

## Small Enterprises, Industrial Relations and the Rdp (1995) 16 ILJ 544

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### Introduction

The small, medium and micro enterprise (SMME) sector spans an immense sweep of economic activity, from entirely non-regulated to entirely regulated businesses, 'from the survivalist activities of informal sector hawkers to high-tech manufacturing enterprises employing fewer than 200 workers'.<sup>1</sup> It comprises, in reality, a multitude of subsectors of different branches of the economy, each with its own specific issues, problems and potentialities. In addressing the issue of industrial relations, it will be neither appropriate nor fruitful to try to deal with this multifaceted 'sector' in its entirety. In the first place, most informal enterprises are conducted by single individuals, families or partnerships and do not involve employment relationships in the normal meaning of the term.<sup>2</sup> In the second place, much informal activity is conducted by unemployed persons seeking merely to maintain themselves until jobs become available. Such enterprises are transient and difficult to target or track for purposes of industrial relations policy. Thirdly, structured collective labour relations as we know them are in many respects premised on the realities of larger workplaces and may be less appropriate to workplaces employing only one, two or a handful of people.

This article is therefore concerned with (a) enterprises employing people in de facto employment relationships (whether in the formal or informal sectors); (b) what may be termed 'entrepreneurial' rather than survivalist activity, and (c) primarily (though not exclusively) 'small' and 'medium' rather than 'micro' enterprises.<sup>3</sup> The term 'SMME sector' is used in this qualified

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sense hereafter. This is not to disregard the problems of the poorest of the poor. Rather, it is to assert that their struggle for subsistence falls beyond the scope of industrial relations policy; it is a challenge to the agencies of economic development and social security rather than those concerned with relations between employer and employee.

More particularly, the article focuses on entrepreneurial SMMEs in the context of a modern, developing economy. On the one hand it is true that the majority of our working population still labours under third-world conditions; and some would argue that this should be our benchmark. According to the Prime Minister of Malaysia, for example, lower labour costs are essential to newly industrializing countries competing in the global market place: 'Remove that and they would lose their only competitive advantage.'<sup>4</sup> In South Africa such an approach is only too familiar. It was taken to extremes in the apartheid era with its numerous devices for depressing the cost of labour such as the bantustan system, the border areas policy and repression of trade union rights. Hopefully, it has now been buried together with apartheid. Thus the Ministry of Trade and Industry, having taken note of it, suggests a different approach:

'A view more in line with the RDP and modern international thinking holds that a high skills base and higher motivation among the work force results in higher levels of productivity, which enhances the competitiveness of enterprises.'<sup>5</sup>

Finally, the article confines itself to issues of industrial relations policy aimed at extending *basic labour rights*; it does not attempt to argue the case for imposing specific *conditions of employment*. Wages, hours of work and the like will be influenced crucially by economic and other conditions in the industry, subsector or enterprise concerned. While it is universally accepted that certain abuses (e.g. child labour) should be prohibited, it is equally widely accepted that conditions of employment should be determined by the participants themselves, ideally by means of collective bargaining. This is certainly the position in South Africa, as explained in the Reconstruction and Development Programme (RDP) and guaranteed by the interim Constitution.<sup>6</sup>

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### Industrial Relations in the Smme Sector

The importance of constructive industrial relations to socio-economic development has given rise to a vast literature, not to mention a vast industry, and needs no elaboration here. From this standpoint the SMME sector internationally has been a source of concern at least since the early 1970's. Thus, in an early analysis of the informal sector in Kenya, Leys identified 'intense exploitation of labour, with very low wages and often very long hours underpinned by the constant pressure for work from the "reserve army" of job seekers'.<sup>7</sup> Twenty years on the Director-General of the International Labour Organization criticized 'the non-compliance of the informal sector with labour legislation and basic labour standards'.<sup>8</sup>

