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**UNIVERSITY OF CAPE TOWN – FACULTY OF LAW**

# Collective Bargaining in a Globalised Era-A change in Approach

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**LLM**

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Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the LLM in approved courses and a minor dissertation/research paper. The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations

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# INTRODUCTION

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## 1. A BRIEF HISTORY OF SOUTH AFRICA'S LEGISLATIVE FRAMEWORK

When collective bargaining began, it was as a mechanism used by employers and groups of employees to resolve their conflicting goals, however it has evolved through the years to become a 'sophisticated means of transforming and regulating what occurs in the workplace'.<sup>1</sup> It is seen as a necessary element of employment relations because it allows the employer to 'give effect to its legitimate expectation that the planning of production, distribution, etc., should not be frustrated through interruptions of work'.<sup>2</sup> It therefore allows certainty and stability within the workplace, a feature good for production and for the commercial entity overall. On the other hand, workers aim to ensure that their

'legitimate expectations...wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure'.<sup>3</sup>

South Africa's collective bargaining system emerged after the enactment of the 1924 Industrial Conciliation Act.<sup>4</sup> This Act created a framework for voluntary centralised bargaining. Bargaining was to be centralised and to take place between unions and employers at industrial councils. The system however, excluded all African and indentured Indian labour. It was thus a labour relations system based on race and which created a racial divide. The legislative framework established by the 1924 and

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<sup>1</sup> John Grogan *Workplace Law* 9ed (2007) 353 and John P. Windmuller *Collective bargaining in industrialised market economies: A reappraisal* (1987) 4-5. Barbara Adair & Sue Albertyn 'Collective bargaining in the South African public sector - The emergence of sector based bargaining' (2000) 21 *ILJ* 813.

<sup>2</sup> Paul Lyndon Davies & Mark Robert Freedland *Kahn-Freund's Labour and the Law* (1983) 69.

<sup>3</sup> *Ibid.*

<sup>4</sup> Act 11 of 1924.

1956<sup>5</sup> Acts was thus designed to be repressive towards African workers. It favoured and protected non-African labour thereby creating and perpetuating tension within the labour relations system. Non-African unions were able to register as unions and thus able to negotiate with employers' associations at industrial councils. This ensured that the wages and terms and conditions of employment of non-African workers improved, whilst those of African workers did not. This created inequalities within the labour market. There were attempts by government to remedy the situation. Unfortunately these attempts were conservative and unable to fully address the issue of race, consequently the inequalities remained.

Although African workers were prohibited from forming registered unions and bargaining at industrial councils, this did not prevent African workers from forming and joining unregistered unions.<sup>6</sup> Despite the repression that African workers faced from the successive governments in power African unions began to grow. Although they did face some challenges, these unions generally grew stronger between the 1940s and the 1980s. This was a result of the growth of the labour intensive secondary sector from the 1930s to the 1970s. The manufacturing sector was typically labour intensive and thus employed a large number of African workers. This meant that large groups of African workers could be found in one location thus making it easier for unions to recruit them. Their ability to recruit a significant number of the workforce as well as improve the conditions of their members was displayed by the Durban strikes in 1973. These strikes, which began in Durban, ultimately acted as the catalyst for change. The government had no choice but to make significant changes to the legislation governing industrial relations.<sup>7</sup> The key legislative changes were made between 1979 and 1981. However, they were not enough to address all the issues the bargaining system had. During the late 1970s and 1980s issues relating to the duty to bargain, bargaining levels as well as the

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<sup>5</sup> Industrial Conciliation Act 28 of 1956.

<sup>6</sup> Robert A. Jones *Collective Bargaining in South Africa* (1982) 28.

<sup>7</sup> Shane Godfrey, Jan Theron & Margareet Visser *The state of collective bargaining in South Africa: An empirical and conceptual study of collective bargaining* (Development Policy Research Unit Working Paper 07/130, 2007) 55.

future of industrial councils arose between African unions and employers. These were matters the new labour dispensation would have to address.

The government in the new democratic South Africa prioritised resolving the problems plaguing the industrial relations system. It did this by enacting a new labour relations Act. This Act repealed the 1956 LRA and enacted the Labour Relations Act of 1995<sup>8</sup> which established a collective bargaining system combining new elements with elements from the previous legislative dispensation. The new system retained the voluntary duty to bargain. It balanced this by entrenching a protected right to resort to industrial action as well as by creating organisational rights available to unions with 'sufficient' and/or majority representivity. The former enabled unions to compel the employer to bargain, whilst the latter assisted unions in bargaining. The Act also promoted centralised bargaining. It did this by retaining, but renaming industrial councils, bargaining councils and by ensuring that bargaining council agreements could be extended where parties to the agreement covered the majority of workers in a sector. Therefore, the effectiveness of trade unions depended, to a substantial extent, 'on their representativeness and their cohesiveness'.<sup>9</sup> The collective bargaining mechanism established by the 1995 LRA thus became the primary

'mechanism for setting wages and other terms of employment...a way of managing complex organisations...a form of joint industrial government, and generally...a means of regulating labour-management relations'<sup>10</sup>

## **2. SOUTH AFRICAN COLLECTIVE BARGAINING IN A GLOBALISED ECONOMY**

### **2.1 GLOBALISATION**

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<sup>8</sup> Act 66 of 1995.

<sup>9</sup> Windmuller op cit note 1 at 18.

<sup>10</sup> Ibid at 3.

Globalisation is usually accompanied by,

‘trade liberalisation and a rising volume of international trade; currency market liberalisation and an enormous increase in international currency transactions; liberalisation of the rules governing foreign investment and cross-border capital flows; the emergence and dominance of multi-national enterprises; increased manufacturing in developing nations; heightened international wage competition; and steady increases in cross-border labour migration.’<sup>11</sup>

Therefore, globalisation, like the industrial revolution, has influenced economies, politics, societies and cultures in both developed and developing countries within the last few decades.<sup>12</sup> Although globalisation is a term that is familiar to most, its meaning is contested. It ‘is one of the most used, but also one of the most misused and one of the most confused, words around today’.<sup>13</sup> Therefore, globalisation takes on different meanings in different contexts, however, for our purposes globalisation shall be examined in the context of labour.

There are a different schools of thought regarding globalisation, but the two most prominent are the ‘hyper-globalists’ and the ‘neo-liberals’. The ‘hyper-globalists’ argue that globalisation has created a ‘borderless world’, a world in which ‘nation-states are no longer significant actors or meaningful economic units’.<sup>14</sup> Globalisation is viewed as an ‘inevitable state of affairs’<sup>15</sup> where governments, regardless of their political persuasion, appear increasingly powerless to make decisions on economic or social policy.<sup>16</sup> This school of thought believes that these developments have encouraged companies to cut

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<sup>11</sup> Ibid.

<sup>12</sup> Steve Chan & James R. Scarritt (eds) *Coping with globalisation: Cross-national patterns in domestic governance and policy performance* (2002) at 4.

<sup>13</sup> Peter Dicken *Global Shift: Mapping the Changing Contours of the World Economy* 5ed (2007) 7.

<sup>14</sup> Ibid at 5.

<sup>15</sup> Ibid.

<sup>16</sup> Debbie Budlender *Industrial relations and collective bargaining: Trends and developments in South Africa* (2009) 2.



back on labour costs and shed labour for the sake of forcing the stock market value of their enterprise to rise.<sup>17</sup> On the other hand are the ‘neo-liberals’. They argue that globalisation was the ‘most positive economic development in the past century.’<sup>18</sup> According to this perspective, globalisation has resulted in a ‘more efficient allocation of resources and exploitation of comparative advantages between countries’ consequently raising productivity, boosting economic growth and providing increased prosperity for all.<sup>19</sup> In sum, globalisation is a win-win situation.<sup>20</sup>

Globalisation is, however, more intricate than this as it is a set of ‘complex...inter-related processes’.<sup>21</sup> In addition, globalisation is neither entirely “good” nor entirely “bad”. The ILO states that the position lies in between these two opposite points. The ILO

‘is generally optimistic about the net impact of free trade and increased foreign investment on economic growth and the level of employment. However, it acknowledges that as economic competition across national borders intensifies the incentive for employers and governments to reduce labour costs is augmented.’<sup>22</sup>

There have been a number of changes taking place on a global scale. Economies were once ‘based in manufacturing and mining, with public works providing services, all oriented to fixed workplaces where workers were under a common roof’.<sup>23</sup> However, this has changed. Globalisation has led to the ‘fragmentation of many production processes and their geographical relocation on a global scale in ways that slice through national boundaries.’<sup>24</sup> The cumulative effect of this new phenomenon has been the introduction of a new dynamic where

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Dicken op cit note 13 at 29.

<sup>22</sup> Budlender op cit note 16 at 2.

<sup>23</sup> Guy Standing *Work after globalisation: Building occupational citizenship* (2009) 66.

<sup>24</sup> Darcy Du Toit ‘What is the future of collective bargaining (and labour law) in South Africa?’ (2007) 28 *ILJ* 1408.

'[c]apital and labour live in different places and times. While capital is global, exists in the space of flows and lives in the instant time of computerised networks, labour inhabits the local, exists in the 'space of places' and lives by the clock time of everyday life.'<sup>25</sup>

Globalisation can thus be described as 'a process of restructuring the world economy'.<sup>26</sup>

Globalisation has not only altered the world economy, it has also led to the 'emergence of a new division of labour.'<sup>27</sup> The previous economic model 'consisted of an integrated enterprise, belonging to an industrial sector, employing a mass of employees administered by a management bureaucracy'.<sup>28</sup> There was a lot vested in the concept of the workplace.<sup>29</sup> Globalisation has led to the transformation of many aspects of labour.<sup>30</sup> It has altered the character of the firm and the workplace.<sup>31</sup> It has led to the 'splintering of production processes' which has resulted in a trend towards contracting out labour thus leading to a workforce that is no longer located in one workplace.<sup>32</sup>

## 2.2 South Africa and globalisation

South Africa has not escaped the effects of globalisation. Before 1994 the South African economy had gone through 'a phase of progressive de-linking from global processes and integration in the global economy'.<sup>33</sup> However, when South Africa gained democracy it re-entered the world economy.<sup>34</sup> It did so at a time when globalisation and its processes had begun to gain momentum. Therefore, when South Africa re-joined the world economy it was exposed to the effects of globalisation. This had a profound effect on its economy and economic policies.

