representation.

3.2 THE INDUSTRIAL CONCILIATION ACT OF 1924

In South Africa collective bargaining has been officially recognised as an institution since 1924. This recognition came in the form of the Industrial Conciliation Act which was largely a response to an armed uprising of white workers in 1922. This was the first comprehensive piece of labour legislation in South Africa and its focus

---

39 Nel South African Employment Relations: Theory and Practice 133.
40 Grogan Collective Labour Law 2.
41 Ibid.
42 Grogan Collective Labour Law 3.
43 Nel South African Employment Relations: Theory and Practice 36.
45 11 of 1924.
was on collective labour rights. Individual labour rights were covered in terms of the Wage Act which followed a year later.

The primary grievance of these white workers was a demand for protection against a perceived threat of cheap African labour. Though harshly dealt with, the white miners did succeed in achieving protection through the exclusion of Africans from the Industrial Council system. This was achieved by excluding Africans from the definition of “employee” with a concomitant limitation on membership of trade unions to “employees”.

This structure of excluding blacks assisted in achieving the first of two political objectives of the Act. This first of these objectives was to provide preferential employment opportunities for white workers as a means to address the “poor white” problem. The second political objective was to prop up General Smuts’ political base after it had been eroded significantly following the 1922 strikes.

The central objective of the 1924 Act from a frame-work point of view was to facilitate industrial self-governance. The mechanics to achieve this objective was a network of industry specific councils, comprised of employer and employee representatives. The thinking was that these parties to the council would be left to their own devices to resolve disputes within their scope of registration. A feature of the South African collective-bargaining landscape is that the system of councils has not been imposed upon the respective sectors. The exception to this is the national and provincial state departments.

---

46 Grogan Collective Bargaining 3.
47 Ibid.
49 Ibid.
51 Ibid.
52 Notice of Motion 19.
53 Ibid.
54 Van der Walt et al Labour Law in Context 188.
55 Ibid.
One negative “side-affect” of the exclusion of Africans from the ambit of the legislation was that they could not be bound by the extension of council agreements. This created a loophole and served to thwart the objective of preventing unfair competition on wages. The legislature took steps to close this loophole during the following decade such that extensions became binding in respect of African employees.

3.3 DEVELOPMENTS IN SOUTH AFRICA FROM 1937 TO 1979

In the amendments of 1937 an allowance was made for “pass-bearing” African workers to be overseen by a newly formed labour inspectorate. The 1947 Industrial (Natives) Act Bill was introduced by the United Party Government following a period of organisation of black labour in the 1940s. This Bill, had it been enacted would have recognised African Unions even though they would still have been excluded from the Industrial Council system. However, even this limited progress was blocked following the election of the Nationalist Government in 1948, which proceeded to scrap the bill. The allowances made in terms of the 1937 amendments also came to an end when legislation was amended such that Africans were again no longer classified as employees. The racial policies of the Nationalist Government were endorsed in terms of the Industrial Conciliation Act of 1956 and the Black Labour Relations Regulations Act of 1953.

It must be noted, however, that this only restricted black membership in registered trade unions and did not prevent the formation of unregistered black trade unions. Such unregistered black unions were not illegal and did exist but had to operate outside of the Industrial Conciliations Act, and as such were unable to conclude legally enforceable industry agreements. Their existence was often fleeting and

56 Notice of Motion 20.
57 Ibid.
58 Grogan Collective Labour Law 3.
59 Webster Cast in a Racial Mould: Labour Processes and Trade Unionism in the Foundries 61
60 Grogan Collective Labour Law 3.
61 28 of 1956.
62 48 of 1953.
63 Jones Collective Bargaining in South Africa 28.
64 Ibid.
they came under pressure from the Government in a number of ways. This pressure was often aimed at its leaders by way of detention, gaol and banning orders. As a consequence these unions struggled to build any worthwhile momentum, that is, until the Natal strikes of 1973 and the Soweto uprisings in 1976 which proved to be a timely shot in the arm.

The economic growth following the 2nd world war was accompanied by a parallel evolution in the emergence of stable collective bargaining systems. This relative stability was, however, undermined with the increased integration of global markets post 1970. These markets, dominated by multinational corporations fundamentally transformed the labour-market landscape. This was because of the impact of collective agreements on the labour markets in times of growing international competition. The economic stakes for the national Government became too high to be left in the hands of private players alone. Instead, the strategy developed to one of seeking pacts with the respective social partners so as to create synergy between bargaining outcomes and Government policy.

The wave of mass strikes in Natal in 1973 involving 100 000 African and Indian workers was a direct cause for the formal establishment of MAWU in Pietermaritzburg in April of that year. This can be contrasted with a large strike by 71 000 black workers on the mines in 1920 which was easily dealt with because there was no union organisation. Strikers were also isolated from one another because of the compound system on the mines.
### 3.4 THE WIEHAHN COMMISSION

In much the same way that the Smuts Government of 1924 could not ignore the reality of the 1922 strikes the Nationalist Government was also forced into action. The first step was the appointment of a commission headed by Professor Wiehahn which recommended labour-law reforms. The most significant reform was the removal of the exclusion of black workers from the labour legislation.

A significant pre-democracy milestone for collective bargaining in South Africa was the Wiehahn Commission of Inquiry of 1979. This inquiry was commissioned following strikes amongst black workers in the Durban area in 1973, followed by the emergence of new African trade unions. These developments were perceived as a threat to the existing industrial-relation system as well as white-minority rule itself. The conclusion drawn by the commission was that racially segregated bargaining institutions were unsustainable and it was recommended that they be abolished.

The following amendment to the Labour Relations Act in 1981 established the first completely non-racial labour statute. This was achieved by virtue of the following new wide definition of “employee”:

> “Any person who is employed by, or working for, any employer, and receiving, or entitled to receive, any renumeration, and any other person whatsoever who in any manner assists in the carrying on or conducting of the business of an employer.”

In 1978, just prior to the changes following the Wiehahn report, there were 70,000 black members of 27 unregistered unions. Four years later in 1982 there were 579,000 black employees that were members of registered trade unions.

---

76 Grogan *Collective Labour Law* 3.
77 Grogan *Collective Labour Law* 4.
79 Ibid.
80 Ibid.
81 Jones *Collective Bargaining in South Africa* 29. Blacks were included in terms of the definition that was changed in 1979 but it was structured in such a way that it only included urban blacks. This caused black unions to be faced with a dilemma whereby registration required them to shed their non-urban members which included migrants, frontier commuters and foreign blacks.
82 Jones *Collective Bargaining in South Africa* 25.
83 Jones *Collective Bargaining in South Africa* 47.
84 Jones *Collective Bargaining in South Africa* 48.
This shift in the political and economic dynamics underpinning industrial councils from the 1970s did not undermine the significance of their pivotal role within the South African Labour Relations framework. In fact, their numbers reached a high in 1983 when there were 104 in operation. By 2004 the number of councils had declined significantly but the number of employees covered by councils had doubled. This apparent anomaly was caused by the advent, after 1995, of four large public-sector bargaining councils. By 2012 approximately 20.3 percent of the total labour force in South Africa was covered by Bargaining Councils.

3.5 POST-APARTHEID

This has been the case in post-apartheid South Africa, with the Department of Labour publishing five-year plans of action clarifying their priorities within the broader regulatory framework. This partnership sentiment has been shared in Europe where a research report viewed collective bargaining and legislation as being complementary.

Halton Cheadle, in South Africa, views collective bargaining as a means to implement the “fair labour practices” as mandated by our primary source of legislation, namely the Constitution. Section 23(5) of the Constitution guarantees the right of trade unions and employers’ organisations to engage in collective bargaining. The fact that South Africa adopted a constitutional dispensation post 1994 represented a significant shift in respect of the rights of its subjects. This was because subjects were no longer singularly dependent on the will of Parliament. Instead, the Constitution serves to protect rights by ensuring that legislation emanating from Parliament complies with said Constitution. It is important to note

86 Ibid.
87 Van der Walt et al Labour Law in Context 188.
89 Ibid.
90 Ibid.
92 Grogan Collective Labour Law 10.
93 Ibid.
that notwithstanding the constitutional entrenchment of the right to bargain there is no
duty to bargain imposed on employers.\textsuperscript{94}

It was in fact the Interim Constitution\textsuperscript{95} which played an initial role in shaping the new
labour legislation post-apartheid to the extent that it set out to comply with South
Africa’s international law obligations. This Constitution included the right to join and
form trade unions, to bargain collectively and the right to strike.\textsuperscript{96} The fact that these
labour rights were entrenched in the Constitution is indicative of the drafters’
intentions to avoid the abuse of unions that occurred under the old regime.\textsuperscript{97} The
Interim Constitution became effective in April of 1994 and consequently influenced
the ensuing debate on labour legislation which was high on Government agenda,
given the role that the labour movement had played in dismantling apartheid. It also
helped that there had been a large scale movement of union leaders into party
politics immediately after political transition.\textsuperscript{98}

The labour movement was headed by the trade-union federation COSATU\textsuperscript{99} which
formed an integral part of the tri-partite political alliance with the African National
Congress and the South African Communist Party. Their views on collective
bargaining structures at the onset of democracy were set out at their Campaigns
conference in 1994.\textsuperscript{100} The Congress had concrete views in this regard calling for
centralised bargaining in specifically demarcated sectors on a co-ordinated basis
which could involve the amalgamation of existing councils. The strength of the views
was illustrated in a call for legislation that would compel centralised bargaining.\textsuperscript{101}

This strong support for centralised collective bargaining by the trade union
constituency from the 1990’s stood in contrast to previous feelings of distrust towards
the council system. This distrust emanated from the long-time exclusion of black
workers from the council system and the prejudice they had suffered as a result.

\textsuperscript{94} Grogan \textit{Collective Labour Law} 85.
\textsuperscript{95} Constitution of the Republic of South Africa 1993.
\textsuperscript{96} Godfrey \textit{et al Collective Bargaining} 81.
\textsuperscript{97} Grogan \textit{Collective Labour Law} 11.
\textsuperscript{98} Grogan \textit{Collective Labour Law} 5.
\textsuperscript{99} Congress of South African Trade Unions.
\textsuperscript{100} Godfrey \textit{et al Collective Bargaining} 82.
\textsuperscript{101} COSATU’s policy on collective bargaining par 2.4.5.
This had the consequence that even after the post-Wiehahn reforms black trade unions continued to prioritise plant-level organisation. However, by the late eighties the benefits of centralised collective bargaining had become clear to COSATU. The African National Congress held similar views and specifically highlighted collective bargaining as an important component of their reconstruction and development programme (RDP).\textsuperscript{102}

COSATU’s research arm, NALEDI\textsuperscript{103} produced a discussion paper shortly after the conference wherein they expanded on COSATU’s centralised bargaining policy. This paper supported the extension of agreements favouring a concept of “framework agreements”.\textsuperscript{104} Such agreements set out only basic conditions of employment which left room for plant-level bargaining on issues that were not contained in the framework agreement.\textsuperscript{105} It was envisaged that such a system would be able to accommodate lesser-resourced enterprises and reduce the required number of exemption applications.\textsuperscript{106}

At the time of political transition Business South Africa (BSA) also offered their support for the underlying principles of the council system. BSA also offered support for the extension of agreements albeit under certain conditions, most notably an effective exemption system.\textsuperscript{107}

3.6 THE IMPACT OF GLOBALISATION

The spine of collective bargaining is trade unionism, and consequently any pressure exerted on this vital organ, impacts directly on the health of the collective institution. This section examines the impact of globalisation on both the spine and the “mother body”. The term “globalisation” has been defined by a number of authors. Tomlinson described it as a complex connectivity in which there is “the rapidly

\textsuperscript{102} Finnemore \textit{Introduction to Industrial Relations in South Africa} 196.
\textsuperscript{103} National Labour and Economic Development Institute.
\textsuperscript{104} Godfrey \textit{et al Collective Bargaining} 83.
\textsuperscript{105} \textit{Ibid.}
\textsuperscript{106} \textit{Ibid.}
\textsuperscript{107} Answering affidavit of the 20\textsuperscript{th} respondent: The MEIBC par49.
developing and ever-densening network of interconnections and interdependencies that characterises modern social life”.

The collapse of the apartheid regime ended the politically motivated economic sanctions imposed on South Africa. This process opened the country up to a whole new world of globalisation. Whilst these developments would undoubtedly have resulted in significant social improvements for workers in South Africa it did bring with it some stern challenges for the trade-union movement. Arguably the biggest of these were the response and plans required from local employers in order to compete in the global economy. These plans often included investment in new technology, flexible work practices as well as a reduced demand for labour. These factors contributed to unemployment rates which impacted negatively on trade-union membership. 500 000 jobs were lost in South Africa between the period 1994 and 2000. Even though the economic growth rate increased in the period until 2007 this did not serve to make any serious dent on the high unemployment levels in the country. The challenges faced by employers when re-entering the global market place caused a strong business lobby for Government support. Notwithstanding the political alliance between the ANC and COSATU this lobby made useful gains culminating in the 1996 “GEAR” policy.