Abuses such as these, however, are not confined to the informal sector. A study of Western Cape hives owned by the Small Business Development Corporation (SBDC) in 1991 revealed a number of problem areas ranging from inadequate health and safety precautions to neglect of basic labour rights.<sup>9</sup> Although a systematic study of working conditions in SMMEs in the formal sector remains to be conducted, anecdotal evidence suggests that violations of labour rights and protective laws are considerably more widespread here than in the hives.<sup>10</sup> Union density, except where closed-shop agreements are operative, ranges from low to non-existent. In much of the SMME sector the old South Africa lives on: labour's hard-won rights are practically a dead letter and collective bargaining is perceived as a threat.<sup>11</sup> Among workers, not surprisingly, the study revealed attitudes ranging from caution to fear at the prospect of joining a union.

If the principles of the RDP and the interim Constitution are to be extended to those areas of the SMME sector where they have

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not yet reached, such fears and suspicions will need to be addressed. The starting-point should be that collective bargaining is not a bureaucratic device for foisting unrealistic demands on employers; it should be a transparent process for working out terms and conditions of employment that both employers and workers can live with and, hopefully, prosper under. As such, it is as relevant to small enterprises as to large.

## Industrial Relations and National Development

The struggle of organized labour against oppressive, archaic employment relations has been a driving force in South Africa's political transformation; the ongoing drive for worker empowerment, it has been recognized, could play no less important a role in the country's socio-economic transformation. As Anstey argued in 1990:

'Nation-building will require a capacity for labour-management parties to move beyond the adversarialism inherent in their relationship, to a more open acknowledgement of their interdependence and the creative development of co-operative endeavour as well.' <sup>12</sup>

This theme has become part of the fabric of the RDP. As the RDP White Paper today expresses it:

'Industrial democracy will facilitate [sic] greater worker participation and decision-making in the workplace. The empowerment of workers will be enhanced through access to company information. Human resource development and education and training are key inputs into policies aimed at higher employment, the introduction of more advanced technologies, and reduced inequalities.' <sup>13</sup>

Industrial democracy in this context refers principally to *collective bargaining* over conditions of employment and *worker participation* in management decisions on production related issues - a policy which has become more tangible with the publication of the Draft Labour Relations Bill in February 1995. <sup>14</sup> While collective bargaining and worker participation may not in themselves be sufficient to secure the aims of the RDP at the level of industrial relations, they are, unquestionably, stepping stones towards achieving them. Though the draft bill makes inadequate provision for accommodation of the SMME sector (as will be argued more

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fully below), it cannot contemplate excluding them from these aims.

## The Existing System

Anecdotal evidence of the burdens imposed on SMMEs by the extension of industrial council agreements <sup>15</sup> is legion. Yet more systematic studies suggest that legal regulation is a relatively minor problem for most SMME employers. <sup>16</sup> An explanation for these apparently contradictory positions may be the fact that labour legislation is frequently a dead letter in the SMME sector. According to Theron, therefore, the attitudes of small entrepreneurs 'would change if labour legislation were vigorously enforced'. <sup>17</sup> Where industrial council agreements are enforced, this suggests, hardship to SMMEs may well result to the extent that such agreements do not take the position of SMMEs into account. <sup>18</sup>

The limited degree of enforcement and the absence of systematic research makes it difficult to generalize with any accuracy. It does appear, however, that employers' organizations in a majority of industries are, unsurprisingly, dominated by larger and more powerful

companies. Notwithstanding guidelines from the Department of Labour requiring industrial councils to weigh up the interests of SMMEs when drawing up agreements, the enormous variability among industrial councils in terms of size and organization gives little ground for confidence that such guidelines will be uniformly adhered to or, indeed, that the interests of SMMEs will be articulated at all.

#### *Representativity of SMMEs on industrial councils*

Lack of representation of SMME employers, despite the requirement of the LRA that an industrial council may only be registered if the industrial registrar considers it to be 'sufficiently representative' of the industry concerned,<sup>19</sup> thus emerges as a first and most obvious problem of the existing dispensation. Given the low degree of unionization among employees in SMMEs, precisely the same can be said of the representation of the latter.