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<sup>25</sup> Ronaldo Munck *Globalisation and labour: The new "great transformation"* (2002) 57.

<sup>26</sup> Dejo Olowu 'Globalisation, labour rights, and the challenges for trade unionism in Africa' (2006) 18 *Sri Lanka Journal of International Law* 132.

<sup>27</sup> Du Toit 'What is the future of collective bargaining' op cit note 24 at 1408.

<sup>28</sup> Standing *Work after globalization* op cit note 23 at 66.

<sup>29</sup> Ibid

<sup>30</sup> Ibid.

<sup>31</sup> Standing *Work after globalisation* op cit note 23 at 66.

<sup>32</sup> Ibid at 84-5.

<sup>33</sup> Christian Rogerson 'Local economic development in an era of globalisation: The case of South African cities' (2002) 91 *Tijdschrift voor Economische en Sociale Geografie* at 398.

<sup>34</sup> Ibid.

South Africa's exposure to globalisation resulted in the introduction of the Growth, Employment and Redistribution policy (GEAR) which was 'designed to accommodate the forces of globalisation and to ensure South Africa's re-entry into the global economy.'<sup>35</sup>

South Africa's exposure to globalisation also had a profound impact on employment. The economy had opened up to international trade and consequently, it now faced greater competition than before.<sup>36</sup> The primary and secondary sectors, which had been relatively sheltered until the early 1990s, underwent a period of decline.<sup>37</sup> The decline experienced in these sectors had an impact on labour as these two sectors were the most labour intensive sectors.<sup>38</sup> Formal employment in these sectors fell,<sup>39</sup> however employment in the tertiary sector increased.<sup>40</sup> This thus changed the sectoral composition of South Africa's employment substantially.<sup>41</sup>

The changes that resulted in the employment sector as a result of globalisation were not only limited to the number of people in employment. They also affected the nature of employment. The pressures employers were exposed to led to the flexibilisation of labour. This resulted in the rise of what has been termed 'atypical' or non-standard employment. Atypical employment is employment lacking the characteristics found in a standard employment relationship. This form of employment has been described as,

'part-time work, casual work, homework, subcontract work, unstable irregular employment, disguised wage work, family labour, moonlighting, illegal work or work in illegal, short-term contractual or fixed employment, work that entails combining pre-

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<sup>35</sup> Ibid.

<sup>36</sup> Dani Rodrik 'Understanding South Africa's economic puzzles' (2008) 16 *Economics of Transition* 783.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Abhijit Banerjee, Sebastian Galiani, Jim Levinsohn et al 'Why has unemployment risen in the new South Africa?' at 19 available at <http://www.nber.org/papers/w13167.pdf> accessed on 17 September 2011.

<sup>40</sup> Rodrik op cit note 36 at 783.

<sup>41</sup> Banerjee et al op cit note 39 at 19.

capitalist and/or traditional non-market social relations with market related ones – and so on'.<sup>42</sup>

Therefore, where the standard employment relationship may be described as indefinite, full-time and, in most cases, conducted at the workplace of the employer; an atypical employment relationship is one where the terms and conditions of employment do not comply with this criteria.<sup>43</sup> Flexibilisation has created a new class of vulnerable and relatively powerless workers who are in need of more rather than less protection from labour laws. This will be demonstrated below.

### 2.2.1. Casualization

Casualization is the result of temporal flexibilisation. This arises from the employer's desire to replace employees in a standard employment relationship with temporary or seasonal labour and/or part time employees. This changes the standard employment relationship by altering the employment relationship between employer and employee from continuous to temporary and/or from full time to part time. Although the use of temporary, seasonal and/or part time labour has always been around, it has become evident that the use of these labour arrangements is becoming more and more predominant.<sup>44</sup> It is also important to note that in the past these workers would have been considered as part of the core function of the business, and thus important to the survival of the business. However, in the era of globalisation these workers are now considered to be dispensable and are now found at the periphery of the business.<sup>45</sup>

Employers clearly benefit from the casualization process. They are able to reduce their labour costs by avoiding the 'non-wage costs of employment such as paid leave, sick leave, healthcare compensation etc'.<sup>46</sup> They are also able to link the demand for business to the size of their labour force. They can thus increase their workforce when

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<sup>42</sup> Jan Theron & Shane Godfrey *Protecting workers on the periphery* (2000) 1-2.

<sup>43</sup> Andries Bezuidenhout, Shane Godfrey, Jan Theron et al *Non-standard employment and its policy implications* (Report submitted to the Department of Labour June 2003) 5.

<sup>44</sup> Theron & Godfrey op cit note 42 at 6.

<sup>45</sup> Theron & Godfrey op cit note 42 at 7.

<sup>46</sup> Standing *Work after globalization* op cit note 23 at 72.

business picks up and they can decrease it when their business faces a downturn.<sup>47</sup> Unfortunately the consequences of casualisation are not mutually beneficial. Casualised workers face a number of disadvantages their permanently employed peers do not. For instance businesses that employ casualised workers do not have to provide employment benefits such as a pension schemes, medical aid, paid sick leave and maternity leave.<sup>48</sup> In addition, they have wage insecurity and they also tend to have lower wages than their counterparts.<sup>49</sup>

### **2.2.2 Externalisation**

Externalisation occurs when ‘employment regulated by a contract of employment is...displaced by employment that is regulated by a commercial contract.’<sup>50</sup> Externalisation is caused by the employer’s need to achieve numerical employment flexibility. It may occur when an employer retrenches various sections of his workforce and uses contracted workers or workers from a temporary employment service (TES) to do the work instead. If an employer chooses to engage contractors the contract of employment between the employer and the employees is replaced with a commercial contract between the employer and an independent contractor, or between the employer and a self-employed individual.<sup>51</sup> In this instance, the retrenched employees find themselves in precarious employment positions as either workers in the informal sector or workers for ‘small service suppliers’<sup>52</sup> such as subcontractors or a TES. Externalisation therefore forces employees to trade relatively permanent and secure employment with their employers for either ‘short term highly insecure contracts’<sup>53</sup> or unemployment. If an employer makes use of a TES a triangular employment relationship is created between the TES, employer and worker. The TES becomes a nominal employer supplying labour and assuming the risk of employment. The employer, however, is the real employer as it ultimately determines the terms and conditions of

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Bezuidenhout et al op cit note 43 at 6.

<sup>51</sup> Ibid.

<sup>52</sup> Olowu op cit note 26 141.

<sup>53</sup> Ibid.

employment.<sup>54</sup> The triangle is completed by the commercial contract that ties the nominal employer (service provider) to the real employer (client).<sup>55</sup> This form of employment is not only highly precarious, but it changes the standard employment relationship by obscuring who the employer is and by moving the worker's place of work from the employer's premises, to those of the client's.

### 2.2.3. Informalisation

The combination of casualisation and externalisation has led to informalisation. Informalisation occurs when employment becomes increasingly unregulated either in part or altogether.<sup>56</sup> Informal work in South Africa has been described as work which occurs at businesses that are not registered in any way. Thus, it is work which 'takes place outside the formal wage-labour market...including various forms of self-employment.'<sup>57</sup> It is usually conducted from homes, street pavements, and in some cases business premises. During apartheid legislation repressed the development and growth of African businesses.<sup>58</sup> This was meant to deter 'rural-urban migration and...to protect white business from competition'.<sup>59</sup> The effect of this was to push African enterprise and entrepreneurship into the informal market.<sup>60</sup> Towards the end of apartheid this legislation was repealed which resulted in the informal sector experiencing accelerated growth.<sup>61</sup> Therefore, although the effects of globalisation have played a significant part in increasing the number of employees in the informal sector, some of the growth can also be attributed to the removal of apartheid legislation from the South African statute books. In general, the informal sector tends to attract entrepreneurs because it enables them to conduct business outside of the rules that apply to most. For example, the informal sector can generally escape 'state regulation in terms of taxation, labour

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<sup>54</sup> Jan Theron 'Employment is not what it used to be' (2003) *ILJ* 1255.

<sup>55</sup> *Ibid.*

<sup>56</sup> Bezuidenhout et al op cit note 43 at 6.

<sup>57</sup> Munck *Globalisation and labour* op cit note 25 at 112.

<sup>58</sup> The Blacks (Urban Areas) Consolidation Act) 25 of 1947 restricted black urban business and the Group Areas Act 36 of 1966 restricted non-white entrepreneurs from operating in important parts of the economy.

<sup>59</sup> Guy Standing, John Sender & John Weeks *Restructuring the labour market: The South African challenge* (1996) 86.

<sup>60</sup> *Ibid.*

<sup>61</sup> Roderik op cit note 36 at 782.

regulations and other general rules that are applicable in the conduct of business.’<sup>62</sup> Informalisation results in the ‘atomisation of the workforce’.<sup>63</sup> This makes the *de facto* protection of workers in the informal sector extremely difficult.

### 2.3. Globalisation and the Labour Relations Act 66 of 1995

The Labour Relations Act of 1995<sup>64</sup> was drafted to function within the standard employment relationship context. It based the regulation of market forces on statutory regulation and collective voice regulation. These two forms of regulation were intended to counter the inequalities of the labour market. Statutory regulation refers to the ‘rules and procedures established by laws and decrees that govern aspects of the employment relationships’.<sup>65</sup> Collective voice regulation ‘refers to the constructive role that collective bargaining between employees and employers play in resolving disputes and thereby promoting productivity and economic growth’.<sup>66</sup> The sections establishing the collective voice regulation mechanism were drafted in such a way as to make collective bargaining dependent on the ability of unions to recruit and retain members.<sup>67</sup> The effects of globalisation have however, resulted in increased flexibility in the nature of employment. The 1995 LRA has struggled to adequately cater to the growing numbers of atypical workers. Atypical workers are notoriously difficult to organise and as a result unions have battled to gain organisational rights and compel employers to bargain. Furthermore, unions have found it difficult to have agreements concluded at bargaining councils extended as they no longer represent the majority of workers within a sector. Therefore, unions have battled to use the collective bargaining scheme set up in the 1995

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<sup>62</sup> Ibid.

<sup>63</sup> Munck *Globalisation and labour* op cit note 25 at 113.