An analysis of trade union membership trends indicates a variety of factors that play an influencing role. The three key sets of factors can be categorised as cyclical, structural and institutional. Cyclical factors refer to rising unemployment in times of economic downturn. It is generally accepted that a downturn would impact negatively on membership but it has been shown that this is not always the case. The level of bargaining is an example of a variable which may oppose this trend.

---

109 Finnemore Introduction to Labour Relations in South Africa 43.
110 Ibid.
111 Ibid.
112 Finnemore Introduction to Labour Relations in South Africa 46.
113 Finnemore Introduction to Labour Relations in South Africa 44.
114 The ANC Government’s Growth, Employment and Redistribution Policy leaned far closer to liberal free market ideology and was the guide for economic policy over the next ten years.
Where the bargaining is conducted at a higher, multi-employer level unionisation levels have proved to be less vulnerable.116

Structural factors are now accepted to be a greater cause of union decline than unemployment.117 The neo-liberal economic policies associated with free-market economies strongly advocate labour-market flexibility.118 This has the consequence of increased part-time and casual work which hinders union-organisation potential. Other trends associated with globalisation include privatization, downsizing and outsourcing. These have all tended to erode the traditional operating base for trade unions.

The impact on the mother-body of collective bargaining (and bargaining councils in particular) is the indirect impact of these trends on council representivity. This is because one of the measures of council representivity is party trade-union membership within the sector. This particular problem has been debated by labour-department officials, with one suggested solution being that all “atypical” employees be excluded from the calculation of representivity.119 This is because of the degree of difficulty for union organisation amongst this particular grouping. A second idea that has been floated is the compulsion that outsourced employees remain or become members of the majority trade-union party.120 Standing in the way of that suggestion is that it will fall foul of the principle of freedom of association and would most likely attract a constitutional challenge.121

3.7 THE HISTORY OF AGREEMENT EXTENSION

An important sub-component of the history of collective bargaining in South Africa, in the context of this dissertation, is the history of objections to the extension of collective agreements. The fact that there has been a specific history in this regard indicates that the current objection by the FMF is not a new one and that this issue

120 Ibid.
121 Ibid.
has received considerable previous attention from all the social partners. This point is emphasized by the MEIBC in their answering affidavit in order to highlight the fact that the current legislative dispensation is a product of this extensive debate.

Going back to the Act of 1924 the Minister had powers of extension to all employers and employees as long as he regarded it as expedient and as long as the parties were “sufficiently representative”. The Act of 1937 had little impact on the status quo with the relevant section 48(2), also making reference to expediency and sufficient representivity.\textsuperscript{122} What is clear at that point in time was that the Minister was provided with a degree of discretion which included the capacity to grant limited exemptions.\textsuperscript{123}

The Industrial Conciliations Act of 1956 (later renamed the Labour Relations Act of 1956) was promulgated under the watch of the National Party which had come into power in 1948. This Act was amended on numerous occasions before its final demise when repealed by the current LRA. At the time it was repealed extensions were still subject to the criteria of sufficient representivity and expediency. One development from the 1937 Act was that the Council themselves could grant exemptions as opposed to the Minister only.\textsuperscript{124}

The all-important question of what constituted sufficient representivity was not answered by the 1956 Act\textsuperscript{125} in the form of a clear definition. However, the then Director General of Labour stated three relevant measures.\textsuperscript{126} Significantly this did include an assessment of party employers as a percentage of all employers, which is not the case under the current legislation. The other two measures were an assessment of employees at party firms relative to the industry and the number of union employees relative to the industry.\textsuperscript{127}

\textsuperscript{122} Answering affidavit of the 20\textsuperscript{th} respondent: The MEIBC par 28.
\textsuperscript{123} S 51(1) of the Industrial Conciliation Act of 1937.
\textsuperscript{124} Answering affidavit of the 20\textsuperscript{th} respondent: The MEIBC par 31.
\textsuperscript{125} Labour Relations Act 28 of 1956.
\textsuperscript{126} Answering affidavit of respondent 20: The MEIBC par 34.
\textsuperscript{127} \textit{Ibid.}
If a 50% measure were achieved in all three assessment categories then the Council would be considered representative. However, even if 50% were not achieved on all measures the Minister had discretion to extend after due consideration of a number of other factors. These factors included the restrictiveness of the agreement on new businesses, the level of consultation with non-parties, wage differentiation flexibility, flexibility towards new entrants and small employers and accommodation through exemptions. A research study undertaken in 1994 / 1995 showed, in the opinion of Godfrey, that the Minister used to exercise his discretion in favour of extensions.

The most significant juncture in this particular historical sub-component occurred at the transition to political democracy. This was the first time that all social partners across the political and economic spectrum engaged in debate on this particular issue. The significance of this juncture, it is argued, lies not only in the breadth of the discussion but more particularly so by virtue of its depth.

A significant intervention by the ILO in the early 1990s is said to have strongly influenced the thinking that underpinned the post-apartheid legislation specifically as it pertained to the extension of bargaining-council agreements. This intervention was effected by the ILO’s Fact Finding and Conciliation Commission of South Africa in February 1992 (FFCC). The intervention was precipitated by a complaint from COSATU regarding the Minister’s discretion not to extend agreements. This complaint had arisen following three separate occasions where the Minister had applied his discretion in this manner.

The FFCC report emphasized the principles of voluntarism and non-intervention as espoused by the ILO supervisory bodies. The report noted that intervention by public authorities should only be justifiable for major economic or social reasons or in the general interest. Importantly, in the context of this paper, the FFCC supported limited intervention (by the Minister) in respect of freely-concluded agreements. It was their position that intervention should be restricted to technical matters only.

---

128 Answering affidavit of respondent 20: The MEIBC par 35.
129 Answering affidavit of respondent 20: The MEIBC par 36.
130 Answering affidavit of respondent 20: The MEIBC par 41.
131 At par 709.
132 Ibid.
example would be compliance with minimum labour legislation.\textsuperscript{133} It is noteworthy that the explanatory memorandum for the Draft Labour Relations Bill of 1995 specifically included the FFCC report as one of the reference points of the bill.\textsuperscript{134}

The Labour Force Survey (LFS) conducted in 2004 estimated that Bargaining Councils covered 20.3\% of the total labour force in South Africa.\textsuperscript{135} The survey provided a breakdown of coverage across the economy indicating that in four of the five major sectors there was no coverage at all.\textsuperscript{136} Of the remaining five sectors there was only significant coverage in three of them.\textsuperscript{137} These were the manufacturing, transport and community services.\textsuperscript{138}

The total picture from the survey is that of 7 241 951 employees employed nationally only 2 358 012 are registered with councils and only 335 420 are employees at non-party firms.\textsuperscript{139} This represents a percentage of only 4.6\% of all employees which are employed at non-party employers and covered by bargaining councils. Whilst this might appear to be an insignificant number it has been noted that the number of non-party employees reflected in the survey are only those employees employed at registered non-party employers.\textsuperscript{140} It does not reflect the number of employees employed at non-registered non-party employers. As such it is conceded by the authors of the survey that undercounting of employees covered by extended agreements is a reality.\textsuperscript{141}

\textsuperscript{133} At par 710.
\textsuperscript{134} Explanatory memorandum (1995) 16 \textit{ILJ} 278 at 278-279.
\textsuperscript{135} Godfrey \textit{et al} \textit{Collective Bargaining} 114.
\textsuperscript{136} Godfrey \textit{et al} \textit{Collective Bargaining} 115.
\textsuperscript{137} \textit{Ibid}.
\textsuperscript{138} \textit{Ibid}.
\textsuperscript{139} Godfrey \textit{et al} \textit{Collective Bargaining} 117.
\textsuperscript{140} \textit{Ibid}.
\textsuperscript{141} Godfrey \textit{et al} \textit{Collective Bargaining} 118.
CHAPTER FOUR
THE CURRENT LEGISLATIVE FRAMEWORK

4.1 THE COLLECTIVE-BARGAINING FRAMEWORK

The Bargaining Council system forms an integral part of South Africa’s labour relations framework in terms of current legislation.\textsuperscript{142} The collective-bargaining provisions in the LRA are extensive, effectively constituting the spine of the South African labour relations framework. This framework is outlined in Chapter Three of the Act which follows the introductory and general protection chapters respectively.\textsuperscript{143}

The first section of the Act in the introductory chapter describes its purpose, which includes the provision of a framework for collective bargaining in respect of wages and other conditions of employment. This is one of three key purposes of the Act, the other two being giving effect to constitutional obligations\textsuperscript{144} as well as those obligations incurred by virtue of our associations with the International Labour Organisation.\textsuperscript{145}

The Freedom of Association in chapter two provides the initial brace for the spine by removing any restrictions to the existence of its components. These components or “parties” to the bargaining-council system are the trade unions on the one hand and the employer organisations on the other.

The base of the spine is found in part A of Chapter Three. Part A provides a strong foundation for the trade-union party by providing for extensive organisational

\textsuperscript{142} Act 66 of 1995.
\textsuperscript{143} Chapter One of the Act covers the purpose, application and interpretations of the Act whilst chapter two covers freedom of Association and General protections.
\textsuperscript{144} S 1(a) of Act 66 of 1995.
\textsuperscript{145} S 1(b) of Act 66 of 1995.
rights.\textsuperscript{146} At the heart of the structure is the provision for “soldiers on the ground” in the form of union representatives in the work place.\textsuperscript{147} These foot soldiers constitute a crucial operating *nexus* between plant-level aspirations and centralised bargaining mandates. They also play a pivotal role in monitoring compliance with the resultant negotiated collective agreements.\textsuperscript{148}

Equally important for purposes of sustainability is the facilitation of union funding from its members and access to the workplace by its officials.\textsuperscript{149} The legislation serves to bolster the collective bargaining environment further by providing for agency-shop and closed shop agreements.\textsuperscript{150} An agency shop agreement enables a union with a majority of members employed in a workplace or by an employer’s organisation to deduct an agency fee from non-members.\textsuperscript{151} This agency agreement overrides any other law or contractual provision in that the deduction may be effected without the authorisation of the non-member.\textsuperscript{152}

### 4.2 THE OPERATION OF BARGAINING COUNCILS

The functions and powers of bargaining councils in terms of current legislation are outlined in section 28 of the Labour Relations Act.\textsuperscript{153} The core functions include the conclusion and enforcement of collective agreements.\textsuperscript{154} Other important functions of councils are dispute resolution,\textsuperscript{155} the promotion of training and education schemes\textsuperscript{156} as well as the administration of industry benefit funds.\textsuperscript{157}

\begin{footnotesize}
\begin{itemize}
  \item 146 Ss 11-22 of the Labour Relations Act 66 of 1995.
  \item 147 Provided for in s 11 of Act 66 of 1995.
  \item 148 S 14(4)(b) of the Act provides the right for union representatives to monitor compliance and s 14(4)(c) provides for the right to report any contraventions to the employer, trade union or any other valid authority.
  \item 149 Ss 13 and 12 of Act 66 of 1995.
  \item 150 Ss 25 and 26 of Act 66 of 1995.
  \item 151 S25(1) of Act 66 of 1995.
  \item 152 S 25(4)(a) of Act 66 of 1995.
  \item 153 Act 66 of 1995.
  \item 154 S 28(1)(a) and s 28(1)(b).
  \item 155 S 28(1)(c) and (d).
  \item 156 S 28(1)(f).
  \item 157 S 28(1)(g).
\end{itemize}
\end{footnotesize}
For the purposes of enforcement bargaining councils have the authority to appoint council agents who perform a role not dissimilar to that played by department of labour inspectors empowered to enforce primary labour legislation such as the Basic Conditions of Employment Act.\textsuperscript{158}

The powers of a bargaining-council agent are outlined in Schedule 10 of the LRA.\textsuperscript{159} These powers provide the agent right of entry (into a workplace) without warrant or notice and to require persons to disclose information relating to the implementation of the relevant collective agreement.\textsuperscript{160} This disclosure may be required under oath or affirmation.\textsuperscript{161} Any false statement in response to a question posed by a council agent may be used against that person in criminal proceedings relating to perjury.\textsuperscript{162} The council agents enjoy the backing of the Labour Court which is empowered to issue an order against any person resisting the lawful requirements imposed by council agents.\textsuperscript{163}

Council agents are empowered to issue compliance notices in cases of non-compliance with council agreements. Arbitration, with the council as the applicant, shall follow in the event of a failure to adhere to the dictates of the order. An arbitrator nominated by the council, alternatively a CCMA commissioner, shall hear the matter and shall be empowered to make remedial and / or punitive awards if he/she finds in favour of the council. Awards of this nature are final and binding and executable in the same manner as those of orders of the Labour Court.