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The draft bill addresses the problem by requiring, firstly, that 'adequate provision' should be made in the constitution of bargaining councils (replacing industrial councils) for 'the representation of small and medium enterprises'<sup>20</sup> and, secondly, by defining 'sufficiently representative' as meaning representation of a majority of employees in the industry as well as employers employing a given percentage of employees in the industry.<sup>21</sup> As the widespread disregard of the existing s 19(3) of the LRA shows, however, 'provision' does not mean the same as effective implementation of such provision. Also, SMMEs almost invariably account for a minority of employees in any given industry, so that bigger firms may well continue to be deemed 'representative' of the industry unless NEDLAC fixes the percentage, referred to above, at a high enough level to ensure that substantial numbers of SMMEs will need to be included.

The lack of employee representation is not addressed at all.

#### *Extension of agreements and applications for exemption*

Despite the problem of representativity, a request by an industrial council is enough to trigger extension of the agreement to the whole of the industry concerned.<sup>22</sup> Once an agreement is extended, the only remedy for parties who feel unable to comply with it is to apply for exemption.<sup>23</sup> A second problem is the bureaucratic and undemocratic nature of the procedures for extension as well as exemption applications.

In the case of applications for exemption, no formal criteria are laid down by the LRA.<sup>24</sup> Recent research suggests that no standard procedures are observed by industrial councils, that applications are frequently by letter and that applicants are not in all cases permitted to state their case in person.<sup>25</sup> It would also appear, however, that the vast majority of exemption applications presented to industrial councils are granted. The problem thus appears to be neither the complexity of exemption procedures nor, in most cases, an obdurate attitude on the part of councils. Rather, judging by the relatively small number of exemption applications reaching councils, it might be that many SMME employers unable to comply with an agreement simply do not go through the formality of applying for exemption.

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Contrary to the more familiar criticism of the system, therefore, it may be that the parties most severely prejudiced by the present system are workers in SMMEs (or other enterprises) who may find themselves deprived of wages, working conditions and benefits

provided for by industrial council agreements on mere application by their employer. Space does not permit a full discussion of the issue here; questions remaining to be examined include (a) whether an industrial council may adversely alter terms and conditions of employment without affording a fair hearing to the employees affected; and (b) the legality of unilateral alteration of terms and conditions of employment which are deemed to have been incorporated into each employee's contract of employment.

The draft bill states that a bargaining council agreement may only be extended if it provides 'for the expeditious granting of exemptions to non-parties . . . by an independent body on the grounds of undue hardship'.<sup>26</sup> Again, given the diversity of existing industrial councils, it remains to be seen what effect is given to such a provision in practice, who the 'independent bodies' will consist of and how they are expected to perform differently from industrial councils or their existing exemption committees. Moreover, while stipulating that the parties requesting extension shall be 'representative' in the sense discussed above, the draft bill does not appear to require any form of representation of employees affected by such applications.

#### *Lack of flexibility*

A third feature of the existing system, reflecting its historical origins in the heyday of Fordism, is the standardization of working conditions and working practices which the extension of agreements presupposes. Modern technology and managerial technique, however, place an increasing premium on flexibility. The rigid nature of the existing system, with compliance or exemption being the only two legal options, has resulted in a significant degree of informalization, decentralization and withdrawal of employer parties from industrial councils, causing them to collapse. Though this problem affects all enterprises, SMMEs are particularly involved to the extent that decentralization has opened up new niches for subcontracting and other forms of linkages. The draft bill does not address this complex situation but passes the ball to unions and employers: it authorizes them to reach legally binding agreements on 'any' matter of mutual interest (draft bill clause 183) which may then be extended to the whole industry.