<sup>64</sup> Act 66 of 1995.

<sup>65</sup> Gordon Betcherman, Amy Luinstra & Makoto Ogawa ‘*Labour market regulation: International experience in promoting employment and social protection*’ (Social Discussion Paper Series No. 0128 November 2001) at 4 available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers.?Labour-market-DP/0128.pdf> accessed on 19 September 2011.

<sup>66</sup> Imraan Valodia ‘*Economic policy and women’s informal and flexible work in South Africa*’ (paper presented at Trade and Industry Policy Secretariat Annual Forum 18-20 September 2000) 11 available at <http://www.tips.org.za/files/394.pdf> accessed on 19 September 2011.

<sup>67</sup> Windmuller op cit note 1 at 18.

LRA to improve the wages and terms and conditions of employment for atypical workers.

### **3. RESEARCH OBJECTIVE**

Statutory regulation can only cater for some and not all eventualities, consequently it is inherently inflexible. It therefore generally struggles to adapt to any fundamental changes that might occur. The 1995 LRA is no exception to this phenomenon. When the drafters of the 1995 LRA created the Act they were working within the context and paradigm of standard employment relationships. Therefore the collective bargaining mechanisms established by the 1995 LRA were tailored for standard employment relationships. The drafters of the Act underestimated the manner in which workers in atypical forms of employment would increase over the coming decades. At present, the bargaining system established by the 1995 LRA is operating in a changed context. The 1995 LRA has battled to adapt to and accommodate the flexibility introduced to employment relationships by globalisation. This paper tries to establish whether other regulatory devices can be added to the labour market as a way of supporting the collective voice regulatory system established by the 1995 LRA and ensuring that it better caters to atypical workers.

### **4. SCHEME OF PAPER**

The paper is divided into four chapters, with each chapter focussing on a specific theme. The first chapter will look at the history and emergence of South Africa's collective bargaining system. The second chapter will focus on the collective bargaining structure that was established by the 1995 Labour Relations Act.<sup>68</sup> Chapter three will assess just how well the system that was established in 1995 is coping today in light of the changes that have been driven by globalisation. The final chapter will try to look at possible solutions before concluding.

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<sup>68</sup> Act 66 of 1995.



# CHAPTER ONE

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## 1. INTRODUCTION

South Africa's industrial relations history has influenced and shaped its current collective bargaining structure. This chapter aims to describe as well as discuss the history of collective bargaining in South Africa. It will do this by highlighting the major milestones in South Africa's collective bargaining history which have helped to shape the bargaining structures we have today. Examining the history which shapes our current legislation will help explain the direction the drafters of the Labour Relations Act of 1995<sup>69</sup> took, as well as shed some light on the challenges our collective bargaining system is currently facing.

## 2. BACKGROUND

When diamonds and gold were discovered in South Africa at the end of the nineteenth century there was a shortage of labour.<sup>70</sup> This shortage of labour attracted workers from all over the world. Skilled workers poured in from overseas, whilst unskilled African labourers, as well as Indian and Chinese labourers voluntarily entered into the country.<sup>71</sup> This created competing interests amongst the various groups of labourers. First, it placed a large number of workers from different races in a small locality and second, it created discrimination.<sup>72</sup> When the skilled labourers from overseas migrated to South Africa they brought their skills and expertise as well as the institutions of bargaining to which they had grown accustomed. Therefore, upon their arrival in South Africa they formed craft unions. These unions brought together workers trained in a particular skill.<sup>73</sup> The overall aim of these unions was to maintain the status of skilled workers as well as to guard the domain of skilled workers.<sup>74</sup> The craft unions therefore excluded African

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<sup>69</sup> Act 66 of 1995.

<sup>70</sup> Johan Piron *Collective bargaining in South African labour law* (unpublished PhD thesis, University of Port Elizabeth, 1976) at 120.

<sup>71</sup> Jones op cit note 6 at 26.

<sup>72</sup> Ibid.

<sup>73</sup> Jones op cit note 6 at 1.

<sup>74</sup> Ibid.

workers, who were regarded as cheap, unskilled labour.<sup>75</sup> African workers also faced pressure from an influx of unskilled white labour which competed with African workers.<sup>76</sup> This created pressure for unskilled jobs which led to unrest.<sup>77</sup> Finally the different groups of workers were not paid the same wages. There was a gap in wages between the skilled white labourers and the African, Indian and Chinese labourers. This gap in wages was to persist and continue to be problematic over the next few decades.

The pressures created by the competing interests between skilled and unskilled labourers in South Africa led to several strikes occurring in the mining sector from 1907 to 1922. The unrest was caused by white workers reacting to the inclusion of African workers into certain occupations.<sup>78</sup> They felt that the inclusion of African workers would reduce their wages and threaten their lifestyle.<sup>79</sup> At that time, the Industrial Disputes Prevention Act of 1909<sup>80</sup> was the only piece of legislation attempting to regulate workers; however its purview was quite limited as it only applied to white workers in the Transvaal.<sup>81</sup>

The gold mining industry came under pressure when the production of gold decreased by twelve and a half per cent.<sup>82</sup> The Chamber of Mines, which had been created to represent the major mines operating at the time, tried to cut production costs by using African labour which was cheaper than white labour.<sup>83</sup> Replacing white labour with similarly skilled, but cheaper, African labour was contrary to the agreement the Chamber of Mines had signed with the S.A. Industrial Federation, which had been established to represent the white mineworkers.<sup>84</sup> The Chamber of Mines and the S.A. Industrial Federation tried and failed to come to a negotiated agreement. After

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<sup>75</sup> Jones op cit note 6 at 26.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Jones op cit note 6 at 26.

<sup>79</sup> Ibid.

<sup>80</sup> Act 20 of 1909

<sup>81</sup> Shane Godfrey, Johan Maree, Darcy Du Toit et al *Collective bargaining in South Africa: past, present and future* (2010) 42.

<sup>82</sup> Stuart Jones & Andre Muller *The South African economy, 1910-90* (1992) 55.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

negotiations broke down the Chamber of Mines announced that it intended to retrench two thousand white workers. This led to white mineworkers striking.<sup>85</sup> They were joined by sympathetic workers, and so the mineworkers strike turned into a general strike which was to be later termed the Rand Rebellion.<sup>86</sup> The Rand Rebellion exposed the inadequacy of labour regulation and bargaining structures in South Africa.<sup>87</sup> It thus became clear that there was an ‘urgent need to create means to enable employers and workers to solve labour disputes in an orderly, peaceful way’.<sup>88</sup>

This realisation prompted the government to address the labour unrest by enacting the Industrial Conciliation Act of 1924,<sup>89</sup> which was the first statute to regulate labour throughout South Africa.<sup>90</sup> Its aim was to provide for the ‘prevention and settlement of disputes between employers and workers’.<sup>91</sup> The Act created a voluntary collective bargaining system which was supported by the voluntary establishment of industrial councils between registered unions and an employers’ organisation.<sup>92</sup> These industrial councils operated within a certain industry, occupation or undertaking and had jurisdiction over that industry.<sup>93</sup> Bargaining took place at industrial councils, between unions and employers’ organisations.<sup>94</sup> The Act also empowered the Minister to extend any of the collective agreements concluded to cover workers within a particular industry if the trade union and employers’ organisation were sufficiently representative.<sup>95</sup> These collective agreements were extensive in their coverage and could regulate the following bargaining topics;

‘remuneration, methods of calculating minimum rates of remuneration, manner of remuneration, piece-work rates and matters pertaining to piece-work, who may be employed in a particular class of work, the prohibition of the employment of persons

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Piron op cit note 70 at 124.

<sup>88</sup> Jones & Muller op cit note 82 at 57.

<sup>89</sup> Act 11 of 1924.

<sup>90</sup> Du Toit D, Woolfrey D, Bosch D, et al *Labour Relations Act law: Comprehensive guide* 5ed (2006) 6.

<sup>91</sup> Jones op cit note 6 at 24.

<sup>92</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 6.

<sup>93</sup> Jones op cit note 6 at 52,

<sup>94</sup> Jones op cit note 6 at 52.

<sup>95</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 6.

under a certain age...establishment of pension, sickness, medical, unemployment, holiday, provident and other insurance funds...'<sup>96</sup>

Bargaining at industry level allowed trade unions to negotiate with several employers within a particular industry simultaneously.<sup>97</sup> This arrangement was beneficial for unions because it ensured that workers doing similar jobs in an industry worked under similar conditions, thus promoting a sense of equity.<sup>98</sup> It also ensured that wages and working conditions were standardised.<sup>99</sup> It also saved the resources of both unions and employers as bargaining took place in one location at the same time, thus doing away with the need to bargain with different unions or employers again and again.<sup>100</sup> Therefore, although industry level bargaining was introduced by the Act it became a feature of the South African bargaining system because of its practicality.

The collective bargaining mechanism that was established by the 1924 Act did not apply to every worker in South Africa. It was limited in two ways. First, it covered the private sector only.<sup>101</sup> Therefore any civil servants or workers in the public sector were excluded. However, it is important to note that within the private sector certain industries such as the domestic service and agriculture were also excluded.<sup>102</sup> Second, the Act excluded all pass-bearing African workers from the definition of employee, thereby formalising the practice of exclusion and racial discrimination which had come to exist.<sup>103</sup> Therefore, in terms of the Act, only white, coloured and non-indentured workers were allowed to join and form registered trade unions.<sup>104</sup> African workers could not form registered trade unions and thus they could not take part in bargaining at industrial councils.<sup>105</sup> Despite being excluded from bargaining at industrial councils,

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<sup>96</sup> Section 24(1) of the Industrial Conciliation Act 11 of 1924.

<sup>97</sup> Jones op cit note 6 at 52.

<sup>98</sup> Jones op cit note 6 at 19.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Piron op cit note 70 at 335.

<sup>102</sup> Piron op cit note 70 at 335.

<sup>103</sup> Jones op cit note 6 at 26 and Du Toit op cit note 90 at 6.

<sup>104</sup> Jones op cit note 6 at 26.

<sup>105</sup> Jones op cit note 6 at 28.