The collective agreements (which agents are tasked to enforce) become binding on parties and non-parties to the agreement in terms of sections 31 and 32 of the LRA respectively.\textsuperscript{164} Those considered as “parties” to the agreement are the respective employer organisations and trade unions who are signatories to the agreement as well as their respective members which include individual employers and employees.

\textsuperscript{158} 75 of 1997.
\textsuperscript{159} 66 of 1995.
\textsuperscript{160} Schedule 10(1) of Act 66 of 1995.
\textsuperscript{161} Schedule 10(5)(a) of Act 66 of 1995.
\textsuperscript{162} Schedule 10(9) of Act 66 of 1995.
\textsuperscript{163} Schedule 10(11) of Act 66 of 1995.
\textsuperscript{164} 66 of 1995.
The agreement becomes legally binding on all these parties upon signing of the collective agreement.\textsuperscript{165} It is worth mentioning that the parties to an agreement might not include all the parties to a bargaining council. It can therefore transpire that parties to a bargaining council may be classified as non-parties in relation to any specific collective agreement. As such the bargaining council non-parties and all other non-parties would fall into the same boat in so far as becoming bound by the extension of the collective agreement in terms of section 32.

The legal obligation to comply with a collective agreement in terms of section 31 is typically less of a driving force (than in the case of non-parties) because parties are voluntary signatories to the agreement. There will, however, always be differing levels of satisfaction even amongst the parties to agreements, and as such there will certainly be occasion where council agents are required to utilise their powers to enforce compliance within the ranks of the parties.

It is, however, the legal obligation that is founded in section 32 which has courted extensive and emotive debate since the inception of the Act. This is because the compliance is enforced on an involuntary basis by extending the agreement to the non-parties. This debate is ongoing and current and forms the essential subject matter of this treatise. It is therefore imperative to provide a thorough analysis of the mechanics of section 32.

4.3 THE MECHANICS OF SECTION 32

The first hurdle to the extension of a collective agreement in terms of this section 32 is that a majority of the party trade unions and a majority of the party employer organisations must vote in favour of the extension.\textsuperscript{166} This vote must take place at a meeting of the Council and the non-parties to whom the agreement is extended must be identified and they must fall within the registered scope of the Council. If this hurdle is crossed the Council may then elect to request the Minister to extend the agreement to such non-parties.

\textsuperscript{165} S 31 of Act 66 of 1995.
\textsuperscript{166} Ss (1)(a) and (1)(b).
The Minister must, within 60 days of receiving such request, publish a notice in the Government Gazette that effectively binds the identified non-parties to the terms of the collective agreement.\textsuperscript{167} This Minister has no discretion in this regard so long as the first hurdle has been successfully crossed and secondly, upon the extension of the agreement, the majority of employees falling within the registered scope belong to the trade unions that are party to the bargaining council, and the majority of employees falling within the registered scope are employed by the employer organisations that are party to the bargaining council.\textsuperscript{168} In reality the effect of extending an agreement to non-parties is to render them parties to the agreement. This point was made by the Labour Appeal Court in \textit{Kem-Lin Fashions v Brunton & Another}.\textsuperscript{169}

The manner in which the representivity criteria have been structured in section 32 allows for permutations which could be perceived as being at odds with basic majoritarian principles. As an example in the instance where 51\% of all employees within the scope are “party employees” and only 51\% of those employees fall under signatories to any particular collective agreement then one can conceivably have that particular agreement extended by a 26\% minority faction to 74\% majority faction.

Despite this apparent structural bias (towards enabling extension) the legislation goes one step further. In the instance where the majority criteria outlined above have not been satisfied the Minister may still use his/her discretion to extend the agreement notwithstanding. This facility made possible in terms of sub-section 32(5) was not contained in the original labour-relations bill of 1995.

In order to extend in such circumstances the Minister must be satisfied that, firstly, the parties are “sufficiently representative” and secondly that a failure to extend the agreement will undermine collective bargaining at a sectoral level.\textsuperscript{170}

\textsuperscript{167} S 32(2) of Act 66 of 1995.
\textsuperscript{168} The validity of any representivity measurement depends on the accuracy of the available data. The fact that only registered non-party employment details are typically included in the calculation skews the measure in favour of party employers.
\textsuperscript{169} (2001) 22 ILJ 109 (LAC).
\textsuperscript{170} S 32(5) of Act 66 of 1995.
The term “sufficiently representative” is not defined in respect of the relevant section of the Act nor is there any existing case law to heed.\textsuperscript{171} However, some guidance is provided by section 49 of the LRA.\textsuperscript{172} This section clarifies that parties to a council may be considered sufficiently representative for the whole of an area even if there are no parties in any particular part of the area.\textsuperscript{173} This view on representivity has significance to the extent that it may facilitate the extension of agreements into rural areas that are unorganised by either trade unions or employer organisations.

The section does not provide a definition of “sufficiently representative” nor does it espouse on the criteria that should be considered to determine whether collective bargaining is being undermined. In practice it appears as though the Minister is adopting a stricter approach to extensions.\textsuperscript{174} It has been suggested that even if one of the parties is in the low 40% then the agreement shall not be extended.\textsuperscript{175} As such it appears then that in practice this back door to extensions is guarded closely and there is no easy passage through it. Godfrey, however, argues that the objective to promote centralised bargaining as outlined in the LRA should predispose the Minister to interpreting representivity more flexibly and broadly than an absolute majority. I would argue that this must have been the intention of the drafters because any other interpretation would render clause 32(5) meaningless and redundant.

In the case of \textit{Valuline CC and Others v Minister of Labour and Others},\textsuperscript{176} the Pietermaritzburg High Court had to consider this question. The court elected to review and set aside the Minister’s decision to extend the 2010 National Main Collective Agreement of the National Bargaining Council for the Clothing Manufacturing Industry to non-parties in the clothing industry. It did so on the basis that the requirements of section 32 of the Labour Relations Act of 1995 (as amended) (“the LRA”), which regulates the extension of collective agreements concluded in bargaining councils to non-parties, were not met.

\textsuperscript{171} Godfrey \textit{et al} Collective Bargaining 91.
\textsuperscript{172} Grogan \textit{Collective Labour Law} 73.
\textsuperscript{173} S 49(1).
\textsuperscript{174} Godfrey \textit{et al} Collective Bargaining 124.
\textsuperscript{175} \textit{Ibid.}
\textsuperscript{176} (5642/2011) [2013] ZAKZPHC 9 (13 March 2013).
The judgment further confirmed that the High Court has concurrent jurisdiction with the Labour Court to determine matters arising out of section 32 of the LRA.

It is clear from this judgment that collective agreements concluded in bargaining councils can only be extended to non-parties if the requirements of section 32 of the LRA are met. Importantly, either the Labour or High Courts can be approached to consider this type of dispute.

4.4 THE AMENDMENTS TO SECTION 32

In terms of the Labour Relations Amendment Act, 2014 amendments have been effected to the wording of section 32. These include adding further criteria that must be met before the Minister is able to extend an agreement to non-parties.

The first of these is a requirement that bargaining councils have in place an effective procedure to deal with applications for exemption by non-parties. This procedure must ensure that applications are heard within 30 days of submitting the application. The second targets expediency by requiring that appeals to the independent body are also heard within 30 days of the appeal application.

The amendments aim to ensure a fair hearing for appellants by taking measures to ensure that the independent appeal body is impartial. This is achieved by a new provision that would prevent any representative from either a trade union or an employer’s organization that is party to the council from participating in the appeals body.

Section 32(5), which opens the door for extensions in circumstances where there is not a 50% majority, is the object of amendments on two different fronts. The first front would appear to close the door somewhat by requiring the Minister to invite and consider comments regarding the proposed agreement extension. This would...

---

177 Act no.6 of 2014
178 S 4(a) of the Labour Relations Amendment Bill of 2013.
179 S 4(b) of the Labour Relations Amendment Bill of 2013.
180 S 4(c) of the Labour Relations Amendment Bill of 2013.
181 S 4(d) of the Labour Relations Amendment Bill of 2013.
appear to be aimed at providing non-parties (who are in the majority) to have their voice heard before the Minister may elect to impose the agreement on them. The second front would appear to lever the door back open by allowing the Minister to specifically consider the extent of non-standard employment in the sector as a criterion to determine sufficient representivity. These non-standard work practices include the provision of labour through temporary employment services, employees on fixed-term contracts as well as part-time employees.

It is generally accepted that non-standard employment practices serve to inhibit trade union organization. As such it is probable that the intention behind this amendment is to allow some elasticity below the 50% threshold in sectors where there are significant non-standard work practices.

The MEIBC in their answering affidavit noted that the proposed amendments (at that time) have been the subject of negotiations amongst all the social partners at NEDLAC.

---

182 S 4(e) of the Labour Relations Amendment Bill of 2013.
5.1 BACKGROUND TO THE FREE MARKET FOUNDATION

The Free Market Foundation is a section 21 company that was registered in 1975 in terms of the Companies Act 61 of 1973.\textsuperscript{183} The Foundation describes itself in its Notice of Motion as an independent policy, research and education organisation, promoting the principles of limited government, economic freedom and individual liberty.\textsuperscript{184} The Foundation argues that its status as an independent public-benefit organisation and the ideals that it fosters, form the basis for its \textit{locus standi} in this particular matter.\textsuperscript{185}

The Minister of Labour eventually responded to the FMF’s legal challenge by filing responding papers with the Court on 17 April 2014. The FMF has pointed out that this is more than a year after the initial notice of motion in March 2013 and views the various delays and requests for extension as a tactic to obstruct the course of justice for the unemployed.\textsuperscript{186} The FMF filed its final affidavits with the courts on 20 May 2014 and is currently seeking a date for a hearing.\textsuperscript{187} Chairman of the FMF, Herman Mashaba, has questioned why the Minister, as an executive tasked with the job of protecting South Africa’s constitution, would be part of delaying the progress of the challenge.\textsuperscript{188} Mr Mashaba has also questioned why the Minister would not want to have the opportunity to apply her mind in the process of extending agreements.\textsuperscript{189}

\textsuperscript{183} Notice of Motion 3.
\textsuperscript{184} Notice of Motion 3.1.
\textsuperscript{185} Notice of Motion 7-8.
\textsuperscript{187} \textit{Ibid}.
\textsuperscript{188} \textit{Ibid}.
\textsuperscript{189} \textit{Ibid}.
In its responding affidavit respondent no 20, the Metal and Engineering Industry Bargaining Council (MEIBC), has questioned the appropriateness of this question being debated in a court of law. Instead the Council contends that the wide range of competing political and economic interests makes this topic the one best suited to the legislative process.\textsuperscript{190}

5.2 \textbf{ALLEGED CONSTITUTIONAL VIOLATIONS}

The Foundation argues that the parties of bargaining councils are private actors and as such the delegation of regulatory powers to these private actors (by the state) constitutes a violation of the constitution.\textsuperscript{191} It contends that this delegation to private actors violates the principle of legality embodied in section 1 of the Constitution.\textsuperscript{192} This is because the matters that have been delegated constitute a “core coercive function”.\textsuperscript{193} This is the first alleged constitutional violation.

The second is that the manner of extension violates the principle of freedom of association as contained in section 18 of the Constitution.\textsuperscript{194} This submission is based on the assertion that persons outside of the bargaining-council framework are required to comply with rules that have been formulated by other persons who have no “legitimate, responsive or accountable” authority over them.\textsuperscript{195}

The third violation according to the FMF is that, because the private actors are not accountable through the democratic political process, their control over the current regulatory framework falls foul of section 33 of the Constitution.\textsuperscript{196} This is because the current framework violates their right to lawful, reasonable and procedurally fair administrative action.