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#### **Addressing the Problems of the Present System**

Guidelines for addressing these problems, to the extent that they affect SMMEs, are suggested by the MTI Discussion Paper. In 'working towards a new dispensation for labour in small enterprises', it says government will support reform in inter alia the following respects:

- (a) 'The particular needs and interests of small enterprises should be accommodated through greater flexibility and simplicity in the present system of collective bargaining. Rather than moving towards blanket exemptions from industrial council agreements . . . industrial council agreements should become more representative of industry in general and SMMEs in particular. *On this basis industrial council agreements could be negotiated to make specific provision for the needs and interests of small enterprises*'; and

(b) 'government will investigate and support initiatives for *encouraging a greater degree of organization of workers and employers in this sector as well as voluntary participation by employers in collective bargaining*'. <sup>27</sup>

Two questions are thrown up by this approach. One is the legal question of the framework in which industrial (or bargaining) council agreements could be recast in order to achieve the aim described in (a) above. The second is the more complex organizational question, with important policy overtones, of how employers and workers can be 'encouraged' to organize and participate in collective bargaining.

#### *Evolving a new framework for collective bargaining*

Working on the assumption that 'flexibility does not equal decentralization', Baskin <sup>28</sup> has put forward an interesting proposal for a unified approach to collective bargaining at national, industrial and plant levels. In contrast to the industry-only approach reflected in the LRA and draft bill, Baskin proposes that industrial (bargaining) councils 'would normally set basic conditions and broad frameworks' only, 'and then devolve bargaining downwards (or upwards) whenever appropriate'. In consequence, each such agreement 'would normally include a range of schedules to accommodate specific conditions facing particular sections of that industry'. <sup>29</sup> On this basis the SMME sector within each industry could be dealt with by means of a special schedule dedicated specifically to its needs. On the face of it, moreover, this approach

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would appear to be compatible with COSATU's policy on collective bargaining. <sup>30</sup>

Even special schedules, of course, may not accommodate all SMMEs. To the extent that cases of 'undue hardship' remain, provision for exemption remains necessary although as a last rather than a first resort. In addition to the guidelines of the draft bill, it is submitted that such provision should include clearer criteria for the procedure as well as the adjudication of exemption applications.

#### *Encouraging organization in the SMME sector for collective bargaining purposes*

As agreed instruments of collective bargaining, special SMME schedules would require representative organizations of SMME employers and unions representing workers in SMMEs to negotiate them. In the absence of a practicable way of bringing this about, the 'special schedules' option would be fatally flawed by the lack of representativity of many industrial councils.

The problem, it is submitted, should be viewed in a broader context. The LRA, the draft bill and indeed the interim Constitution reflect the deeply ingrained tradition of voluntarism in our law of collective bargaining. For purposes of this discussion, it will be accepted that a practical solution to the problem can be sought only on this basis. The existing lack of organization in the SMME sector reflects the absence of inducements to engage in collective bargaining within the framework of industrial relations itself. To find such inducements, it will be necessary to look at the policy being proposed for SMME development in its entirety.

The operative part of such a policy would be to make it beneficial for small employers, in financial and other terms, to comply with policy requirements such as those under discussion. Possible benefits could include the following: <sup>31</sup>

Reservation of certain types of products for manufacturing by eligible SMMEs.

Assisted access to procurement markets of public sector enterprises, state departments, provincial and local government for eligible SMMEs.  
Access to finance mobilized by private sector financial institutions (possibly in terms of a state guarantee scheme) or specialized financial institutions for the needs of eligible SMMEs.  
Tax incentives and specialized tax rates for eligible SMMEs.

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Access to properly serviced start-up premises and structures for eligible SMMEs.  
Rent subsidies for eligible SMMEs.  
Access to the support provided by local service centres, including the assistance of mentors, access to new technology and training in business skills as well as job skills, for eligible SMMEs.  
Access to targeted assistance programmes (e.g. tourism industry, transport sector, etc) for eligible SMMEs.