African workers attempted to establish their own unions.<sup>106</sup> However the growth of these unions was unstable.<sup>107</sup> Those African unions that did manage to establish themselves and grow were limited to bargaining with individual companies at plant level. Bargaining at this level was erratic as ‘employers were generally suspicious of them, and since they were not recognised by law, there was no compulsion to deal with them’.<sup>108</sup> The new labour legislation effectively created a racial divide within labour which was to become increasingly problematic with the passage of time.

## **2.1. THE LABOUR SYSTEM BETWEEN THE 1920S AND 1960S**

South Africa’s economy had primarily been founded on agriculture and mining, however between the 1920s and 1930s its economic base broadened.<sup>109</sup> The primary sector, which comprised of agriculture and mining, began to decrease, whilst the secondary sector, which was based on manufacturing, increased its contribution to the Gross Domestic Product.<sup>110</sup> This period was therefore accompanied by ‘sustained and rapid industrialisation’.<sup>111</sup> This created a demand for labour and consequently the secondary sector became a major employer.<sup>112</sup> By 1960 12 per cent of the workforce was employed in manufacturing and 53 per cent of that workforce consisted of African labour.<sup>113</sup> Therefore, the period between the late 1940s and 1960s was characterised by a growth in employment and an increase in the African working class. This created competition for jobs between African and white workers.

African unions began to grow in numbers from the 1930s. Industrialisation and the labour shortage it had created, led to an influx of workers into factories. This meant that large groups of workers could be found in a central location therefore making it easier for African unions to recruit members. Although the number of unions increased

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<sup>106</sup> Ibid.

<sup>107</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 42.

<sup>108</sup> Jones op cit note 6 at 28-9.

<sup>109</sup> Jones & Muller op cit note 82 at 21.

<sup>110</sup> Ibid at 22.

<sup>111</sup> Ibid at 167.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

the unions themselves did not strengthen in terms of organisation and strategy.<sup>114</sup> African unions managed to organise workers, however their inability to bargaining at industrial councils meant that they were unable to make any significant and far reaching gains for workers;<sup>115</sup> consequently disillusioned ‘members tended to drift away’ after some time.<sup>116</sup> Furthermore, the legal restrictions placed on the movement of Africans made the administration of unions difficult.<sup>117</sup> The unions therefore remained weak.

Towards the end of the 1950s African trade unions began to realign themselves.<sup>118</sup> This was prompted, amongst other things, by the decision of the South African Trades and Labour Council to exclude African trade unions from membership.<sup>119</sup> This led to the formation of the South African Congress of Trade Unions (SACTU) in 1955.<sup>120</sup> African unions operating at that time were under pressure to deal with the demands of their members regarding the political repression they faced. These issues were inseparably bound up with the African workforce’s economic situation.<sup>121</sup> Therefore, any African unions at that time who sought to discharge their duties and to achieve their aims were inevitably drawn on to the political platform.<sup>122</sup> This created a relationship between labour and politics and ultimately created conflict between African trade unions and the State.<sup>123</sup>

The Nationalist Party, which had come into power in 1948, sought to counteract natural market forces by creating policies which would protect white workers at the expense of African workers.<sup>124</sup> This ultimately led to the Industrial Conciliation Act 28 of 1956. The Act allowed the National Party to use ‘industrial conciliation machinery’ to

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<sup>114</sup> Godfrey, Theron & Visser op cit note 7 at 49.

<sup>115</sup> Ibid.

<sup>116</sup> Alex Lichtenstein ‘Making apartheid work: African trade unions and the 1953 Native Labour (Settlement of Disputes) Act in South Africa’ (2005) 46 *The Journal of African History* 298.

<sup>117</sup> Ibid.

<sup>118</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 51.

<sup>119</sup> Ibid.

<sup>120</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 52.

<sup>121</sup> D Du Toit *Capital and labour in South Africa: Class struggle in the 1970s* (1981) 99.

<sup>122</sup> Ibid.

<sup>123</sup> Du Toit *Capital and labour in South Africa* op cit note 121 at 100.

<sup>124</sup> Hofmeyer Julian ‘Reform of the labour market in South Africa’ (1994) 9 *SA Journal of Economic History* 13-4.

regulate and control a section of the workforce.<sup>125</sup> The Act did this by prohibiting African workers from joining a registered union and prohibiting workers from registering new unions that were ‘mixed’ or in other words, that had both coloured and white members.<sup>126</sup> Those unions that were already in existence and had both white and coloured members had to set up separate branches for their members.<sup>127</sup> In addition, the Act held that only white members could hold executive posts.<sup>128</sup> The Act also introduced the concept of ‘job reservation’.<sup>129</sup> The idea behind ‘job reservation’ was to keep certain types of work ‘for persons of a specified race’.<sup>130</sup> Section 77 of the 1956 Act

‘empowered the Minister of Labour to safeguard the economic welfare of employees of any racial group by reserving for them particular kinds of work in particular areas’.<sup>131</sup>

White labour was thus protected from competition from other racial groups whilst Coloured and Indian labour was protected from competition from African labour.<sup>132</sup> This further entrenched the racial divide amongst workers.

The National Party’s desire to bring the industrial relations regime in line with the government’s apartheid policy strengthened the relationship between political organisations and African unions. During the late 1950s and early 1960s the African National Congress (ANC) and the South African Congress of Trade Unions (SACTU) played an important part in the growing resistance to apartheid.<sup>133</sup> Although SACTU was a labour federation it put most of its energy into mass campaigns rather than into bargaining.<sup>134</sup> During the 1960s SACTU’s leadership joined the ANC’s military wing, Umkhoto we Sizwe (MK).<sup>135</sup> However, when the government arrested most of the MK’s

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<sup>125</sup> A Chorn ‘The Industrial Conciliation Act 28 of 1956: A review’ in *Working papers in South African labour law* at 7.

<sup>126</sup> Du Toit *Capital and labour in South Africa* op cit note 121 at 9.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Jones & Muller op cit note 82 at 181.

<sup>132</sup> Ibid.

<sup>133</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 53.

<sup>134</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 54.

<sup>135</sup> Ibid.

leadership, it meant that SACTU's leadership was also arrested thus devastating SACTU's leadership structure.<sup>136</sup>

## 2.2. LABOUR SYSTEM BETWEEN THE 1970S AND 1980S

At the start of the 1970s African trade unions were weak.<sup>137</sup> They had managed to organise African workers, however they had been unable to use their ability to organise workers to create any meaningful change in the working conditions of the African workforce. SACTU had established strong political ties with the ANC which ultimately led to the suppression of the African trade union movement. Although African unions were at a low point they would soon recover, as a result of various socio-economic factors, and ultimately gain real change for African workers.

A number of important changes occurred during the early 1970s and 1980s. In South Africa, the African component in the labour market expanded. The number of African workers employed in manufacturing and construction were now in the millions and although section 77,<sup>138</sup> which created job reservation still existed, job reservation had effectively crumbled in practice and a range of occupations opened up for Africans.<sup>139</sup> This led to more African workers in skilled and professional positions ultimately increasing the number of Africans in urban areas.<sup>140</sup> The period of rapid economic growth which had been experienced on a world-wide scale since the end of the Second World War came to an end which placed pressure on the South African economy.<sup>141</sup> Therefore, despite the growing African workforce, the majority of urban African families were extremely poor and battled to survive in an economy experiencing rising prices.<sup>142</sup> These factors ultimately led to the outbreak of strikes by African workers in Durban in 1973. These strikes spread to the rest of the country.

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<sup>136</sup> Ibid.

<sup>137</sup> Du Toit *Capital and labour in South Africa* op cit note 121 at 226.

<sup>138</sup> Industrial Conciliation Act 28 of 1956.

<sup>139</sup> Jones Stuart 'Black advancement in the secondary sector of the South African economy 1880-1980' (1987) 2 *SA Journal of Economic History* 60.

<sup>140</sup> Ibid at 60-2.

<sup>141</sup> Jones 'Black advancement in the secondary sector of the South African economy 1880-1980' op cit note 139 at 60.

<sup>142</sup> Du Toit *Capital and labour in South Africa* op cit note 121 at 252.



The Durban strikes, coupled with the realisation that the growth of the South African economy in the future lay in the hands of African workers, drove the government to make some changes.<sup>143</sup> The government amended the Native Labour (Settlements Disputes) Act<sup>144</sup> to provide for joint liaison committees of employers and African workers that would operate alongside work committees.<sup>145</sup> Work committees had been created by the Native Labour (Settlement of Disputes) Act.<sup>146</sup> They were meant to be used by African workers as ‘an alternative to collective bargaining in industrial councils’.<sup>147</sup> The committee system was rejected by the African workers who flocked to join the new, unregistered unions that had emerged in the wake of the strikes.<sup>148</sup> These unions were excluded by statute from bargaining at industrial councils and thus they made the workplace their powerbase.<sup>149</sup> They realised that earlier unions had crumbled because of their inability to improve the status of African workers by failing to engage in bargaining. These new unions therefore tried to avoid the same fate. They invested in organisation, by establishing a strong shop steward structure and in negotiation, by pressurising employers to engage in collective bargain at plant-level.<sup>150</sup> These new unions therefore, backed their organisation with ‘militant collective action’ which helped them gain ground in spite of the hostility faced from employers and the state.<sup>151</sup>

The government appointed the Wiehahn Commission of Inquiry into Labour Legislation in 1977 and it made its recommendations in 1979.<sup>152</sup> It recommended that the existing definition of ‘employee’ be extended to cover African workers and that African workers be permitted to join and form registered trade unions.<sup>153</sup> This would

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<sup>143</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 55.

<sup>144</sup> Act 48 of 1953.

<sup>145</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 54.

<sup>146</sup> Act 48 of 1953.

<sup>147</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 51.