\textsuperscript{190} Answering affidavit of the 20\textsuperscript{th} respondent: The MEIBC par 15.
\textsuperscript{191} \url{http://mg.co.za/article/2013-03-08-00-bargaining-extension-fought-on-constitutional-grounds-1} accessed 16 May 2014.
\textsuperscript{192} Act 108 of 1996.
\textsuperscript{193} Notice of Motion par 36.1.
\textsuperscript{194} Act 108 of 1996.
\textsuperscript{195} Notice of Motion par 36.2.
\textsuperscript{196} Act 108 of 1996.
The fourth alleged violation as a consequence of the delegated authority is the violation of the right to dignity in terms of section 8 of the Constitution.\textsuperscript{197} It is alleged that the obligation to submit to the will of others who are beyond state supervision impinges on important matters of self-actualisation.\textsuperscript{198}

The fifth and final constitutional violation is that of section 9, governing the right to equality.\textsuperscript{199} The argument goes that a failure to vest any supervisory powers in the hands of the Minister allows for unfair discrimination against work seekers and potential new business entrants.\textsuperscript{200}

It is argued further that the system serves to distort majoritarian principles such that a minority effectively imposes its will on the majority.\textsuperscript{201} The Foundation’s case also relies heavily on the perceived negative impact of centralised bargaining on job-creation opportunities.\textsuperscript{202} Counsel for the Foundation has indicated that in this regard they will be drawing on the work of economists from Europe, Australasia and the United States.\textsuperscript{203}

\textbf{5.3 THE HEADS OF ARGUMENT}

The Free Market Foundation is the applicant in a matter that has been lodged in the Gauteng North High Court that amounts to a constitutional challenge of certain provisions contained in section 32 of the Act.\textsuperscript{204} The respondents in this matter are listed in the notice of motion as the Minister of Labour (first respondent), the Minister of Justice and Constitutional Development (second respondent) with the remaining forty-eight respondents comprising of bargaining councils registered in terms of section twenty-nine of the Act.\textsuperscript{205}

\textsuperscript{197} Act 108 of 1996.
\textsuperscript{198} Notice of Motion par 36.4.
\textsuperscript{199} Notice of Motion par 36.5.
\textsuperscript{200} \textit{Ibid}.
\textsuperscript{201} \textit{Ibid}.
\textsuperscript{202} \textit{Ibid}.
\textsuperscript{203} \textit{Ibid}.
\textsuperscript{204} \textit{Ibid}.
\textsuperscript{205} Act 66 of 1995.
The challenge against section 32 is mounted on two fronts. The first is that private actors (in the form of parties to bargaining councils) should not be permitted to impose their collective party agreements on non-parties and especially so in the absence of any discretionary gate-keeping by the Minister. As a means to address this lack of discretion the applications call for an order substituting the word ‘must’ with the word “may” in section 32(2).

5.3.1 BARGAINING COUNCILS ARE “PRIVATE” ACTORS

The FMF argues against entrusting the parties to bargaining councils (as private actors) to impose their own collective agreements on non-parties without any intervening Government discretion.

Instead the FMF argues that an organ of State should be empowered and mandated to apply discretion in the public interest prior to any extension of the agreement. The FMF argues further that, in order to apply this discretion properly the audi alterem partem should apply which requirement would necessitate a proper hearing. A reading of the Act indicates that there is no requirement for those non-parties (which the extension intends to bind) to be consulted or heard prior to the request for extension. It is the absence of any ministerial discretion or due-hearing process which the FMF relies on to contend the unconstitutionality of section 32.

The FMF makes reference to the history of collective bargaining in South Africa, noting that ministerial discretion has always been a vital ingredient in the pot that forms extension of agreements. From the original extension legislation (contained in the Act of 1924) the Minister, whilst empowered to extend, retained discretionary decision-making power. The Minister had to firstly satisfy himself/herself that the

---

206 Minister of Labour.
207 Notice of Motion 14.
208 Notice of Motion 14.1.
209 Notice of Motion 14.2.
210 Notice of Motion par 17 the FMF refers to the origins of collective bargaining in South Africa as a consequence of the Industrial Conciliation Act.
parties were representative in the Industry and secondly that a failure to extend would have the consequence of unfair competition.\textsuperscript{211}

This principle of ministerial discretion (with regard to agreement extensions) survived all following versions of the Act, receiving its final marching orders only within the post-apartheid legislation.\textsuperscript{212} The 1956 Act required that the Minister determine “sufficient representivity” prior to extending the industrial-council agreement.\textsuperscript{213} The Minister also had to consider the rather subjective and vague criterion of “expediency” when applying his/her discretion. The important distinction is that discretion had to be applied. Thomson has suggested that the removal of discretion may serve to prevent arbitrary ministerial intervention but it does prevent beneficial scrutiny.\textsuperscript{214} Thomson noted further that a lack of scrutiny could have negative economic consequences in instances where the relationship between the negotiating parties is too “cosy”.\textsuperscript{215}

With regard to the representivity measure the then Director-General of Labour stated three measures that should be considered.\textsuperscript{216} Quite significant is that the currently excluded measure of employer-party firms as a proportion of all registered firms was included as one of these three measures.\textsuperscript{217}

The Director-General provided further criteria for the Minister to consider in determining “sufficient representivity” in terms of the 1956 Act. These criteria had a strong bias towards protecting the interests of small business. Included in them were whether the agreement was restrictive on the establishment of small businesses, the extent of non-party consultation and wage differentiation on an area basis and the extent to which small business has been accommodated through exemption procedures or general exclusions.\textsuperscript{218}

\begin{thebibliography}{9}
\bibitem{211} Notice of Motion par 17.
\bibitem{212} Act 66 of 1995.
\bibitem{213} Godfrey \textit{et al} \textit{Collective Bargaining} 70.
\bibitem{214} MEIBC answering affidavit par 72.
\bibitem{215} \textit{Ibid.}
\bibitem{216} Godfrey \textit{et al} \textit{Collective Bargaining} 70.
\bibitem{217} \textit{Ibid.}
\bibitem{218} \textit{Ibid.}
\end{thebibliography}
This post-apartheid legislation changed the game such that the Minister is now forced to extend an agreement if the section 32 representation criteria are met. There is no discretion to reject, the Council requests on policy grounds or in the public interest.\textsuperscript{219} The MEIBC in their answering affidavit refer to Godfrey’s assertion that this change was in response to two key problems that had been identified with the previous legislation as it applied to Industrial Councils. These were the issues of representivity and the exercise of ministerial discretion.\textsuperscript{220}

This change in tack with regard to agreement extensions came about despite the fact that the principle (of ministerial discretion) stood firm in other areas of post-apartheid labour legislation. The most relevant example is that of sectoral determinations in terms of the Basic Conditions of Employment Act.\textsuperscript{221} It has been suggested that the changes to Labour Relations Act were certainly no accident and have served to aggravate the oppressive nature of bargaining councils.\textsuperscript{222}

In terms of section 55 of the Basic Conditions of Employment Act the Minister is required to consider a report from a commission that has made recommendations on what should be included in a specific sectoral determination. The Minister is provided with explicit powers to refer the report back to the commission if there are any areas of disagreement.\textsuperscript{223} Any further (responding) report from the commission may cause the Minister to make a sectoral determination.\textsuperscript{224} It is, however, clear from the wording that there is no specific obligation in this regard. This ministerial discretion with regard to determining wages in unorganised sectors has been in existence from the onset of the Wage Act of 1925.

Support for this call for greater ministerial discretion can be found in the Government’s Growth, Employment and Redistribution strategy launched in June of 1996. The strategy document suggested that collective agreements should not be extended to non-parties unless there was reasonable certainty that there would be no

\textsuperscript{219} Notice of Motion par 32.
\textsuperscript{220} MEIBC answering affidavit par 70.
\textsuperscript{221} Act 75 of 1997.
\textsuperscript{222} Expert report: Professor Neil Rankin.
\textsuperscript{223} S 55(2) of Act 75 of 1997.
\textsuperscript{224} S 55(3) of Act 75 of 1997.
consequent job losses.\textsuperscript{225} It was proposed that the Minister be given greater discretion to consider these labour-market implications prior to giving extensions the green light.

5.3.2 MAJORITARIAN PRINCIPLE IS VIOLATED

On the second front the Foundation challenges the form of majoritarianism contained in section 32, alleging that it does not amount to “true majoritarianism”.\textsuperscript{226} Reliance is placed on the principle that, if the will of some is to be imposed on others, then this collective intention must at least represent the will of the majority.\textsuperscript{227} The FMF argues that in terms of the way the section is currently structured the abovementioned is not the case.

In this regard the foundation effectively argues that representivity should be assessed in terms of employers rather than employees that are party to the bargaining council.\textsuperscript{228} Empirical evidence suggests that adjusting the measure in this manner would have a significant impact. Whereas studies have shown that party employers employ 63\% of all employees covered by councils, these party employers only constitute 41\% of all employers.\textsuperscript{229}

Godfrey suggests that the omission of an employer-representivity measure is notable.\textsuperscript{230} He argues that the existence of such a measure would pressurize employers’ organisations to recruit smaller members. This in turn would require a more accommodating disposition towards them.\textsuperscript{231}

Industries of significance that would no longer enjoy a majority in terms of this measure include the Metal and Engineering industry, the Clothing Industry, Road Freight and SA Road Passenger, Textile Industry and Geographic Regions of the

\begin{flushright}
\textsuperscript{225} Godfrey et al Collective Bargaining 110. \\
\textsuperscript{226} Notice of Motion 2.1. \\
\textsuperscript{227} Notice of Motion 15. \\
\textsuperscript{228} Notice of Motion at par 2.1. \\
\textsuperscript{229} Godfrey et al Collective Bargaining 118. \\
\textsuperscript{230} Godfrey et al Collective Bargaining 92. \\
\textsuperscript{231} Ibid.
\end{flushright}
Furniture Industry. The only sizeable industry (with a genuine non-party component) that would still enjoy a majority on this measure would be the motor industry. In this industry the employers enjoy a marginal 54% majority which might be at risk if one factors in that not all non-party employers are registered.

This impact of factoring-in unregistered employers has shown to have a major impact on representivity in some sectors. A study of the textile industry compared data from a labour-force survey as a means to estimate the extent of unregistered employees in the industry. The results of this study indicate that as many as 46% of the industry employees are unregistered. Given that these employees are almost certainly all employed at non-party employers and with little or no union membership the impact on “real” levels of council representivity is profound.

The problem, however, is access to reliable data on unregistered employers. The problem with using alternative databases such as that of the UIF and Compensation Commissioner is the allocation of data to the correct sector. This is because of the lack of uniformity with regard to sectoral definitions.

The Foundation has proposed an amendment to the wording so as to reflect their position that employer numbers should form the true basis of representivity. These proposed amendments would be inserted in two different sub-sections which both deal with representivity. The first covers representivity amongst parties to the Council whilst the other covers representivity within the registered scope of the Council.

The applicant also has issue with sub-section 32(5) which as currently worded, allows for the possibility of agreement extension even in the absence of a majority. The proposed amendment in this regard is the deletion of the entire sub-section.

---

232 Godfrey et al Collective Bargaining 155 Table Two.
233 Ibid.
235 Godfrey et al Collective Bargaining 129.
236 S 32(1)(b).
5.3.3 THE ECONOMIC ARGUMENTS

5.3.3.1 THE NEGATIVE ECONOMIC IMPACT OF EXTENDING AGREEMENTS

The Foundation argues essentially that the extension of party agreements negates market competition and creates a barrier to entry for both small employers and the unemployed.\(^{237}\) Herman Mashaba, chairman of the Foundation, argues that the extension of agreements not only limits job creation but also leads to higher consumer prices, resulting in an uncompetitive economy.\(^{238}\) The FMF emphasises the critical nature of their challenge in the context of South Africa’s pressing unemployment levels. The unemployment level quoted by the FMF is the 2012 level of 25% which they juxtapose against the 13% that prevailed in 1994.\(^{239}\) This amounts to 4.5 million unemployed South Africans with a further, 2.1 million underemployed and a further 2.3 million that would like to work but have become discouraged by the negative prospects of finding work.\(^{240}\) Updated employment data for 2014 from Stats South Africa indicates an increase in unemployment in the last three quarters to June 2014. The second-quarter figure of 25.5% represents a three-year peak and is set to climb further amidst an economy that cannot absorb the increase in new entrants into the labour market.\(^{241}\) In order for the unemployment rate to be stabilised the economy would be required to create approximately 150 000 new jobs per quarter.\(^{242}\)

What has been evident from the second quarter stats is that job growth has only occurred in the Government sector, being off-set by losses in the agricultural, manufacturing, mining, construction, utilities and finance sectors.\(^{243}\) This is clearly a move in the wrong direction in terms of the increased tax burden and consequent Government debt. What is of particular concern for Iraj Abedian, MD of Pan African

\(^{237}\) Notice of Motion par 12.


\(^{239}\) Freedom Foundation Fact sheet on the legal challenge accessed from www.freemarketfoundation.com on 22 June 2014. According to Stats SA the unemployment rate as at the first quarter in 2014 is 25.2% (Sunday Times of 22 June 2014).


\(^{241}\) Business Times 3 August 2014 4: “Gloom for growing army of job seekers” Miriam Isa.

\(^{242}\) Ibid.

\(^{243}\) Ibid.
Investments is the double digit increases that have been taking place against the backdrop of this high unemployment. Abedian attributes this to the labour militancy which has seen a five month strike in the platinum industry and a four week strike in the engineering sector.\textsuperscript{244} He suggests that small and medium size business which accounts for 65\% of formal employment in South Africa cannot afford these increases.