Each statute or set of regulations making provision for the above or other forms of assistance to SMMEs would, necessarily, have to define the category of SMMEs eligible for such assistance. In addition to the technical features of each definition, it is submitted that all definitions should incorporate a number of requirements with which any SMME would need to comply in order to qualify for public assistance. These might include:

- Registration with the appropriate industrial (bargaining) council. <sup>32</sup>
- Membership of an appropriate employers' organization for industrial council purposes.
- Observance of the norms of freedom of association in the workplace.
- Adherence to affirmative action.
- Compliance with industrial council agreements, schedules to industrial council agreements and any other collective agreement, wage regulatory instrument, legislation or regulations applicable to work or working conditions in such workplace.

The above suggestions are tentative; the precise requirements of eligibility for state support should be subject to thorough consultation, within the framework of the law, to ensure that all genuine problems are taken into account and all options are considered. The underlying principle, however, should be clear. No one can compel SMME employers, or any other citizen, to promote the aims of public policy or to refrain from lawful activities which they consider to be to their own advantage. Conversely, however, the state cannot be expected to support activities which undermine the aims of public policy.

Public policy, as embodied in the RDP, clearly sets its face against the exploitation of labour as a means of stimulating SMME growth. The new dispensation for small enterprises, it stipulates,

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must 'not harm the interests of labour'. <sup>33</sup> A procurement policy supportive of small enterprise 'must, however, require appropriate labour standards for suppliers'. <sup>34</sup> These and other provisions make clear that public support for SMMEs is not conceived of as a blank cheque but, rather, as a form of partnership in the nation-building project.

In the same vein, the RDP White Paper states:

'In recognising the value of this [the SMME] sector in the generation of new employment and competitiveness, the Government will endeavour to bring small and medium enterprises into the regulatory framework for labour standards.' <sup>35</sup>

By targeting for support those SMMEs which subscribe to recognized industrial relations standards, it is submitted, the government would be acting within the mandate on which it was elected.

#### ENCOURAGING ORGANIZATION AMONG EMPLOYEES IN SMMEs

The promotion of employer organization, however, would be only half the battle won. There can be no collective bargaining in the SMME sector without extending the frontiers of trade unionism. Obstacles of quite a different order face unions in this task - inter alia employer hostility, the reluctance of workers to jeopardize their jobs, and the sheer logistical difficulties of organizing and servicing a multitude of workplaces containing relatively small numbers of members. How can these problems be addressed? <sup>36</sup>

An integrated support programme for SMMEs, bringing with it greater commitment to fair employment practices and modern industrial relations on the part of employers, would undoubtedly increase the scope for workers to exercise their legal rights without

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fear of victimization. It should be recognized, however, that unionization is unlikely to increase significantly among workers in SMMEs without a change of attitude on the part of the unions. Unions have tended to give little priority to the organization of workers in SMMEs as a result of the organizational difficulties involved, the relatively limited results attendant on such efforts and what are perceived as more pressing demands on their already strained resources.

A number of measures could help to address these problems:

A support programme for the SMME sector as outlined above could include, at relatively little cost, subsidies to unions for the specific purpose of expanding their organizing efforts in that sector.

The establishment of worker representation in the workplace as proposed in the draft bill suggests possibilities for the extension of a union presence into unorganized workplaces. Workplace forums with fairly extensive functions are called for, though only in workplaces employing 100 or more employees. <sup>37</sup> If this provision stands, it would exclude most of the SMME sector from the benefits identified by the draft bill. In addition, the draft bill provides for the election of trade union representatives with limited functions in workplaces employing ten or more members of a registered trade union. <sup>38</sup> Such representatives (or workplace forums, to the extent that the cut-off number for the latter is reduced before the bill is enacted) could emerge as focal points not only of shop-floor consultation but also of union recruitment in smaller enterprises.