<sup>148</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 10.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 56.

formally include African workers into the statutory framework. It would also allow African workers to be represented directly at industrial councils for the first time.<sup>154</sup> The Commission also recommended the creation of a National Manpower Commission.<sup>155</sup> The Commission would include representatives from employer's organisations, trade unions and the state who would be tasked with 'monitoring the labour situation in the country and elsewhere'.<sup>156</sup> The Wiehahn Commission also recommended the establishment of an Industrial Court, tasked with adjudicating labour disputes and unfair labour practices, to replace the Industrial Tribunal.<sup>157</sup>

The recommendations made by the Wiehahn Commission were a lot less cautious than its predecessors. It tackled the racial dual system which had become entrenched by legislation head on. Unfortunately, the National Party government was not as progressive as the Commission. They did not embrace the recommendations made by the Wiehahn Commission fully. Instead, they adopted a more cautious approach. This was encompassed in the 1979 amendment<sup>158</sup> to the Industrial Conciliation Act.<sup>159</sup> The amendment to the 1956 Act included African workers in the definition of employee however, the inclusion was limited to African workers with permanent urban residence rights only.<sup>160</sup> The amendments did not remove the restrictions on trade unions.<sup>161</sup> This meant that the unions with non-urban African workers and mixed unions still could not participate fully in the bargaining system.<sup>162</sup> However, the government would soon incorporate all African workers in the next few years. The government did, however follow the Commission's recommendations and set up a National Manpower Commission and an Industrial Court.<sup>163</sup>

### **2.3. THE TRANSITION PHASE**

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid at 57.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> It was during this period that the Act was renamed the Labour Relations Act 28 of 1956.

<sup>159</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 57.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid at 58.

<sup>163</sup> Ibid at 58.

In 1979 the Federation of South African Trade Unions (FOSATU) was created.<sup>164</sup> It was multi-racial although it developed from 'solid black-union roots' and it strove for industrial, instead of craft unions.<sup>165</sup> The African unions were unhappy with the restrictions that still existed and thus they pushed for greater change.<sup>166</sup> The government, in 1981 amended the statute books again.<sup>167</sup> This time it expanded the definition of employee to include all African workers and it also removed all racial restrictions on union membership that existed.<sup>168</sup>

Initially the unregistered unions did not trust the new dispensation, thus they resisted registering with the Department of Labour.<sup>169</sup> The government overcame this resistance by extending the regulations placed on registered unions to unregistered unions. This meant that unregistered African unions faced the same restrictions as registered unions, without the benefit of bargaining at industrial councils. The extension of the regulations therefore effectively coerced African unions into registering.<sup>170</sup> African unions were now faced with a dilemma. On the one hand, their organisational power base was at the workplace and they had become accustomed to bargaining at the workplace. On the other hand, they were now able to bargain at industrial councils, however their bargaining position was weak.<sup>171</sup>

Unions began to form more federations in the early 1980s. The Council of Unions of South Africa (CUSA) and the South African Allied Workers Union (SAAWU) were formed during this period. The formation of these federations signified the 'burgeoning growth and strength of the new unions' and thus their ability to 'hold their own' at industrial councils.<sup>172</sup> This meant that the initial position unions had taken on whether or not to bargain at industrial councils needed to be reappraised.<sup>173</sup> FOSATU

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<sup>164</sup> Jones op cit note 6 at 49.

<sup>165</sup> Ibid at 49-50.

<sup>166</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 58.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid at 59.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 12.

<sup>173</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 60.

was able to develop a new policy concerning which level to bargain for its affiliates, however CUSA and SAAWU were too busy consolidating their structures to create a solution for their affiliates. FOSATU resolved that its affiliates could join councils as long as they benefitted from the bargaining and they did not abandon their plant level bargaining.<sup>174</sup> The appropriate level of bargaining and the relationship between plant and centralised bargaining therefore became a major issue during this period.<sup>175</sup>

A few years later the Congress of South African Trade Unions (COSATU) was formed in 1985.<sup>176</sup> COSATU focused on industrial level bargaining. From the start it pushed for the establishment of one union operating in one industry, which would eventually lead to ‘national, industry-wide councils in all sectors’.<sup>177</sup> This shift in policy reflected a growth in confidence from the unions.

The close ties between labour federations and political organisations which had emerged during the 1970s continued and were further strengthened. COSATU became closely linked with political parties and this close relationship would have significant implications for the industrial relations system in the democratic South Africa. The political changes that occurred in the early 1990s, such as the unbanning of the ANC and the release of Nelson Mandela, left the National Party government with little option but to recognise an agreement concluded by COSATU, the South African Employers’ Consultative Committee in Labour Affairs (SACCOLA) and the National Congress of Trade Unions (NACTU) on 14 September 1990 titled the ‘Laboria Minute’.<sup>178</sup> This document set the stage for the next piece of labour legislation that would be enacted. It provided for a multi-party consultative process between all relevant parties before any new labour legislation was submitted to Parliament.<sup>179</sup>

## CONCLUSION

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<sup>174</sup> Ibid at 12.

<sup>175</sup> Du Toit et al *Labour Relations Act law op cit* note 90 at 13.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid at 15.

<sup>179</sup> Ibid at 15.

South Africa experienced several changes in the twentieth century. Some changes were economic and political whilst others related to its labour relations system. South Africa's economy grew and shifted from being primarily based on mining and agriculture to being based on manufacturing. Politically, the National Party introduced and implemented its apartheid policy which led to political tensions as well as tensions in labour. These economic and political factors had a significant impact on the industrial relations system.

The 1924 and 1956 labour legislation created racial tensions within the labour market. African unions started off weak and unorganized, however with the passage of time and the increased repression by government these unions were forced to grow stronger. The introduction and growth of the manufacturing sector as well as the employment of African workers in this sector led to the growth in union membership. Although they experienced some growing pains between the 1930s and the 1960s, by the start of the 1970s they had realised the importance of collective bargaining and achieving real gains for their members. Their focus in the years to come would be recruiting new members and negotiating for their better employment conditions.

During this period African unions realised that they were unable to divorce the economic issues from the political issues. The political and economic repression experienced by the African population meant that unions became both political and labour entities. In addition, the growth in the manufacturing sector meant that there were large concentrations of African workers in certain locations. These workers were relatively militant and thus willing to embark on mass industrial action, as had been proven by the Durban strikes. Workers at that time had a common and easily identifiable identity. They found common ground on political and labour issues. The growth in numbers unions experienced came from the African workers' united opposition against a racist government and a racist industrial relations system. Thus unions at this point had become more militant and more organized.

African unions made the shop floor their recruitment base. They were prohibited by legislation from registering as unions and thus they were unable to bargain at

industrial councils. They thus gained strength at plant level and bargained with employers at plant level. This meant that bargaining took place at individual firms and at industrial councils; something that would become problematic in the future. This period of time was thus characterised by the gradual growth of unions in strength and membership.

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# CHAPTER TWO

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## 1. INTRODUCTION

The start of democracy in South Africa led to a new regulatory era for labour. The new government faced many political, legislative and socio-economic issues which had to be addressed. One of the first issues the new government had to attend to was the regulation of labour and the labour legislation it had inherited from the previous administration. The new government replaced the old statutory dispensation with a new statutory framework. This chapter begins by discussing the concerns unions, employers and government faced at the time the new labour dispensation was created. It explores these concerns and how they gave the bargaining system established by the new legal dispensation its particular characteristics.

## 2. THE LABOUR RELATIONS ACT 66 OF 1995

### 2.1 Background

By the start of the early nineties it was clear that the time for change in the statutory framework regulating labour was both inevitable and imminent. Furthermore, the strong bond formed between COSATU and the ANC during the 1980s ensured that when the ANC came into power in April 1994, addressing the labour system was one of its top priorities.<sup>180</sup> A number of issues had arisen during the late 1970s and 1980s between unions and employers. These issues had been created by the bargaining structures and legislative restrictions established by the 1956 LRA together with the amendments to the 1956 LRA in the late 1970s and early 1980s. In terms of collective bargaining, unions and employers had been confronted with issues relating to bargaining levels, industrial councils and the duty to bargain.

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<sup>180</sup> Du Toit et al *Labour Relations Act law op cit* note 90 at 16.

When it came to determining the appropriate bargaining level, African unions, which had been excluded from industrial councils by legislation, tended to bargain at plant level, whilst employers had generally bargained at industrial councils. African unions had organised at plant level thus this is where their strength lay. Therefore, when the 1956 LRA was amended to allow African unions to bargain at industrial councils there was some reluctance on their part to do so. Employers were generally reluctant to bargain with African unions altogether. Employers tended to refuse to bargain with unions at plant level and cited their industrial council membership as a reason.<sup>181</sup> However, once African unions began to join the industrial councils employers, began to resist centralised bargaining and advocated for decentralised bargaining instead.<sup>182</sup> Bargaining levels thus became an issue the 1956 LRA was unable to adequately deal with and thus something the new labour dispensation would have to address.

The role of industrial councils also emerged as an issue during this period. Industrial councils had been established by the Industrial Conciliation Act of 1924.<sup>183</sup> Their history made some African unions and their members wary of industrial councils as they tended to associate them with those problematic areas of the bargaining system.<sup>184</sup> The 1924 and 1956 Acts permitted only registered unions and registered employers' associations to form an industrial council for bargaining purposes. Therefore, until 1979 African unions were prohibited from registering as unions and thus were unable to negotiate at industrial councils.<sup>185</sup> Some of the unions permitted to register and bargain at industrial councils had used industrial councils to benefit their members, who were generally skilled white workers. Some African unions therefore viewed industrial councils as institutions which had helped to perpetuate the suppression of African workers and the dual race bargaining structure. The new labour legislation

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<sup>181</sup> Ibid at 12.

<sup>182</sup> Ibid.

<sup>183</sup> 11 Act of 1924

<sup>184</sup> Kate Jowell 'Industrial councils: The baby or the bathwater?' in Willy Benedix (ed) *South African industrial relations of the eighties* (1988) 171.

<sup>185</sup> Ibid.



would have to determine whether or not they would remain a part of South Africa's bargaining structure.

The 1979 amendments to the 1956 LRA created the Industrial Court which was tasked with dealing with those matters relating to labour disputes. The Industrial Court developed unfair labour practice jurisprudence which made a distinction between disputes of interest and disputes of right. The court did not hear any matters concerning disputes of interest as these were left to power play, whilst disputes of right were open to adjudication.<sup>186</sup> Issues surrounding collective bargaining and the duty to bargain were regarded as disputes of interest. Whenever disputes relating to the duty to bargain arose the court was unable to provide clear guidance on the matter as its jurisprudence was inconsistent and problematic. It eventually held that 'employers had a broad duty to bargain in good faith'.<sup>187</sup> However, the court did not provide guidance on the level parties were to engage in collective bargaining.<sup>188</sup> Therefore, bargaining levels as well as the principle of voluntarism were issues the new labour legislation would need to resolve.