This suggestion by Abedian has been proved to be more than mere speculation. This is borne out by the fact that small employers in the metal and engineering sector, organised by NEASA, embarked on an unprecedented lock-out that followed the settlement agreement that should have heralded a return to work for striking workers. NEASA embarked on the lock-out to reinforce their demands on the issue of affordable wages and clearly illustrates the extent of their frustration with the bargaining council agreement. This was after their counterpart Employers Federation SEIFSA, which represents the majority of big employers in the sector, signed for a double digit increase with the trade union parties. NEASA’s other demands included an improved exemption policy and a lower minimum wage for employees entering the industry.\textsuperscript{245}

Herman Mashaba of the FMF, commenting on the wage agreement reached in the engineering sector, had this to say:

'It is baffling that whilst all agree that this current agreement will do nothing to stem the job losses in the metal and engineering sector, it is still being welcomed as a good result.'\textsuperscript{246}

Rod Harper, senior partner at Cowan-Harper attorneys has also shared his opinion on the metal and engineering bargaining council suggesting that the council had to ask whether smaller employers should be expected to pay the same increases as the larger employers.\textsuperscript{247} Harper points to other councils that allow for greater flexibility such as differentiated rates between urban and rural areas. This is not so in the case of the metal and engineering industry which does not allow for a two tier system.

\textsuperscript{244} Ibid.
\textsuperscript{245} Business Times 3 August 2014 4: “David vs Goliath battle in metal sector” Jana Marais.
\textsuperscript{246} Ibid.
\textsuperscript{247} Ibid.
This is notwithstanding the fact that certain large SEIFSA members are allowed to bargain at company level.248

Of particular concern with regard to the unemployment problem is the impact on the youth where only 12% of persons between fifteen and twenty-four are employed. This compares with a figure of 40% in most other emerging economies, emphasizing that the unemployment debate is of particular concern in South Africa.249 A job-growth rate of only 0.7% for the period 2000 – 9250 suggests there shall be no quick fix to the unemployment problem which can be causally linked to a variety of other social problems.251 These include criminal activity, drug abuse and unsafe sex.252 Very importantly, long-term unemployment causes despair and hopelessness which, as the Arab Spring has proved, is a recipe for political turmoil. It is little wonder that a new political party such as the Economic Freedom Front (EFF), which speaks to this demographic, was able to make such inroads in their first national election.

The second distinctive characteristic of the South African socio-economic landscape, other than high unemployment, is its low market competitiveness.253 The FMF note the significance of this fact in the context of evidence which links high levels of labour market regulation with low efficiencies.254

The FMF makes use of expert witness, Professor Neil Rankin, to support their socio-economic arguments relating to their claim.255 Rankin’s report contained in his expert affidavit concludes that section 32 extensions in their current form have served to disadvantage the South African economy.256 This disadvantage, according to Rankin, manifests in the form of causing and exacerbating unemployment, retarding employment growth, undermining competitiveness and increasing prices for

248 Ibid.
249 The Expert Report 70 of the Notice of Motion.
250 Ibid.
251 Expert Opinion 71 of the Notice of Motion.
252 Ibid.
253 Expert Opinion 73 of the Notice of Motion.
254 Ibid.
255 It is recorded in the Notice of Motion that Rankin is an associate professor at the University of Stellenbosch.
256 Expert Affidavit par 3.
consumers. In the introduction to his report Rankin paints a picture of bargaining councils as a system of “insiders” that functions to the detriment of a group of “outsiders”. He describes the insiders as typically comprising larger business and organised labour whilst the “outsiders” are made up of the unemployed, small business, potential entrepreneurs and their would-be employees.

5.3.3.2 DAVID VERSUS GOLIATH

This dynamic of conflicting interests between large and small employers and their respective influence within the Council system has been a topical issue during the Metal and Engineering strikes of 2014. NEASA, the employers’ organisation representing mostly smaller employers has openly criticised the Minister of Labour for allegedly favouring the employers’ organisation SEIFSA, that represents all the large employers in the industry. NEASA represents 3 000 members in the Metal and Engineering sector, and their chief executive, Gerhard Papenfus, claims that even more of his members’ products are being manufactured outside of South Africa. This has resulted in approximately fifty of NEASA members closing their doors every month. Many of these companies, according to Papenfus, used to be competitive exporters.

Papenfus views the Labour Relations Act as the biggest threat to these businesses because it compels the smaller businesses to comply with the agreements that are struck between SEIFSA and NUMSA within the Metal and Engineering Bargaining Council. He accused the counterpart employers’ organisation SEIFSA of breaking ranks and going behind NEASA’s back to broker a deal with NUMSA that will destroy his smaller-member companies. Papenfus explains that his member companies do not have the same resources as the bigger SEIFSA companies and are therefore not in a position to make the same offer. He believes NUMSA is alert to this fact and

---

257 Ibid.
258 The Expert Report.
260 Sunday Times 20 July 9: “Big Business does the dirty on smaller rivals” by Chris Barron.
261 Ibid.
262 Ibid.
“know where their salvation lies”, and hence the bilateral discussions between the dominant trade-union and employer association on the council.263

The lack of financial muscle of smaller employers is not the only inhibiting factor in order to comply with bargaining-council agreements. The administrative burden of compliance hits smaller employers harder as they do not possess the same economies to compete with the scale maintained by larger employers. Papenfus claims that the same amount of work is required for a payroll for 5 employees as that required for a payroll of 100 employees.264

Johan Maree, Professor of Sociology at the University of Cape Town, agrees that the Industrial Council system has generally suited larger employers and registered trade unions in that the extension of their agreements has served to prevent undercutting of wages by smaller employers and non-unionised workers.265 Maree suggested further that this was the key reason to explain the longevity and durability of the industrial-council system.266

The notion of exclusivity and protectionism within the context of labour institutions is not a new concept. Craft unions in particular were criticised in the past for having a similar objective which was to protect their domain of scarce skills so as to ensure the longevity of their high standard of living.

Empirical research on the Industrial Council system has suggested that, whilst party employers are typically larger firms, they are not always in the majority.267 This statistic has raised the question as to how it is then possible that a select group of larger employers are capable of controlling the mandates of employer associations and ultimately council agreements. An answer to this question was suggested in a

263 Ibid.
264 Ibid.
265 http://www.humancapitalreview.org/content/default.asp?Article_ID=1026 article by Johan Maree “Collective bargaining trends in South Africa and contemporary challenges”.
266 Ibid.
different study of the Western Cape Clothing Industry. This study found that whilst larger firms might constitute a minority of employers in absolute numbers, their representatives at association meetings had the expertise to sway employer thinking.

Support for this dissertation would come from the author of this treatise based on his experiences as secretary of the Port Elizabeth Engineers Association over a period of fifteen years. During this period it was found that the affairs of the Association were dominated by the human-resource professionals employed by the larger firms in the Association. In this case the requirement to sway small employers was not as relevant due to the fact that small employers were in fact seldom in attendance.

This does beg the question as to why these smaller employers continue to associate with the employer organisations if they effectively do not have a voice within the forum. The answer to this apparent anomaly may lie somewhere within the concept of “reluctant collectivism”. This phrase was coined by Donnelly when researching employer views on associability shortly after the new political dispensation in South Africa. Donnelly suggested that this behaviour is largely a consequence of insecurity by employers in the face of a perceived combined threat from the institutions of Government and organised labour. This insecurity would be enhanced in the case of smaller employers who are generally less resourced to cope with these threats.

5.3.3.3 AN UNLIKELY LIAISON

According to Rankin the unfettered extension of agreements has the effect of creating a common interest (amongst bargaining-council parties) to raise the cost of employment. This argument seeks to change the historical view of organised capital and labour as diametrically opposing forces to one where there is a common

---

interest to stand together in defence against the third party outsiders - which it might be argued includes the South African economy itself.

A review of the dynamics that existed within the Steel and Engineering Industrial Council way back in 1987 confirms that council parties had by then already recognised the extent of their interdependence. At that time what is now one of South Africa’s biggest trade unions, viz NUMSA, had been launched following the amalgamation of a number of unions.\textsuperscript{272} Up until that point in time NUMSA’s primary predecessor, MAWU, had followed a strategy of being the Council’s prodigal child and chief antagonist. They filled this role by being party to Council negotiations but always refused to sign the industry agreement.\textsuperscript{273} This tactic was in support of their strategy to retain enterprise-level bargaining which they viewed as their primary power base.

By 1987, however, their power base (and numbers) had grown to the extent that a failure to sign the agreement by NUMSA would have had the effect that the non-parties would be in the majority. What NUMSA recognised at this point was that a failure to extend the agreement had the potential to collapse the major employer association. This was because employers would resign in mass from the association if their non-member employer counterparts were not obliged to pay the same increases. NUMSA realised further that a collapse of the employer association was not in their interests as it would spell the end of collective bargaining, and with it the ability to operate effectively on a national level.\textsuperscript{274}

It is argued that the extension of agreements benefits big business by significantly reducing the business prospects of would-be small (new) business entrants. This is because these smaller, under-capitalised entities are typically more labour intensive and as such more sensitive to the price of labour. Support for this argument comes from business partner, MD Jo Schwenke, who points to the furniture-manufacturing industry as a good example.\textsuperscript{275} Schwenke highlights the fact that the big players in

\textsuperscript{272} This amalgamation was in terms of COSATU’s policy of forming one union per industry.
\textsuperscript{273} Godfrey \textit{et al Collective Bargaining} 62.
\textsuperscript{274} Godfrey \textit{et al Collective Bargaining} 63.
\textsuperscript{275} Article by Greta Steyn in \textit{Finance Week} of 2 February 2005: “Red Tape Strangling Job Creation”.

47
the industry are generally capital intensive with a low labour to capital ratio. As such the impact of an increase in labour costs is easier to absorb.

The party unions and their members are also beneficiaries to the extent that the system serves to prop up the floor price of labour. Rankin finds support for his thesis (regarding the negative impact on employment) from Professors Nattrass and Seekings of the University of Cape Town. He quotes from what he regards as their seminal work on the topic as follows:

“The extension of agreements, the [National bargaining council for the clothing manufacturing industry] compliance drive, and resulting job losses puts paid to the argument that South Africa’s bargaining councils do not affect employment. Indeed the story illustrates how, under the hypocritical guise of promoting ‘decent work’ labour-market institutions and industrial policies can create an unholy coalition of the state, a trade union, and metro-based, relatively capital intensive employers whose actions can inflict massive job-destroying structural adjustment on a labour intensive industry.”

The report leans on the case study of the Clothing Industry in KZN and in particular the developments in the Newcastle region. These developments followed a bargaining-council decision in January 2010 to close down non-compliant employers in this region. By November of that year 26 employers had been “successfully” closed down but the impact of job losses was severe. Faced with potential job losses of up to 16 700 jobs the Council instituted a moratorium on the council raids on non-compliant employers. This moratorium was conditional on a phasing in of compliance. Almost two years later up to seventy-two per cent of employers were still non-compliant and, although these were predominantly small businesses, they employed a majority of the known employees in the industry.
A study of the actual remuneration being paid at the non-compliant employers indicated a large gap between actual and bargaining-council minimums.284 Thousands of employees in the Industry were being paid less than a third of the prescribed council minimums.285 Whilst this does not paint a pretty picture of working conditions it is pointed out that pay for performance had become a typical feature of remuneration structures at non-compliant firms.286 This has the consequence of aligning pay with productivity with the result that in some cases productive employees received as much as double the prescribed minimums.287

Bargaining-council agreements, however, effectively rule out this type of wage model because they require that any incentive pay be over and above the minimum wage.288 This restriction on a productivity-based wage model has a greater impact on the lower end of the clothing market that competes on price with highly productive foreign competitors.289 These imposed conditions forced the hand of local manufacturers to lobby for import-tariff barriers in order to maintain their margins.290 Their lobbying bore fruit in 2006 when voluntary export restrictions (VERs) were achieved following negotiations with China.

These gains from the negotiation table would have been welcomed in the manufacturing sector as some form of relief from the pressures exerted by bargaining-council agreements. The real loser in this scenario, however, is the clothing consumer and in particular those poorer consumers at the lower end of the market.291 A study by Rankin and Edwards in 2012 concluded that the impact of these VER’s caused an average 6 - 11 per cent hike on clothing prices.292 It was estimated that the total cost of the VERs was in the region of R429 million to R857

284 Ibid.
285 Ibid.
286 Ibid.
287 Ibid.
288 The Expert Report 68 of the Notice of Motion.
289 Ibid.
290 Ibid.
291 Ibid.
292 The Expert Report 69 of the Notice of Motion.
This argument is not new and had been espoused by advocates of labour-market flexibility soon after the promulgation of the first post-apartheid labour legislation. The South African Foundation (SAF) produced a macro-economic policy in 1996 that targeted the extension of bargaining-council agreements. Their argument was that extension of agreements allowed what they termed “insiders” (both employers and employees) to price new entrants out of the market place. The victims, they argued, were mainly small businesses and the unemployed.

This argument for labour market flexibility had not gone unnoticed by the ANC Government since the advent of democracy. Indeed, as early as 1996 the Government introduced their Growth, Employment and Redistribution (GEAR) strategy which called for greater ministerial discretion relating to the extension of collective agreements.

Later in 1999 President Mbeki, in his opening of Parliament speech, announced a review of labour legislation in response to the criticism of its negative impact on investment and job creation. The findings of this review informed the contents of the Labour Relations Bill of 2000. It was also reflected in the Labour Ministry’s “programme of action” at the time (1999-2004). In terms of this programme there was an agreement to amend labour legislation in response to demands from business quarters for the relaxation of sectoral-agreement extensions.