The establishment of industrial districts to promote economic and technical cooperation among small employers could create territorial bases for trade union structures encompassing numbers of workplaces which might be too small to be organized individually. This could be accommodated by making provision in the draft bill for the establishment of workplace forums covering more than one workplace under specified conditions - for example, in the same locality and/or engaged in the same branch of activity. <sup>39</sup>

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## Development of Mechanisms for Monitoring Compliance With Legal Requirements

Possibly the most serious weakness of the existing system is not so much the presence or absence of regulations applicable to SMMEs but, rather, the fact that such regulations are ignored to a very significant extent - in other words, the lack of an effective monitoring system. Self-regulation by employers, subscribing to the costs of compliance in return for the greater benefits of doing so, would no doubt be the best mechanism and the hallmark of a successful industrial relations system. In practice, unfortunately, this cannot be taken for granted. Any proposals for new regulations aimed at promoting collective bargaining in the SMME sector should therefore simultaneously address the question of how, and to what extent, such regulations could be monitored or enforced. The following are some possibilities:

Applications by employers for any of the benefits referred to above should be supported by a statement by a majority of the employees in such workplace, or a trade union or other organization representing a majority of employees, to the effect that certain specified requirements are being complied with.

Shop stewards could monitor industrial council agreements. <sup>40</sup>

As is the case with certain statutes at present, all employees should have the right to report breaches of any of the requirements referred to above and enjoy statutory protection against victimization. Since this in itself will have only a limited impact, annual reports from employees, in prescribed form, on particular aspects of work and working conditions could be a condition for continuation of benefits or public support.

The draft bill takes a tentative step in this direction by giving trade union representatives the statutory capacity to monitor their employers' compliance with collective agreements or other law. <sup>41</sup> Workplace forums, too, may double as health and safety committees inter alia for the purpose of monitoring compliance with health and safety regulations. <sup>42</sup> Further measures for giving employees a real stake in decision making at workplace level along the lines suggested above, it is submitted, would contribute to transforming the 'adversarial' attitudes criticized in the MTI Discussion Paper. It would also promote the RDP's broader objective of human resources development through the empowerment of workers in the workplace.

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## The Constitutional Dimension

Advocates of what might be termed a 'free market' philosophy might object that measures designed to persuade SMME employers to join employers' associations impinge on their freedom of association. It is submitted that this is not so. Membership of any organization gives rise to certain duties and benefits. Offering benefits to prospective members cannot be said - particularly in view of the general limitation on fundamental rights <sup>43</sup> - to violate the freedom of association of non-members.

More cogently, the guarantee of freedom of economic activity contained in s 26(1) of the interim Constitution could be raised. By disqualifying all SMME (and other) employers who fail to comply with certain criteria from tendering for public sector contracts, would parliament not be in breach of the interim Constitution? It is submitted that it would not. The interim Constitution immediately goes on to qualify the right to economic activity by stating that it can be limited to promote, inter alia, 'the quality of life, . . . human

development, social justice, basic conditions of employment [and] fair labour practices'. <sup>44</sup> To the extent that the suggested measures might limit the economic freedom of employers who refuse to engage in collective bargaining, to register or otherwise to obey the law, it is submitted, they would be validated by s 26(2).

Even more compelling is s 7(1) of the interim Constitution. It states that the legislature and all executive organs of the state must comply with the Chapter on Fundamental Human Rights. This would make it unlawful for parliament or any agency of public administration to violate the basic human rights of any citizen or to assist any other person to violate such rights. One of the basic rights entrenched by the interim Constitution is that of freedom of association; another is the right to fair employment practices. <sup>45</sup> Failure or refusal by employers to permit employees the exercise of their rights to collective bargaining and/or fair employment practices should therefore (apart from any action they might be exposed to in the labour courts) disqualify them from assistance by any organ of state.

## Conclusion

The details of the proposals contained in this article, and, of course, the problems they might encounter, remain to be examined more closely. The guiding principle, however, should be

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clear: it is to bring industrial relations in the SMME sector into line with the standards of the society we are seeking to build. The effect should not be to impose unreasonable burdens on employers or obstacles to growth but, rather, to ensure that the SMME sector develops on healthy foundations. SMMEs eligible for public support should develop into centres of excellence - vibrant components of the modern economy, setting an attractive precedent for others. Pilot programmes could play an important part in testing the waters and charting the way forward.