The issues mentioned above were some of the matters the new labour legislation would need to address. Interested parties were anxious to not only be a part of the change, but to ensure that the changes they envisioned would become a part of the new statutory framework. There were three main parties involved; trade unions, employers and the ANC, which was to later become government.

The ANC had developed the Reconstruction and Development Programme (RDP) before coming to power.<sup>189</sup> It was created in order to ensure 'the integration of

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<sup>186</sup> Du Toit et al *Labour Relations Act law op cit* note 90 at 11.

<sup>187</sup> Du Toit et al *Labour Relations Act law op cit* note 90 at 12.

<sup>188</sup> Du Toit et al *Labour Relations Act law op cit* note 90 at 12.

<sup>189</sup> Sonia Bendix *Industrial relations in South Africa* (2010) 87.

growth, development, reconstruction and redistribution in a unified programme'.<sup>190</sup> It dealt with collective bargaining amongst other issues. It saw South Africa with a centralised collective bargaining system with 'articulation between the national, industrial and workplace levels'.<sup>191</sup> In addition, the RDP proposal envisioned a collective bargaining system which kept the industrial councils.<sup>192</sup> COASTU, which represented a significant number of African unions, had a detailed plan regarding its goals for collective bargaining.<sup>193</sup> The unions that formed COSATU wanted bargaining to occur at sectoral level. It desired a centralised bargaining system which would demarcate industry into different sectors, with each sector having a centralised bargaining forum. COSATU sought commitment from the ANC that it would pressurize employers to engage in centralised bargaining in those sectors which did not have bargaining forums.<sup>194</sup> Although it envisioned a system with voluntary bargaining, it did propose 'seeking compulsory bargaining if the changes it proposed' were unable to achieve the desired results.<sup>195</sup> Employers had begun to resist the idea of centralised bargaining as well as the industrial council system.<sup>196</sup> They were against any form of compulsory bargaining and thus motivated to retain the voluntarist system that had always been in place.<sup>197</sup> Furthermore, the small, medium and micro enterprises (SMME) sector wanted a 'blanket exemption from labour legislation and industrial council agreements'.<sup>198</sup> The argument was that the exemption would aid economic growth and stimulate job creation.<sup>199</sup>

It was thus up to the new legislation to find a happy medium between these different and competing interests. After the ANC came into power in April 1994 it

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<sup>190</sup> Ibid.

<sup>191</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 82.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid at 87.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 20.

<sup>197</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 88.

<sup>198</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 21.

<sup>199</sup> Ibid.

dismantled the Department of Manpower and created the Department of Labour.<sup>200</sup> It then commissioned a task team to draft a new Labour Relations Act.<sup>201</sup> The National Manpower Commission and the National Economic Forum were abolished and they were substituted with National Economic Development and Labour Council (NEDLAC).<sup>202</sup> NEDLAC was made up of four chambers; ‘Trade and Industry; Public Finance and Monetary Policy; Labour Market and Development’ and ‘government, organised labour and organised business had equal representation in each chamber’.<sup>203</sup> The idea behind NEDLAC was consensus. It was a decision making body established to ensure that any piece of labour legislation presented to Parliament represented the views of the community, unions, government and business. Negotiating the new LRA was to be the first test the newly constituted NEDLAC would face.<sup>204</sup>

## 2.2. LABOUR RELATIONS ACT 66 OF 1995

The new Labour Relations Act<sup>205</sup> faced a difficult task, it needed to please all parties involved whilst simultaneously ensuring that it did not stifle economic growth.<sup>206</sup> The new Act represented a blend of the old and the new. It repealed the Labour Relations Act of 1956 and its subsequent amendments,<sup>207</sup> but retained some features from the past system whilst introducing new structures and rights. When it came to collective bargaining, the LRA stated that it intended to

‘promote orderly collective bargaining, collective bargaining at sectoral level [and] workers’ participation and decision-making at the workplace’.<sup>208</sup>

<sup>200</sup> Bendix *Industrial relations in South Africa* op cit note 189 at 88.

<sup>201</sup> Ibid.

<sup>202</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 17.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Act 66 of 1995.

<sup>206</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 21.

<sup>207</sup> Bendix *Industrial relations in South Africa* op cit note 189 at 88.

<sup>208</sup> Preamble to the Labour Relations Act 66 of 1995.

The Act therefore addressed some of the concerns some parties had concerning the duty to bargain, the fate of industrial councils and bargaining levels.

### 2.2.1. Duty to bargain

The parties negotiating the new LRA settled on a collective bargaining system which was essentially voluntarist.<sup>209</sup> This was based on South Africa's collective bargaining history as well as international norms. South Africa's first comprehensive piece of legislation, the 1924 Industrial Conciliation Act,<sup>210</sup> introduced voluntary collective bargaining and the amendments that had been made to the Act had retained the voluntarist system. Furthermore, when South Africa became a democratic nation it was able to re-join the international community it had been excluded from during the apartheid era. The new democracy therefore began to align itself with the various international conventions that applied at the time. In the sphere of labour, international labour norms were regulated by the International Labour Organisation (ILO). The ILO had the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively<sup>211</sup> which spoke to the issue of voluntarism in collective bargaining. The Convention states that

‘[m]easures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations...’

Therefore, international law advocated for voluntarist collective bargaining systems.

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<sup>209</sup> Bendix *Industrial relations in South Africa* op cit note 189 at 93.

<sup>210</sup> Act 11 of 1924.

<sup>211</sup> Convention No. 48 of 1949.

The drafters of the 1995 LRA realised that it was necessary to balance the voluntary duty to bargain with other measures and so they ensured that the 1995 LRA protected the right to resort to industrial action<sup>212</sup> and it also created organisational rights.<sup>213</sup> The Act permitted unions to strike if an employer was unwilling to come to the bargaining table. They were thus entitled to use their power to coerce the employer into negotiations ‘after conciliation measures ha[d] been exhausted’.<sup>214</sup> The ‘recognition of bargaining agents, the choice of bargaining levels and the scope of the bargaining agenda and bargaining conduct’ were thus left to negotiation between the employer and unions, and if that failed then the matter would be settled by an exercise of power.<sup>215</sup>

The ‘statutory set of organisational rights for representative trade unions’ was available to ‘sufficiently representative’ and majority unions.<sup>216</sup> Unions ‘sufficiently representative’ were entitled to the right to access the employer’s premises, the right to deduct subscriptions, and the right to leave for trade union office bearer,<sup>217</sup> whilst unions with majority representation were entitled to the right to elect shop stewards and the right to information for bargaining and monitoring purposes.<sup>218</sup> In the past unions would have had to negotiate for these rights but the 1995 LRA granted them automatically to ‘sufficiently representative’ and majority unions as a way of assisting unions in bargaining.

Therefore, the 1995 LRA adopted a voluntarist approach and counter-weighted this with the right to resort to industrial action and organisational rights. The courts were therefore prohibited from intervening and creating a duty to bargain.<sup>219</sup> Government,

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<sup>212</sup> Chapter 4 of the Labour Relations Act 66 of 1995 deals with strikes and lockouts.

<sup>213</sup> Sections 11-16 of the Labour Relations Act 66 of 1995.

<sup>214</sup> Du Toit et al *Labour Relations Act law op cit* note 90 at 24.

<sup>215</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 90.

<sup>216</sup> Du Toit et al *Labour Relations Act law op cit* note 90 at 24.

<sup>217</sup> Sections 11, 12, 13 and 15 of the Labour Relations Act 66 of 1995.

<sup>218</sup> Sections 14 and 16 of the Labour Relations Act 66 of 1995.

<sup>219</sup> Martin Brassey ‘Purpose, application and interpretation’ in *Employment and labour law: Commentary of the Labour Relations Act 66 of 1995* A1-16.

employers and unions thus chose to make collective bargaining dependent on the level of unions' representivity and the aggressiveness of their membership.

### 2.2.2. Industrial councils and bargaining levels

The 1995 LRA retained the industrial councils, however it renamed them 'bargaining councils'. This became necessary 'once it became accepted that they would perform a role outside of industry – in the public service, the agriculture sector and for domestic workers, but to name three'.<sup>220</sup> Retaining bargaining councils ensured that wages and conditions of employment could be regulated at sectoral level.<sup>221</sup> They were empowered to 'set minimum employment standards and establish pension, sick and other welfare funds'.<sup>222</sup> They were also given the powers to provide dispute resolution services to parties that were members of the bargaining council.<sup>223</sup>

One of the primary purposes of the Act was to promote centralised collective bargaining.<sup>224</sup> The drafters of the 1995 LRA believed that

'many of the challenges economic restructuring presents to major industries [would] best be met by a co-ordinated response forged by agreement between organised business and labour'.<sup>225</sup>

Bargaining councils thus assisted in promoting centralised collective bargaining. They were free to conclude collective agreements. The collective agreement would be legally binding and it automatically changed the contracts of all employees subject to the

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<sup>220</sup> Martin Brassey 'Collective bargaining' in *Employment and labour law* op cit note 219 at A3-61.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Martin Brassey 'Collective bargaining' in *Employment and labour law* op cit note 219 at A3-75.

<sup>224</sup> Martin Brassey 'Purpose, application and interpretation' *Employment and labour law* op cit note 219 at A1-21.

<sup>225</sup> Ibid.

agreement.<sup>226</sup> If the parties to the agreement covered the majority of workers within a sector they could make an application to the Minister requesting an extension of their collective agreement.<sup>227</sup> The extension of collective agreements protected the bargaining council scheme established by the Act. It stopped employers who were not party to the collective agreements from posing unfair competition' to their competitors bound by the collective agreement'.<sup>228</sup> If collective agreements could not be extended to non-parties

'the non-parties would be able to pay employees at rates which [were] lower than those which their competitors who [were] party to the agreement [had] to pay to their employees...[and] this would seriously discourage orderly collective bargaining in general, and collective bargaining at sectoral level in particular...'.<sup>229</sup>

Therefore, although parties were free to settle on a particular level of bargaining amongst themselves, the Act promoted centralised bargaining at sectoral level.