This Bill included a provision whereby non-parties would be entitled to submit commentary before the Minister took a final decision to extend a collective agreement.

---

293 Ibid.
295 Ibid.
296 Godfrey et al Collective Bargaining 112.
297 Ibid.
299 Ibid.
agreement. The provision was however omitted from the final draft in 2002 whilst pro-council measures such as improved enforcement powers were retained.300

The post-democracy ANC Government was not the first South African Government to give serious attention to the matter of labour-market deregulation. The enormous economic pressure that was brought to bear on the South African economy in the 1980’s caused a shift in National Party thinking. Whereas the Party had historically supported the Industrial Council system its labour-market policy became more aligned with free-market thinking.301 The promotion of small business became a priority agenda item and this focussed attention on the potentially inhibiting effect of industrial-council agreements on this sector. This shift in policy manifested by way of Government circulars which were distributed to industrial councils from the mid-1980s.302 These circulars called for the accommodation of small businesses including special dispensations for rural areas.303 Small businesses also had to be informed of the opportunity to apply for exemption. Quite importantly in the context of the arguments in this paper, adherence to these guidelines was taken into account when deciding whether council agreements would be extended. The key point to be emphasized is that there was a decision to be made by the Minister.

The Free Market Foundation argues along similar lines to the SAF. The FMF argues that a lack of competition on wages facilitates the trade unions’ objective of achieving higher benefits for their own members.304 It is argued further that the employers party to the agreements, are only satisfied to reach agreement on inflated wages in the event that they are extended to non-parties and as such would prevent their entry into the particular sectoral arena.305 The Foundation refers to this common interest in inflating wages as “rent-seeking”, arguing that the negative economic consequences include stunted entrepreneurship and increased unemployment.306

300 Godfrey et al Collective Bargaining 112.
302 Ibid.
304 Notice of Motion 12.1.
305 Notice of Motion 12.2.
306 Notice of Motion 12.3.
6.1 BACKGROUND TO THE MEIBC

The Metal and Engineering Industry Bargaining Council (MEIBC) covers a wide range of activities that include the production of iron and steel as well as the full spectrum of engineering sectors. These sectors range from manufacturing, ship-building, electrical engineering and also includes the plastic industry.307

The Council has four registered employer organisations that are active on the Council. These are the Steel and Engineering Industries Federation of South Africa (SEIFSA), the Federated Employer’s Organisation of South Africa (FEASA), the National Employer’s Association of South Africa (NEASA) and the Plastic Converters’ Association of South Africa (PCASA).308 Juxtaposed on the other side of the Council fence are six trade unions that are parties to the Council. These unions are Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (CEPPWAWU), Metal and Electrical Workers Union of South Africa (MEWUSA), Solidarity MWU, Union Association of South Africa (UASA), National Union of Metal Workers of South Africa (NUMSA) and the South African Equity Workers Union (SAEWA).

There are 10 293 employers registered with the Council on a national basis. Fractionally fewer than two-thirds of these employers are non-parties (6787). The total employee strength in the industry is 318 810 of which fifty-two per cent are employed by the party employers.309 These statistics confirm the generally accepted perception that party employers are on average larger than non-party employers. An analysis of employers in the industry with fewer than 10 employees shows that as

308 Answering affidavit of the 20th respondent: the MEIBC par 100.
309 Answering affidavit of the 20th respondent: the MEIBC par 105.
much as 75% are non-party employers. An analysis of employers with more than 200 employees indicates a non-party percentage at a surprisingly high figure of 40%.\footnote{Ibid.} Whilst this might lend some credence to the MEIBC’s contention that there is a fair spread of employer size in both non-party and party employers it is clear that at the lowest levels there is a significant non-party presence. It would also have been interesting to have access to the statistics pertaining to the really big employers who employ above 1 000 employees. It is probable that an analysis in this regard would indicate a very low non-party constituency. This is significant in light of the arguments levelled at the extent of influence the exceptionally big employers have within the employer caucus.

Historically, the most influential of these organisations have been SEIFSA on the employers’ side and NUMSA on the employees’ side.

\section*{6.2 THE RESPONSE FROM THE MEIBC}

\subsection*{6.2.1 INTRODUCTION}

According to Lucio Trentini, Operations Director for SEIFSA, the MEIBC’s decision to submit their own responding papers was motivated largely by the fact that as the largest and oldest Council they arguably have the most to lose as a consequence of the FMF proposals.\footnote{E-mail correspondence between Trentini and the author on 9 September 2014.} It was for this reason that all the parties to the Council (aside from NEASA), and especially NUMSA, felt strongly that it would not be prudent to be simply part of a combined bargaining-council response. Instead it was felt that the MEIBC should take a lead in defending the matter.\footnote{Ibid.} Trentini confirmed that NEASA, the single biggest employer association on the Council, had gone on record as supporting the FMF proposals.\footnote{Ibid.}

The answering affidavit is submitted by Mr Thuli Mthiyani, employed as General Secretary of the MEIBC. Initial reference is made to the nature of the relief sought by the FMF suggesting that the implications thereof would be far-reaching for the entire
labour-relations landscape. It is contended that their comprehensive response has been formulated with this in mind.314

Before addressing the actual arguments the MEIBC makes a legal point of suggesting that the High Court is not the appropriate forum to consider the application. The FMF is accused of strategically electing the High Court route as a way to circumvent the Labour Appeal Court on the legal path that could potentially end in the Constitutional Court. The MEIBC argues that this negates the opportunity for the Labour Appeal Court, which, along with the Labour Court, has been established for the purpose of on-going interpretation and administration of the LRA, to consider the matter.315 As such the Constitutional Court would be denied access to a judgment from the LAC, and it is on this basis that the MEIBC has submitted, on the principle of *forum non-conveniens*, that the High Court should decline to hear the matter.

That said, the MEIBC proceeds with a response which can be categorised along three broad fronts. The first of these presents a defence against the allegations of victimisation and helplessness of smaller employers within the bargaining-council environment. The Council’s exemption policy and procedure are the fortress upon which this defence is built. The other key weapons in this arsenal include the relief available in the form of exemption appeals and court reviews, as well as the extent of inclusion of small employers within the council system. It is argued that the flexibility forged by these avenues negates any potential negative economic consequences, if there are indeed any at all. In this regard the Council turns to research which concludes that there is no proof that bargaining-council agreements impact negatively on unemployment levels.

The second front focusses on the politico-legal context of bargaining councils. The point is made that these institutions have not been crafted from within a vacuum but are instead the product of extensive debate amongst the key social stakeholders. Most importantly this includes the mandatory negotiations that take place within NEDLAC as part of the legislative development process. It is argued that this is the

314 Answering affidavit of the 20th respondent MEIBC par 8.
315 Answering affidavit of the 20th respondent MEIBC par 12.
democratic womb from which the LRA has been born and that the bargaining-council framework is a core-support structure upholding the objectives of this legislation. It is on this basis that any limitation of constitutional rights, if there are indeed any, would in any event be justified in terms of the limitation clause. The accusation of Council’s being private actors is vehemently denied, noting that they are accountable and are subject to judicial review in terms of PAJA.

The third and final front is to some extent an extension of the second. The focus here is on the positive benefits for employees, industry and society at large that flow from the Council system. These include retirement benefits, a decent living wage, safe work environments as well as capacity to fulfil statutory requirements. It is argued that a successful application by the FMF would collapse the Council system along with these benefits, and it is suggested that this is in fact the FMF’s agenda.

6.2.2 THE FIRST FRONT

6.2.2.1 THE EXEMPTION DEFENCE

In terms of the requirements of the LRA, the constitution of a bargaining council must include a procedure whereby a party affected by a collective agreement may apply to be exempted from the provisions of such agreement.\(^\text{316}\) This procedure must make provision for an appeal to an independent body in the event that the exemption is refused.\(^\text{317}\) It would be fair to say, based on a reading of the MEIBC answering affidavit that their purported efficiency in which they comply with this statutory requirement is the foundation on which they have built their responding arguments.

The Council goes as far as asserting that all the FMF contentions lose credence when juxtaposed against the effectiveness of their exemptions system. The MEIBC are particularly critical of the FMF’s position on exemptions as contained in their founding papers. They accuse the FMF of making a “bland, general and unsubstantiated statement” regarding the exemption process and prospects of success.\(^\text{318}\) The various FMF contentions which are, according to the MEIBC,

\(^{316}\) Van der Walt et al Labour Law in Context 191.

\(^{317}\) Ibid.

\(^{318}\) Answering affidavit of the 20\(^{th}\) respondent: the MEIBC par 130.
stumped by the exemption process include an alleged lack of due process, the right to freedom of association, alleged infringement on the right to dignity, alleged barriers to entry and alleged lack of accountability. It is on this basis that the MEIBC vehemently defends their position that the bargaining-council scheme does not violate any constitutional right.319

The MEIBC alleges that the whole premise on which Rankin bases his economic arguments fall flat in the face of the reality that is the exemption process.320 They point to the exemption statistics as proof of a successful exemptions regime. This success negates any argument of collusion between the bigger players. It is Rankin’s alleged disregard for the exemption provisions which renders his report as being “significantly flawed” in the eyes of the MEIBC.321 Whilst the MEIBC stops short of outrightly disputing Rankin’s postulations regarding the differing impact of wage increases on capital-intensive operations versus labour-intensive operations, they do point out that these nuances can and will be considered in any exemption application.322

The MEIBC points to their National exemptions policy as proof that the current form of extensions does not inhibit small business. This is because their policy specifically caters for small and struggling businesses. The “olive branch” extended to small businesses comes in the form of section 3 of this national exemptions policy. This section facilitates an exemption from the provisions of the main agreement of the council for businesses that employ no more than ten scheduled employees, and which has been in existence for fewer than three years. Any motivation for exemption in terms of this clause must specifically include reference to the impact of the application on the ability to retain or increase employment in the business.

Given that this type of exemption is only applicable to small employers it could be viewed as surprising that such a strong emphasis is placed on these “impact on employment” criteria. If the application were to be considered positively on the basis

319 Answering affidavit of the 20th respondent: the MEIBC par 175.
320 Answering affidavit of the 20th respondent: the MEIBC par 181.
321 Answering affidavit of the 20th respondent: the MEIBC par 188.
322 Answering affidavit of the 20th respondent: the MEIBC par 189.
that it might increase employment levels this cannot be on a significant scale because, if it were, then the employer would be excluded from this exemption avenue by virtue of exceeding the maximum employee threshold. On the other hand, if the application were to be considered on the basis of retaining jobs, then one is effectively talking about retaining the business itself. The small size of the business in terms of employee strength means that in all probability there is not an essential difference between the two.

Neeva Makgetla, former policy chief for COSATU, quoted an 80% successful exemption rate in arguing that the impact of agreement extensions was overstated.\(^\text{323}\) She also argues that the number of private sector employees covered by the extension of bargaining-council agreements is minimal. A possible counter to this could be that there might be more private sector employees in any specific industry if bargaining-council agreements were not extended in the first place.

SEIFSA holds a similar view in support of the exemption process but unsurprisingly Gerhard Papenfus of NEASA begs to differ. Papenfus suggests that SEIFSA’s purported reliance on the exemption route as a way out for smaller employers is a “spacious claim”.\(^\text{324}\) According to him SEIFSA relies on the exemption route to placate members after signing agreements which they cannot afford, and as such he questions the logic and rationale of these unaffordable “deals”. He goes on to say that the exemption system, much vaunted by Government, does not work.\(^\text{325}\) The reason, according to Papenfus, is that an applicant has to be under severe financial strain to be met with any type of consideration and, then with the slow turnaround time from the council, the applicant has gone out of business by the time it receives a response. To add salt to the wounds, approximately half the time the application is denied in any event.\(^\text{326}\)

The solution for Papenfus is for the Government to change the law such that small businesses are given a bigger voice and are consequently freed from domination by

---

\(^\text{323}\) Article by Greta Steyn in \textit{Finance Week} of 2 February 2005: “Red Tape Strangling Job Creation”.

\(^\text{324}\) \textit{Sunday Times} 20 July 9: “Big Business does the dirty on smaller rivals” by Chris Barron.

\(^\text{325}\) \textit{Ibid.}

\(^\text{326}\) \textit{Ibid.}
the bigger players.\textsuperscript{327} As already documented above, the amendments to the Labour Relations Act, as they pertain to section 32, are aimed at strengthening the exemption process. The intention is also to promote impartiality in the appeal process and give the applicants a greater opportunity to be heard.

With regard to the turnaround time it must be noted that section 23 of the MEIBC main agreement deals with exemptions, and that sub-section 23(3) deals specifically with matters of urgency.\textsuperscript{328} It provides for a procedure whereby the Council chairperson and vice-chairperson may consider and decide on applications which are accompanied by a substantive explanation as to the nature of the urgency.\textsuperscript{329} It must be noted that no specific time frames are included in the section, and that the requirement to communicate decisions “without delay” is also less than specific.