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<sup>1</sup> J Baskin *Centralised Bargaining and COSATU* (National Labour and Economic Development Institute 1994) at 17.

<sup>2</sup> P Wellings & M Sutcliffe 'Developing the Informal Sector in South Africa' (1984) *Development and Change* 527 at 533-4.

<sup>3</sup> These terms have no generally accepted definitions, and will moreover have different meanings in different sectors. As a very rough approximation, drawing on the categories used by the former National Manpower Commission (NMC) and other institutions, 'micro' may be said to apply to workplaces employing up to five employees, 'small' up to ten (or 20) and 'medium' up to 50 (or 100). For legal purposes, it is submitted, the distinctions are significant mainly to the extent that they describe enterprises requiring differential treatment on account of their size; but, by the same token, size can be only one of the criteria used to determine whether such treatment is justified.

<sup>4</sup> Mahathir bin Mohamad 'Workers' Rights in the Developing Countries' in International Labour Office *Visions of the Future of Social Justice* (ILO 1994) at 176.

- <sup>5</sup> Ministry of Trade and Industry *Strategies for the Development of an Integrated Policy and Support Programme for Small, Medium and Micro-enterprises in South Africa: A Discussion Paper* (October 1994) at 3.7.2 (referred to below as MTI Discussion Paper. It has since the time of writing been published as a white paper.)
- <sup>6</sup> Republic of South Africa Constitution (Act 200 of 1993).
- <sup>7</sup> C Leys 'Interpreting African Underemployment' (1974) *African Affairs* 426.
- <sup>8</sup> International Labour Office *The Dilemma of the Small Business: Report of the Director-General* Part 1 (1991) at 37.
- <sup>9</sup> D du Toit *Workers in Small Business: The Need for Organisation* (Labour Law Unit UCT 1991); D du Toit with D Bosch *Workers in Small Business: A Challenge for the Unions* (Labour Law Unit UCT 1992). Although certain of the hives had been exempted from industrial council agreements and other regulatory statutes, employers in the hives were bound by their contracts with SBDC to maintain certain basic standards. Moreover they were, arguably, under closer supervision from hive managers than the vast majority of small employers outside the hives, where industrial council inspectors are very few in number and enforcement of applicable rules remains, at best, haphazard.
- <sup>10</sup> Du Toit & Bosch at 15-18.
- <sup>11</sup> The following are just three of the comments by employers interviewed during the study mentioned above: 'Unions are trouble makers. They will tell workers to strike and shop stewards will instigate the workers. We will suffer if workers strike'; 'I am their [the workers'] mother . . . They do not need a union. If they should join a union I will close down or chase them away'; 'I do not want the union in my factory again. If a girl joins the union she must go and work in a factory where the union is allowed. These days they [the workers] are your boss': Du Toit & Bosch at 29-30.
- <sup>12</sup> M Anstey (ed) *Worker Participation* (Juta 1990) at 9. For further elaboration of the point in the African and South African contexts, see The World Bank *Sub-Saharan Africa: From Crisis to Sustainable Growth* (1989) at 84-5 and J Maller 'Perspectives on Productivity in South Africa' in G Moss & I Obery (eds) *South African Review* 4 (Ravan Press 1987) at 317. For a critical discussion see D du Toit 'Democratising the Employment Relationship' (1993) *Stellenbosch Law Review* 325.
- <sup>13</sup> *RDP White Paper: A Discussion Document* (Cape Town undated) at 3.11.4.
- <sup>14</sup> *Gazette* 16259 dated 10 February 1995 (referred to below as the draft bill).
- <sup>15</sup> in terms of s 48 of the Labour Relations Act 28 of 1956 (LRA).
- <sup>16</sup> N J & J Natrass *Small Formal Business in Durban* (Natal Town and Regional Planning Supplementary Report vol 33) at 33; T Rudman *The Third World - South Africa's Hidden Wealth* (Somerset West 1988) at 56.
- <sup>17</sup> J Theron *What Small Business Signifies for Labour Relations* (Labour Law Unit UCT 1994) at 5.
- <sup>18</sup> Which is not necessarily always the case: certain sectors - for example, electrical engineering and hairdressing - consist very largely of small undertakings and industrial council agreements are effectively drawn up between unions and employers representing the SMME sector.
- <sup>19</sup> clause 19(3).
- <sup>20</sup> clause 27(11)(c).
- <sup>21</sup> clause 29(1); the percentage has been left for NEDLAC to determine.
- <sup>22</sup> s 48(1) of the LRA.
- <sup>23</sup> s 51.
- <sup>24</sup> s 51(3).
- <sup>25</sup> D du Toit, S Godfrey, M Goldberg, J Maree & J Theron *Industrial Councils and Small Enterprises* (Sociology Department and Labour Law Unit UCT 1995) especially ch 2.
- <sup>26</sup> clause 35(3)(d).
- <sup>27</sup> MTI Discussion Paper at 3.7.3; emphasis added.
- <sup>28</sup> Baskin at 15.
- <sup>29</sup> *ibid.*
- <sup>30</sup> as articulated at COSATU's Campaign Conference of 25-27 March 1994 and appended to Baskin.
- <sup>31</sup> The proposals that follow are based on those contained in part 3 of the MTI Discussion Document.