### 2.2.3. Worker participation

The 1995 LRA created two vehicles for employee participation. Collective bargaining was chosen as the main vehicle.<sup>230</sup> The collective voice was meant to be 'a countervailing source of power to management [expressed] through unionisation and collective bargaining in particular'.<sup>231</sup> The use of the collective voice as a form of employee participation in the workplace and industry was the traditional form of articulation in South Africa. The collective voice had been the main mode of expression employees had used since the 1924 Act, therefore it was the obvious choice. Workplace

<sup>226</sup> Godfrey, Maree, Du Toit et al op cit note 81 at 90.

<sup>227</sup> Section 32 Labour Relations Act 66 of 1995.

<sup>228</sup> Martin Brassey 'Collective bargaining' *Employment and labour law* op cit note 219 at A3-80.

<sup>229</sup> *Kem-Lin Fashions CC v Brunton & others* (2001) 22 ILJ 109 LAC 115F-H.

<sup>230</sup> Du Toit et al *Labour Relations Act law* op cit note 90 at 22.

<sup>231</sup> Tony Dundon, Adrian Wilkinson, Mick Marchington et al 'The meanings and purpose of employee voice' at 7 available at [www.98.griffith.edu.au](http://www.98.griffith.edu.au) accessed 21 July 2011.

forums were the second vehicle chosen.<sup>232</sup> Workplace forums were based on worker participation at plant level. Workplace forums were different to collective bargaining in that collective bargaining was concerned with ‘how the cake should be cut’ whereas workplace forums were based on the idea of ‘participative decision-making, integrative in nature, by which the cake [could] be made to grow bigger’.<sup>233</sup> Therefore, this form of voice articulation was ‘concerned with improvements in work organisation and efficiency’.<sup>234</sup> Unfortunately workplace forums have not been used as both employers and unions were suspicious of workplace forums from the beginning.<sup>235</sup> Employers believed they would undermine their ‘managerial prerogative’ whilst unions feared their ‘collective bargaining power would be compromised’.<sup>236</sup>

### 3. STATUTORY CONSTRAINTS

When legislators make laws they aim to address a particular ‘mischief’ at that time, thus they take past issues and inequities and they try to remedy them through legislation.<sup>237</sup> When the relevant parties and the drafters of the 1995 LRA came together they were concerned with remedying a specific ‘mischief’ and the solutions they created were coloured by past and present experiences. In the context of labour law, the drafters of the 1995 LRA had to address issues regarding bargaining levels, industrial councils and the duty to bargain. These were some of the issues that had come to the fore during the late 1970s and 1980s. The 1995 LRA chose to address these issues by establishing a collective bargaining system that was voluntarist in nature and balanced by organisational rights as well as the right to resort to industrial action. The 1995 LRA also promoted centralised collective bargaining. This was to be supported by the establishment of bargaining councils and the extension of collective agreements in those sectors where employers and unions covered the majority of workers in the sector.

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<sup>232</sup> Chapter V Labour Relations Act 66 of 1995.

<sup>233</sup> Martin Brassey ‘Workplace forums’ *Employment and labour law* op cit note 219 at A5-1.

<sup>234</sup> Dundon op cit note 231 at 7.

<sup>235</sup> Du Toit ‘What is the future of collective bargaining’ op cit note 24 at 1426.

<sup>236</sup> Martin Brassey ‘Workplace forums’ *Employment and labour law* op cit note 219 at A5-1.

<sup>237</sup> Francis Bennion *Statute Law* 2ed (1983) 162-3.



The collective bargaining system set up thus implicitly required unions to have a large membership. From the 1960s the manufacturing sector had grown to become the biggest sector.<sup>238</sup> It was labour intensive and thus employed a large section of the workforce, including the largest group of African workers.<sup>239</sup> The concentration of capital in industry had thus led to a concentration of African workers in the industrial sector,<sup>240</sup> resulting in the migration of large numbers of African workers from rural to urban areas. Although the manufacturing sector had experienced a decline in growth during the 1980s, it still remained the largest sector and employer.<sup>241</sup> From a political perspective South Africans were increasingly willing to join organisations as a way of protesting against the repressive political situation in South Africa.<sup>242</sup> Therefore, there was a growth in the membership of organisations within the community as well as amongst ‘school children and unemployed youth’ in African townships.<sup>243</sup> This desire to organise was also accompanied by an increased militancy in the South African population, as evidenced by the 1973 strikes in Durban and the 1976 Soweto uprising.<sup>244</sup> Unions thus became an organisation workers desiring to change the political and economic status quo could join. South Africa’s political climate, economic infrastructure and frustrated population made it possible for unions to greatly increase their membership during the 1980s. Therefore, at the time the 1995 LRA was drafted and enacted unions had the necessary membership to compel bargaining and so it made sense to leave collective bargaining issues to be decided by representativity.

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<sup>238</sup> Jones & Muller op cit note 82 at 55.

<sup>239</sup> Jones ‘Black advancement in the secondary sector of the South African economy 1880-1980’ op cit note 139 at 62.

<sup>240</sup> J Foster ‘The workers struggle: Where does FOSATU stand?’ in Willy Bendix (ed) *South African industrial relations of the eighties* (1988) at 677.

<sup>241</sup> Jones ‘Black advancement in the secondary sector of the South African economy 1880-1980’ op cit note 139 at 62.

<sup>242</sup> D Hindson ‘Overview: Trade unions and politics’ in Johann Maree (ed) *The independent trade unions 1974-1984* (1987) at 227.

<sup>243</sup> Maree op cit note 242 at 210.

<sup>244</sup> On June 16 1976 a march organised by school children in Soweto was harshly repressed by police and ultimately escalated into a mass uprising in African townships.

Unfortunately legislators are not omniscient. They are therefore unable to ‘anticipate all the possible combinations of circumstance to which their rules might be applicable, and so they cannot estimate the contingencies that might arise to be determined’.<sup>245</sup> The economic context in which the 1995 LRA was drafted and enacted has since changed. When the 1995 LRA was drafted the manufacturing industry was the biggest contributor to the economy and the main employer.<sup>246</sup> However, the South African economy at that time was partially isolated and had created ‘inefficient and uncompetitive firms’.<sup>247</sup> Therefore, when South Africa became a democracy in 1994 and simultaneously re-entered the global economy this exposed businesses operating in the national economy to ‘intense competition in a rapidly changing market’.<sup>248</sup> This left the new government with the task of attracting foreign investment in order to ensure economic growth.<sup>249</sup>

Initially the government based its economic policy on the RDP, however in 1996 it opted for the Growth, Employment and Redistribution (GEAR) strategy’.<sup>250</sup> GEAR thus became the foundation for economic and social policy.<sup>251</sup> It emphasised economic growth through investment and production.<sup>252</sup> It also emphasised trade liberalisation and flexibility.<sup>253</sup> The globalised world market placed business under pressures they had not been exposed to during the apartheid era. Consequently, the 1995 LRA soon came under attack from employers as ‘perpetuating and increasing rigidities in the labour market with the deleterious effect on global competitiveness’.<sup>254</sup> Employers argued for the introduction of labour market flexibility<sup>255</sup> as there was a feeling that the labour laws

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<sup>245</sup> William Twining & David Miers *How to do things with rules* (1999) at 182.

<sup>246</sup> Du Toit et al *Labour Relations Act law* op cit note 43 at 18.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid.

<sup>249</sup> Mills ‘The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility’ (2004) 25 *ILJ* 1210

<sup>250</sup> Ibid

<sup>251</sup> Bendix *Industrial relations in South Africa* op cit note 189 at 87.

<sup>252</sup> Ibid at 87- 8.

<sup>253</sup> Mills op cit note 249 at 1210

<sup>254</sup> Ibid.

<sup>255</sup> Susan Hayter ‘Regulated flexibility: The impact of South African labour law and labour market policy in the global context’ (paper presented at the Twelfth Annual Labour Law Conference, 1999) 2.

introduced since 1994 had introduced rigidities into the South African labour market, which deterred investors and impeded the flexibility needed to compete globally.<sup>256</sup> This call for flexibility would have a serious impact on the effectiveness of the collective bargaining system created by the 1995 LRA in the years to come.

## CONCLUSION

When South Africa's democratic era commenced the drafters of the new labour law dispensation were faced with the task of addressing a number of issues that had arisen under the previous dispensation. In the collective bargaining context the new dispensation would need to resolve matters pertaining to the duty to bargain, bargaining levels as well as the fate of industrial councils. Unions, employers and government came together and made their contributions to the 1995 LRA. Ultimately the 1995 LRA resolved these issues. However, it did so by creating a collective bargaining system heavily reliant on the representivity levels of unions. At the time the 1995 LRA was drafted unions had not experienced any major problems recruiting and organising new members. The growth in the industrial sector, the repressive political atmosphere as well as the general discontent of the South African populace enabled unions to recruit large numbers. The drafters of the 1995 LRA thus did not make any provision within the Act assisting those unions struggling to recruit members.

The globalised economy in which South Africa now operates has changed the structure of South Africa's economy as well the nature of work. Unions are finding it increasingly difficult to recruit and retain members and as a result their membership numbers have declined. The sections in the 1995 LRA which promote collective bargaining and make the bargaining process easier for unions rely on representivity thus making it harder for those unions struggling to recruit members to access certain rights in the 1995 LRA. The 1995 LRA has unfortunately been unable to assist unions. The

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<sup>256</sup> Ibid.

current bargaining current system is thus struggling to meet the needs of all workers therefore making it necessary to institute some form of change.

# CHAPTER THREE

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## 1. INTRODUCTION

Labour legislation is one of the methods states use to establish mechanisms which intervene in the market economy and try to regulate the consequences of market forces. In South Africa the 1995 LRA does this, in the context of collective bargaining, by establishing certain bargaining structures aimed at creating rules and processes that regulate bargaining between workers and employees. Statutory regulation identifies and remedies specific problems, however, no matter how all encompassing the legislation might be, it is unable to anticipate all the permutations that might arise within a specific context. Therefore once enacted, legislation becomes fairly inflexible and slow to adapt to any changes. The 1995 LRA is no exception to this. When it was drafted it created a bargaining system premised on a labour market where most of the employment relationships were standard employment relationships.