The question of differing views on the actual success rate of exemption applications should theoretically be answered through the vehicle that is section 54(2)(f) of the LRA. This section was introduced via the 2002 amendments and requires that bargaining councils provide details regarding small businesses within their sector. It also requires information relating to the success rate of exemption applications from small businesses. The section 54(2)(f) documentation of the MEIBC indicates an overall exemption success rate of 90% per cent. A comparison of party success rate versus non-party success rate favours party employers at 92.8 per cent as opposed to non-party employers at 83.4%. One cannot argue, on either measure, that these figures do not reflect a system receptive to the economic realities and claims of the applicants.

A significant statistic that emerges from an analysis of the MEIBC data is the relatively low percentage of applications received from small non-party employers. If one had to use the employee-strength details contained in the MEIBC answering affidavit\textsuperscript{330} and relate this to the MEIBC 54(2) data, then only 2.6% of non-party employers employing fewer than 10 employees submitted exemption applications.

\begin{flushleft}
\textsuperscript{327} \textit{Ibid.}
\textsuperscript{328} \textit{Government Gazette} 36393 of 26 April 2013.
\textsuperscript{329} S 23(3)(c) of the main agreement.
\textsuperscript{330} At par 106.
\end{flushleft}
and only 0.58% of small non-party employers in this category applied and were refused exemption. This is a significant statistic given the argument that it is particularly smaller employers who bear the economic brunt of bargaining-council agreement extensions. Whilst still reasonably low, the percentage of small-party employers who submitted applications was significantly higher at 14.4 per cent. It is possible that this reflects the assistance that is available to party employers from their employer organisations.

The MEIBC points to the existence of the Independent Exemptions Appeal Board as further evidence of a fair and equitable exemption system. The Board’s independence is emphasized and it is noted that the current Board consists of a senior attorney, a senior CCMA commissioner and a chartered accountant. Transparency is also highlighted in that decisions are made available to parties on request and the board hearings are open to the public. The MEIBC notes the success rate suggesting that the majority of appeals are upheld. A table depicting the outcome record of appeals from March 2011 to August 2013 (30 months) indicates that 151 appeals were granted by the board and 98 were declined during the same period. This statistic does certainly dispel any possible notion that the Appeal Board is merely rubber-stamping Council decisions.

6.2.2.2 ACCESS TO THE COURTS

The MEIBC makes the point that any party that is dissatisfied by a Council decision has access to the Labour Court as a vehicle to challenge the decision. Whilst recording that there is no evidence of undercutting or collusion in the industry, the MEIBC notes further that actions in the courts could potentially be brought under existing competition laws as well.

It is noteworthy that there have been only five challenges against decisions of the independent exemptions board at the time of submitting the answering affidavit.

---

331 Answering affidavit of the 20th respondent: the MEIBC par 148.
332 Answering affidavit of the 20th respondent: the MEIBC par 149.
333 Answering affidavit of the 20th respondent: the MEIBC par 147.
334 Answering affidavit of the 20th respondent: the MEIBC par 150.
335 Answering affidavit of the 20th respondent: the MEIBC par 179.
Possibly even more significant is that all five of these matters are still pending.\textsuperscript{336} This statistics certainly do not suggest a quick and easy access to justice.

\textbf{6.2.2.3 INCLUSION OF SMALL BUSINESS}

Regarding the representation of small business on the Council the MEIBC argues that there is no requirement to allocate a specific seat on the Council for small business as contemplated in terms of section 30(1)(b) of the LRA. This is because of the wide spread in size across the membership of the existing employer Associations party to the Council.\textsuperscript{337} In an arbitration held in 2011 between NEASA and the MEIBC pertaining to the Council constitution an agreement was reached regarding the allocation of seats on the Council.\textsuperscript{338} It is alleged by the MEIBC that notwithstanding the fact that SEIFSA affiliated employers are in the majority, NEASA was allocated more seats on the Council.\textsuperscript{339} It does appear, however, that despite the agreement this matter has continued to be a bone of contention between the two employer organisations.\textsuperscript{340}

The MEIBC, when explaining the process followed before concluding their agreements point out that non-parties are not totally excluded from the process. The inclusivity comes in the form of an invitation to all non-party employers, prior to the onset of negotiations, to submit proposals for discussion.\textsuperscript{341}

\textbf{6.2.2.4 THE IMPACT ON UNEMPLOYMENT}

The MEIBC relies on research by Godfrey to counter the FMF arguments pertaining to the negative impact of council agreements on employment levels. Reference is made in Godfrey to research by Driffil and Calmfors which concludes that the decentralisation of bargaining does not reduce unemployment.\textsuperscript{342} It is also noted that

\begin{itemize}
  \item \textsuperscript{336} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 180.
  \item \textsuperscript{337} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 103.
  \item \textsuperscript{338} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 209.
  \item \textsuperscript{339} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 210.
  \item \textsuperscript{340} SEIFSA as applicant lodged a dispute in 2013 on this same issue with NEASA as the respondent party.
  \item \textsuperscript{341} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 108.
  \item \textsuperscript{342} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 192.
\end{itemize}
there are numerous economic variables that impact on unemployment levels at any point in time. These include other labour-market factors such as the quality of relations between employers and employees.\(^{343}\)

Regarding the impact of bargaining councils on jobs in the industry, the MEIBC points to the Industry Policy Forum (IPF) as a vehicle that has been instituted to address this issue amongst others. The role of the IPF is also to develop trade and industrial policy, skills development, housing, pensions and bursaries.\(^{344}\)

6.2.3 THE SECOND FRONT

6.2.3.1 THE DEMOCRATIC FOUNDATION AND ACHIEVING THE OBJECTIVES OF THE LRA

The MEIBC suggests that industrial-relations systems are both polycentric and institutional in nature.\(^{345}\) As such they are essentially a political animal best developed through the legislative forums. The Council points to the evolution of labour law over an extended period to support the fact that the legislature is better equipped than the courts in this regard.

The MEIBC argues that the collective-bargaining system has been the foundation of the country’s industrial-relations system. As such any significant disruption to this foundation will have destabilising effects that will spill out beyond the system itself. The MEIBC suggests that the FMF challenge would appear to offend the constitutional right to bargain collectively and as such should be approached with due caution.\(^{346}\) The MEIBC contends further that the extension of collective agreements in terms of section 32 is the key factor holding the system in place. The Council predicts that in the absence of the extension provision councils will collapse in the medium term.\(^{347}\)

---

\(^{343}\) Answering affidavit of the 20\(^{\text{th}}\) respondent: the MEIBC par 193.

\(^{344}\) Answering affidavit of the 20\(^{\text{th}}\) respondent: the MEIBC par 127.

\(^{345}\) Answering affidavit of the 20\(^{\text{th}}\) respondent: the MEIBC par 15 – 16.

\(^{346}\) Answering affidavit of the 20\(^{\text{th}}\) respondent: the MEIBC par 17.

\(^{347}\) Answering affidavit of the 20\(^{\text{th}}\) respondent: the MEIBC par 18.
The point is made that the basic arguments of the FMF are far from novel, having been considered almost continuously throughout the evolution of the council system. Whilst this evolutionary process might have lacked legitimacy in apartheid South Africa this has been far from the case post 1994. The dawn of the new political dispensation saw the birth of National Economic Development and Labour Council (NEDLAC), which replaced the former National Manpower Commission. The legitimacy of NEDLAC lies in its representative nature comprising organised business, organised labour, communities and the State. It is this representative body which considers all proposed labour legislation before it gets to Parliament. Very importantly this included all discussion pertaining to the development of the new post-apartheid Labour Relations Act.

It is this characteristic of vigorous debate between the negotiating partners at NEDLAC which, according to the MEIBC produced a statute of great legitimacy.348 The Council, in their answering affidavit, quote Dhaya Pillay in this regard:

"Then came freedom and with it the 1993 Constitution and its 1996 successor. The people participated in the process of drafting and adopting our Constitution in a way that is said to have been unprecedented internationally. On the labour front the National Economic Development and Labour Council (NEDLAC) was established to provide a structure for the engagement of the social partners in the process of passing labour laws so as to deepen our democracy. Participation has been about as good as government of the people by the people can get. Everyone who wanted to have a say in the drafting of the Constitution and labour laws could have had a say. The possibility of particular interests or issues being omitted has thereby been minimised."

It is also noteworthy that section 32 of the LRA has been the subject of extensive debate over the years by virtue of the fact that it has been amended in every single amendment to the LRA since the inception of the Act.349 This debate occurred within the walls of NEDLAC and the amendments in 2002 were preceded by negotiations within the Millenium Labour Council.350 The Council had in fact published its vision just the year before and it included this statement pertaing to Bargaining Councils:

---

348 Answering affidavit of the 20th respondent: The MEIBC par 59.
349 The amendments to the LRA were implemented in 1996, 1998 and 2002 and on each occasion s 32 was the subject of an amendment.
350 The Millenium Labour Council is an extra-statutory body comprising organised labour and business.
“The Parties acknowledge that Bargaining Councils are an integral part of the collective bargaining arrangements in South Africa, and the need to strengthen their function. One feature is the number of non-parties to the Council. The Parties agree that it would be desirable to promote membership by small business of employer’s associations so that their interests may be represented more effectively in bargaining councils where such bargaining councils have jurisdiction. Membership of such employer associations would be voluntary.”

The MEIBC recorded the positions of the key stakeholders at the time the new LRA was debated in NEDLAC. Of specific relevance is the fact that Business South Africa argued strongly for the retention of the ‘principals’ underlying the industrial council system. This included a qualified support for the extension of council agreements.

6.2.3.2 CONSTITUTIONAL LIMITATION WOULD BE JUSTIFIED

Whilst vehemently denying that any constitutional right is being violated by section 32 extensions, the MEIBC nevertheless argues in their answering affidavit that any limitation would in any event be justifiable. In this regard the Council leans on the writings of Brassey in *Employment Law*. Brassey sets out the case for justification relying principally on the safeguards that have been incorporated by the drafters of the LRA.

The first safeguard lies is the facility for objections against the establishment of bargaining councils in the first place. Also at the genesis phase is the requirement that NEDLAC approves both scope and jurisdiction. Small business interests have to be adequately represented and then there are the various hurdles that need to be crossed prior to a legal-agreement extension. The requirements for an exemption process and independent appeals stand as the final bulwark in the defence of legitimacy. All these factors, according to Brassey, would at the very least justify a successful claim for the limitations clause.

---

351 Answering affidavit of the 20th respondent: the MEIBC par 41.
352 Answering affidavit of the 20th respondent: the MEIBC par 49.
354 Answering affidavit of the 20th respondent: the MEIBC par 177.
6.2.4 THE THIRD FRONT

6.2.4.1 BARGAINING COUNCILS: THE BASTION OF SECTORAL BARGAINING

The MEIBC has a collective bargaining levy that is applicable to party and non-party employers alike. This levy is constituted in terms of the agency-shop provisions of the LRA.\(^{357}\) The Council argues that, if this agreement were not extended to non-parties, the consequent under-funding would hamstring the Council’s ability to effectively engage in collective bargaining. This in turn would negate their capacity to function effectively and would retard the benefits that flow to the Industry. Whether there is in fact a net benefit attributable to bargaining councils is of course up for debate in this dissertation.