- <sup>32</sup> Baskin, looking at possible measures for simplifying or encouraging SMME participation in industrial (bargaining) councils for the negotiation of special schedules, suggests inter alia 'linking exemptions or applicability of special conditions to registration of the SMME concerned' (Baskin at 17).
- <sup>33</sup> RDP at 4.4.7.4.
- <sup>34</sup> RDP at 4.4.7.7.
- <sup>35</sup> RDP at 3.10.4. Similarly, in respect of job creation programmes COSATU argues that '[l]ow wages may not address poverty nor the developmental objectives envisaged by the RDP' and that labour standards on such programmes 'should mirror as far as possible what occurs in the formal employment sector' (L Seftel *The RDP: Job Creation and Minimum Standards* (unpublished paper presented to Labour Law Conference Durban July 1994) at 1). This approach, based on what might be termed the 'conditionality' of public support for private initiative and insistence on developmental in addition to purely economic criteria, has an echo in international development policy. Professor Freeman of Harvard University, for example, argues: 'The world can ill afford to let bankers' concerns dominate decisions on the global economy (especially when taxpayers/workers have to bail out the banks when they fail). The concerns of workers, be they blue collar or white collar, be they in developed or less developed countries, must be part of the process' (R B Freeman 'Work in a Global Economy' in International Labour Office *Visions of the Future of Social Justice* (ILO 1994) at 103.) It is also the position of the International Labour Organization (Seftel at 5).
- <sup>36</sup> For a more detailed examination of the problems, and discussion of some possible responses, see Du Toit & Bosch at 28-51.
- <sup>37</sup> In terms of chapter V of the draft bill. It may be noted, for comparative purposes, that the minimum size of enterprises required to establish works councils in Germany is six employees. In the Netherlands the minimum is 35, though employers with between ten and 35 employees are required to convene regular consultative meetings with their staff.
- <sup>38</sup> clause 13.
- <sup>39</sup> For a more detailed discussion of this and other models, see M Biagi 'Employee Representation in Small and Medium-sized Enterprise: A Comparative Overview' (1992) *Comparative Labour Law Journal* 257.
- <sup>40</sup> This option has already been implemented by, for example, the Transvaal Building Industry Council: cf Du Toit et al at 86-7.
- <sup>41</sup> clause 13(10)(b).
- <sup>42</sup> clause 64(4).
- <sup>43</sup> s 33(1).
- <sup>44</sup> s 26(2).
- <sup>45</sup> s 27.