6.2.4.2 THE COUNCIL BENEFITS

The MEIBC argues that the extension of their social security-related agreements serve to enforce practices that ultimately relieve the social-security burden of the State. These agreements include the Council’s pension, provident fund and sick-pay agreements.\(^{358}\) The Council notes that in the event that the pension and provident-funds agreements were not extended to the industry then 145 630 employees in the industry would be under no obligation to provide for their retirement.\(^{359}\)

The MEIBC argues further that the absence of non-parties within these funds could prejudice their financial liability.\(^{360}\) The extension of agreements increases the scope of employees who have access to social benefits which they would otherwise be unable to afford. It also ensures a decent wage for all employees within bargaining-council jurisdiction which assists with the upliftment of their families.\(^{361}\)

The MEIBC makes further claims of a more specific nature that would follow in the event that bargaining-council agreements were not extended. Such claims include a public safety risk in the event that non-parties in the Lift Engineering sector had no

---

\(^{357}\) In terms of s 25 of the Labour Relations Act 66 of 1995.
\(^{358}\) Answering affidavit of the 20\(^{th}\) respondent: the MEIBC par 129.6.
\(^{359}\) \textit{Ibid}.
\(^{360}\) \textit{Ibid}.
\(^{361}\) Answering affidavit of the 20\(^{th}\) respondent: the MEIBC par 233.5.
obligation to comply with the agreement.\textsuperscript{362} This is because of the specialised nature of this sector. The MEIBC also makes reference to its own statutory responsibilities in terms of dispute resolution, arguing that the underfunding that would result in the event of non-extension would transfer this responsibility to an already overburdened CCMA.\textsuperscript{363}

6.2.4.3 BARGAINING COUNCILS ARE NOT PRIVATE ACTORS

The MEIBC makes the point that Councils are statutory bodies and as such they are responsible and accountable. Their decisions can be reviewed in terms of both the LRA and PAJA.\textsuperscript{364}

6.2.2.4 THE REAL OBJECTIVE OF THE FMF

At the time of that the South African Foundation produced their macro-economic policy in 1996 the labour caucus at NEDLAC produced a responding document entitled “Social Equity and Job Creation”. In this document the caucus accused the SAF document of being nothing more than a “well-financed and well-publicised campaign” for the business community to “cling onto their wealth”.\textsuperscript{365}

The MEIBC suggests in their responding papers that the FMF has a similar objective in that it is representing business interests seeking to maximise profits under the guise of a job-creation agenda. It is argued that the ultimate objective of the FMF application is to render the council system unworkable for this purpose.\textsuperscript{366} This would pave the way to a return to a free-market system where employers, as a consequence of their relative strength, would be in a position to enforce low wages.\textsuperscript{367}

\begin{footnotesize}
\textsuperscript{362} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 129.2.
\textsuperscript{363} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 129.3.
\textsuperscript{364} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 233.2.
\textsuperscript{365} Godfrey et al Collective Bargaining 110.
\textsuperscript{366} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 234.2.
\textsuperscript{367} Answering affidavit of the 20\textsuperscript{th} respondent: the MEIBC par 234.6.
\end{footnotesize}
The MEIBC has recorded the fact that NEASA have the same objective to collapse the bargaining council. In an open letter to NEASA, dated 14 August 2014, the council quotes an extract from NEASA correspondence to SEIFSA in July 2014 as follows:

“There is only one way to get out of this mess and the stronghold NUMSA has on this Council and the South African economy: NEASA, SEIFSA and all other organisations have to withdraw from this council. For NEASA to do this, without the SEIFSA affiliated organisations doing the same, will serve no purpose. At least both of our organisations will have to withdraw. I hereby request you to seriously consider your position in this regard. The MEIBC stands in the way of everything that is important in this industry. It might serve the interests of a particular employer or group of employers and of cause radical trade unions, and especially those with a socialist agenda, but not the interests of employers and the Industry as a whole, and therefore not the interests of South Africa as a whole.”

The MEIBC alleges further that NEASA appears to have adopted a strategy to attack the validity of council structures on any technical issue, notwithstanding the merits.
The history of collective bargaining demonstrates the extent of its socio-political context. Political undercurrents, including the 1922 and 1973 strikes, as well as the onset and demise of apartheid, have all played their role in shaping the development of collective bargaining in South Africa. Global influences have become increasingly relevant over time in the midst of dissipating economic boundaries. The socio-political context in 2014 is the most tumultuous in post-apartheid history. A six-month strike in the Platinum industry, employer lock-outs in the engineering industry, a parliamentary face lift and NUMSA’s expulsion from COSATU are all testament to a multi-faceted attack on the status quo. The Freemarket Foundation application is no different in this respect.

The Platinum strike in the first half of the year was the longest strike in South African history and served to secure a 20% increase on wages. This is at a time when the average inflation rate as at the end of August 2014 has been 6.33%.\(^{370}\) It was also a good example of the political influence in the collective-bargaining process, in this case underpinned by a battle for supremacy between trade unions AMCU and NUM.

It has been widely suggested that political motives influenced the 2014 strike in the Metal and Engineering sector, headed by trade union NUMSA. Gerhard Papenfus, CEO of the National Employers Association of South Africa, attributed the strike to NUMSA’s militant socialist agenda.\(^{371}\) This was in the wake of NUMSA’s uneasy relationship and threatened split from COSATU (which has since eventuated). NEASA in turn have been the subject of accusations as to the political nature of their agenda. NUMSA engineering-sector bargaining co-ordinator, Steven Nhlapo, is


\(^{371}\) Quoted on Five FM radio news on Monday 14 July 2014 during the period of the strike in the Metal and Engineering Industry sector.
quoted as saying that NEASA is “playing dirty political games” as a means to increase membership and revenues.\textsuperscript{372} This was in reference to NEASA’s interdict application against the extension of the agreement in that sector. There is no doubt that both the FMF and NEASA challenges have the potential to overhaul the collective-bargaining landscape in our Country. This much is acknowledged by COSATU.

The current instability in not surprising if one considers the mounting disillusion with political leadership as well as global economic upheaval over the last six years. If one looks abroad it is clear that South Africa does not stand alone in re-evaluating the merits of extended collective agreements. There has been a firm change in stance towards the extension of agreements in Europe as a consequence of countries becoming indebted following the financial crises in 2008.

The response has been to take measures to restrict the extension of collective agreements.\textsuperscript{373} These formed part of their required austerity measures which have been founded on an assumption that reducing wages is the key to regaining competitiveness.\textsuperscript{374} Greece suspended the extension of collective agreements as well as the favourability clause, with the consequence that firm-level agreements now trump sector-level agreements.\textsuperscript{375} The impact has been that since 2012 eighty per cent of firm-level agreements have introduced wage cuts. This was not an unusual phenomenon in Europe, given that more than half of member countries have experienced decreased real compensation over the period from 2010 to 2014.\textsuperscript{376} The Greek Government went further by removing the right of industry players to determine the national minimum wage.\textsuperscript{377}

\begin{itemize}
\item \textsuperscript{374} Ibid.
\item \textsuperscript{375} Law 4024\textsuperscript{2} 2011.
\item \textsuperscript{377} Law 4093 of 2012.
\end{itemize}
In Portugal restrictions were placed on the ability to extend collective agreements with a 50% threshold requirement introduced.\(^{378}\) Only twelve collective agreements were extended in Portugal in 2012 as opposed to a figure of one hundred and thirty-seven in 2008. The number of employees covered by the extensions reduced from 1,9 million to only 328 thousand.\(^{379}\) Likewise in neighbour Spain the number of employees covered by collective agreements reduced from 11,6 million in 2007 to 4,6 million in 2013.\(^{380}\)

The Irish National pay-bargaining system broke down in 2009, with the result that most collective bargaining occurs at plant level. The Irish Government also placed restrictions on the determination of minimum wages in certain sectors.\(^{381}\)

It is important to note in the context of this treatise that these amendments were initiated on a political level and were not the function of a court judgment. There is perhaps merit in the MEIBC’s contention that the courts are not the best forum to address this challenge. This is especially so, given that the FMF elected to refer the matter to the High Court rather than the Labour Court.

The prospects of legal success for the FMF are in my opinion limited given the legitimate political foundation of the current system, and in the absence of any obvious technical constitutional violation that could not in the least be defended in terms of the limitation clause. The fact that bargaining councils are subject to judicial review in terms of PAJA does weaken the “private actors” argument. It would also be hard to argue against the efficacy of the exemption system if the exemption statistics provided by the MEIBC were to be accepted as fact. One must also consider that the latest amendments to section 32 should ensure greater efficiency in the administration of exemption applications and greater impartiality amongst decision makers at the appeal level. It is also a commonly accepted fact that extending agreements in terms of section 32 is the glue that holds the (current) system together. The system will collapse in its absence and undermine the entire collective

\(^{378}\) Resolution 90/2012.
\(^{380}\) Ibid.
\(^{381}\) Ibid.
bargaining framework as it exists. This could potentially impinge on everyone’s constitutional right to collective bargaining.

It is possible that the strategy behind the FMF application is simply to engender political debate on the issue and that victory in the Constitutional Court is not the ultimate prize. Even if this is not the conscious strategy, the application has been successful in raising the profile of the debate. It is certainly an important and relevant debate – the European response proves this. The FMF application must not be underestimated in terms of the value it adds to the debate.

The existence of collusion between Capital and Labour cannot be dismissed out of hand. Neither party can lay claim to a completely altruistic past. The exclusivity of the initial artisan-based unions is an example of self-interest which phenomenon is also very much central to the historic philosophy of capitalism. It is therefore not inconceivable that this self-interest may morph into mutual interest when the opportunity arises. It is fair to suggest that this opportunity does arise within the framework of institutionalised collective bargaining and that it can be executed to the detriment of society at large.

A shift away from highly centralised collective bargaining is not out of touch with wider social trends. A similar theme is evident in the push towards consuming local products as environmental awareness gathers momentum around the globe. In the political arena, the move towards independence and sovereignty has been ongoing since midway through the twentieth century. The status quo continues to be challenged on an ever increasing scale with greater access to information.

It is my opinion that the FMF’s argument for employer representivity warrants attention. There is no doubt that the current employee-strength criteria favour large employers and possibly international corporate capital over local private capital. Understandably there may be a concern that employer-representivity criteria may provide the opportunity for a strategic exodus of small employers from employer organisations in an attempt to undermine council representivity.
This concern, and indeed the whole question of agreement extension, could become redundant in the instance of a total overhaul of the current system. Perhaps the concept of a voluntary central bargaining system is not that unrealistic. It would, however, require that measures are put in place to promote plant-level bargaining as a viable and available alternative. A mandatory agency-fee system payable by employer and employees alike at non-party firms could be channelled towards resourcing the increased manpower that would be required to engineer a shift towards greater plant-level bargaining.

This level of bargaining should theoretically produce agreements that reflect the economic realities of the negotiating parties more accurately. It would also negate the requirement for an exemption system because flexibility would be available in the first instance. A further spin-off would be the opportunity and freedom to craft customised agreements that factor in productivity measures that impact positively on national economic competitiveness. The current system is geared towards eliminating competition on wages but does little to encourage out of the ordinary performance within the bargaining unit. In a sense then it continues to uphold a management/labour divide which in a South African context has particularly negative social consequences.

Institutionalised collective bargaining has proved over time to be an enduring and valued element of socio-political frameworks across the globe. This value has been created, particularly in more recent times, in South Africa, by virtue of it being the product of legitimate democratic processes. As such it is improbable that a court of law would see fit to collapse the system in its entirety. What is clear, however, is that the system does not enjoy universal support and is coming under immense pressure. The social stakes are high and for that reason it is my opinion that any potential adaptation to the system should ideally flow out of the legislative process.
BOOKS

Bean, R *Comparative Industrial Relations: An Introduction to Cross-national Perspectives* (1985) New York, St Martins Press


Du Toit, D; Godfrey, S; Goldberg, M; Maree, J and Theron, J *Protecting Workers or Stifling Enterprise? Industrial Councils and Small Business* (1995)


Godfrey, S; Maree, J; Du Toit, D and Theron, J *Collective Bargaining in South Africa* (2010) Juta & Company


ARTICLES

Barron, C Big Business does the dirty on smaller rivals Sunday Times 20 July 2014

Bruun, N The autonomy of collective agreement

Isa, M Gloom for growing army of job seekers Business Times 3 August 2014

Marais, J David vs Goliath battle in metal sector Business Times 3 August 2014

Steyn, G Red Tape Strangling Job Creation Finance week of 2 February 2005

JOURNALS


ACADEMIC PAPERS


INTERVIEWS WITH THE AUTHOR

Trentini, L Operations Director, SEIFSA 9 September 2014
**TABLE OF CASES**

*Delisle v Canada (Deputy Attorney General) [1999] 2 SCR 989*

*Freemarket Foundation and Minister of Labour, Minister of Justice and Constitutional Development case no. 13762/13*

*Kem-Lin Fashions v Brunton & Another (2001) 22 ILJ 109 (LAC)*

*Mawu v Hart (1985) 6 ILJ 478 (IC)*
WEBSITES

http://www.humancapitalreview.org/content/default.asp?Article_ID=1026


http://mg.co.za/article/2013-03-08-00-bargaining-extension-fought-on-constitutional-grounds-1

www.freemarketfoundation.com


http://www.humancapitalreview.org/content/default.asp?Article_ID=1026


LEGAL DOCUMENTS

Freemarket Foundation Notice of motion of case number 13762/13 before the Gauteng North High Court

MEIBC Answering affidavit in case no. 13762/13 before the Gauteng North High Court
# TABLE OF STATUTES

<table>
<thead>
<tr>
<th>Statute</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic Conditions of Employment Act 75 of 1997</td>
<td></td>
</tr>
<tr>
<td>Constitution of the Republic of South Africa 200 of 1993</td>
<td></td>
</tr>
<tr>
<td>Constitution of the Republic of South Africa 108 of 1996</td>
<td></td>
</tr>
<tr>
<td>Industrial Conciliation Act 11 of 1924</td>
<td></td>
</tr>
<tr>
<td>Industrial Conciliation Act 36 of 1937</td>
<td></td>
</tr>
<tr>
<td>Labour Relations Act 66 of 1995</td>
<td></td>
</tr>
<tr>
<td>Labour Relations Amendment Bill of 2013</td>
<td></td>
</tr>
</tbody>
</table>