South Africa's re-integration into the world economy exposed it to the effects of globalisation. Globalisation altered South Africa's economy as well as the nature of its employment. Globalisation processes resulted in the growth of atypical workers. Although non-standard employment was present in South Africa at the time the 1995 LRA was drafted, the newly elected government was unable to anticipate the full extent of its growth and the impact this would have on workers in the coming years. Although workers in non-standard employment are *de jure* covered by the 1995 LRA, atypical workers are increasingly unable to access the bargaining system set up in the Act. Through the use of empirical studies this chapter will look at how the collective bargaining system set up by the 1995 LRA to regulate bargaining between employers and workers is battling to accommodate atypical workers.

## 2. BARGAINING IN A GLOBALISED CONTEXT

Statutory regulation can take various forms. It can be protective in nature or it can be facilitative.<sup>257</sup> If it is protective in nature it tends to ‘establish rules and procedures aimed at preventing those in strong positions from abusing those in weak positions’ and if it is facilitative then it ‘[establishes] rules and procedures that allow certain activities to take place should parties wish to do so’.<sup>258</sup> The sections regulating collective bargaining in the 1995 LRA are essentially facilitative in nature as they assist potential bargaining agents in establishing bargaining procedures and bargaining rights. At the time the 1995 LRA was drafted South African unions enjoyed considerable growth in union membership. They had also been able to bargain with an increasing number of employers, whether on plant or sectoral level. Therefore at the time the LRA was drafted, facilitative regulations seemed the most appropriate within the collective bargaining context.

Statutory regulation, though beneficial on the most part, does tend to be rigid and inflexible.<sup>259</sup> Furthermore, it is impossible for any law to make provision for every contingency.<sup>260</sup> Although regulations create certainty, which is a positive characteristic in any legal system, this certainty ‘may undermine the system’s efficiency and encourage avoidance and evasion’.<sup>261</sup> This has been the case in South Africa. First, the 1995 LRA was designed for an economy based on a standard employment relationship and this is no longer the case. This has been as a result of the effect of globalisation processes on the economy as well as employers restructuring their employment set-up to accommodate the economic pressures they are now facing. Consequently there has been shift in the economy which has affected the manufacturing industries and a resultant high turnover of atypical workers which has made the recruiting, organising and retention of members by unions difficult.<sup>262</sup> Unions have thus found it increasingly difficult to represent atypical workers and bargain on their behalf. Therefore the

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<sup>257</sup> Guy Standing *Global flexibility: Seeking distributive justice* (1999) 41.

<sup>258</sup> *Ibid.*

<sup>259</sup> *Ibid.*

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> Andries Bieler, Ingemann Lindberg & Devan Pillay (eds) *Labour and the challenges of globalisation: What prospects for transnational solidarity?* (2008) 56.

collective bargaining mechanism set up in the 1995 LRA is battling to accommodate a growing section of the labour force. This will be illustrated by the two empirical studies that follow below.

## 2.1. South Africa's construction sector

Construction is divided into two sectors, civil engineering and building.

'The building sector involves erection, completion and renovation of buildings and structures. Civil engineering involves the construction of public works such as roads, bridges, dams and other structures excluding buildings.'<sup>263</sup>

The building sector provides a useful case study as it has a number of bargaining councils<sup>18</sup> established in terms of the 1995 LRA. Furthermore, the building sector is now facing considerable pressure from the globalisation processes which has had an impact on the nature of employment and the collective bargaining structures set up in the sector. Therefore, there are increasing instances of casualisation and externalisation, which in turn are resulting in informalisation. It is these two factors combined which make the building sector an appropriate case study.

The building sector has always been characterised by very mobile operations.<sup>264</sup> This is because construction work usually occurs at the location of the construction site rather than at the construction firm itself.<sup>265</sup> The availability of jobs within the construction sector has always fluctuated as construction work is based on completing a project and moving on the next. Therefore, work arrangements within the building sector have always been precarious. However, despite this, construction workers formed part of the formal business structure taking part in tax payments and benefit systems.<sup>266</sup> This is no longer the case. There has been a decrease in formal employment experienced in the

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<sup>263</sup> Eddie Cottle (ed) 'Collective bargaining arrangements in the construction industry: A handbook 2009' (2009) 23 *Bargaining Monitor* 4.

<sup>264</sup> Tanya Goldman 'Organising in the informal economy: A case study of the building industry in South Africa' (Small Enterprise Development Working Paper No. 38, 2003) at 1.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

industry since 1994, due largely to retrenchments from large construction firms.<sup>267</sup> Statistics indicate that major construction firms have reduced their formal employees from ‘thousands to a few hundred’.<sup>268</sup> This has led to there being ‘even more labour flexibility’ than before.<sup>269</sup>

The South African construction sector relies heavily on sub-contractors. Sub-contracting in itself is not new to the construction sector.<sup>270</sup> Traditional sub-contracting has always been present in the sector. It established itself in the sector by providing contractors workers with special skills. These traditional sub-contractors were able to conduct their work autonomously and thus they operated independently of the contractor.<sup>271</sup> They therefore provided two things, specially-skilled labour and materials. This part of the sector has been relatively unaffected by the changes in employment and has managed to maintain its size and function within the sector. In contracts, labour only sub-contractors (LOSCs) are a newer form of sub-contracting which has emerged in the last fifteen years. LOSCs provide a different kind of service from traditional sub-contractors, and their growth in the sector is a direct result of the economic pressures experienced by the sector.<sup>272</sup> LOSCs just provide general labour and they work less autonomously than traditional sub-contractors.<sup>273</sup> They perform general construction work and depend on the contractor to supply materials.<sup>274</sup> LOSCs have become the ‘most dominant form of non-standard employment in the construction sector’. Currently, there is a ‘distorted reliance’ on LOSCs within the sector.<sup>275</sup>

LOSCs are mainly responsible for the growth of casualisation in the construction sector.<sup>276</sup> Contractors, together with LOSCs use fixed-term contracts to meet the changes

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<sup>267</sup> Ibid at 11.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

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<sup>271</sup> Ibid at 2.

<sup>272</sup>

<sup>273</sup> Ibid at 2.

<sup>274</sup> Ibid at 2.

<sup>275</sup> Ibid at 1.

<sup>276</sup> Bezuidenhout et al op cit note 43 at 6.



in their workload, thus linking their staffing with their workload.<sup>277</sup> Studies conducted in the sector in 2003 indicated that over half of the workers in the industry are employed by firms which employ 'less than ten regular workers'.<sup>278</sup> Whilst, only 'fourteen percent work in companies with fifty or more regular workers'.<sup>279</sup> A 2011 COSATU Report states that the construction sector now has 'the most casualisation than any other sector' with casualised workers making up close to sixty per cent of the workers in the sector.<sup>280</sup> Externalisation is also found in the construction sector. Usually firms of contractors encourage a group of artisans to terminate their employment with them and form a small team.<sup>281</sup> These former employees either become independent contractors or a sub-contractor their former employer uses. This means that the employer will no longer interact with the workers via an employment contract instead, their interaction will be based on a commercial contract.<sup>282</sup> The structure of LOSCs, and in some cases, their lack of structure contributes to informalisation within the sector. LOSCs are unregulated with a minimal number registering with bargaining councils and complying with collective agreements or labour legislation.<sup>283</sup> For instance, the Southern and Eastern Cape Bargaining Council estimates that approximately half of the employees working in their sector are not registered with the bargaining council.<sup>284</sup>

LOSCs do not comply with legislation or bargaining council agreements when it comes to wages and terms and conditions of employment thus atypical workers earn less wages and under less favourable conditions than their permanently employed counterparts. It is in this instance that the bargaining structure set up by the 1995 LRA is most needed to assist a group of workers in negotiating for better wages and terms and conditions of employment. For a union to bring an employer to the bargaining table it must have enough members to compel the employer to bargain should the employer be unwilling to do so. However, unions in the building sector have been unable to gain the

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<sup>277</sup> Ibid

<sup>278</sup> Goldman op cit note 264 at 11.

<sup>279</sup> Ibid.

<sup>280</sup> COSATU Secretariat Report to the Fifth COSATU General Committee (2011) at 82.

<sup>281</sup> Bezuidenhout et al op cit note 264 at 46.

<sup>282</sup> Ibid

<sup>283</sup> Ibid.

<sup>284</sup> Bezuidenhout et al op cit note 264 at 48.

membership necessary to access organisational rights and compel employers to negotiate about the employment conditions of atypical workers.

The 1995 LRA states that the representivity of a union is to be calculated with reference to the workplace. The workplace is defined as

‘the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.’<sup>285</sup>

The definition of a ‘workplace’ makes it difficult for unions in the building sector to calculate the levels of their representivity. The definition is premised on the type of workplace common to a standard employment relationship in the manufacturing sector rather than the construction industry generally which does not have a fixed workplace as the workplace is never the same.

Despite the fact that the construction sector is highly labour intensive, unions have found it difficult to recruit and organise atypical workers. Labour within this sector is highly fragmented. There are fixed-term contract employees working for contractors and LOSCs as well as informal workers working for LOSCs from time to time. In addition, these workers are located all over the place. These workers also lack a common identity making recruitment even more difficult. The African workers who excluded from the collective bargaining system were able to come together as a collective, despite the challenges they faced, because they worked together in one workplace. They thus shared a collective camaraderie amongst themselves and thus it was easier for unions to recruit them as a collective at the workplace. Atypical workers within the construction sector lack this sense of collective camaraderie. The high turn-over means they hardly have time to form any meaningful bonds with other workers. Furthermore, the highly competitive nature of the sector results in workers within the industry viewing each

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<sup>285</sup> Section 213 Labour Relations Act 66 of 1995.

other as competition rather than as colleagues, thus exacerbating the matter. The LRA creates a structure which supports collective bargaining, however it is evident that workers within this sector are no longer in an environment which makes it possible to form a collective. Thus statistics indicate that unions only represent thirteen per cent of the workforce.

The inability to recruit workers threatens the centralised bargaining system the 1995 LRA promotes. The 1995 LRA creates bargaining councils which operate at sectoral level. They are intended to afford workers a chance to effect change at sectoral level. During the 1990s the building sector had ten bargaining councils,<sup>286</sup> however, the mechanism has become difficult for workers to access. Most bargaining councils have collapsed and of the six that remain only two are properly operational. The bargaining councils in Pietermaritzburg, Durban, Kroonstad and Gauteng have collapsed.<sup>287</sup> The Bloemfontein, East London and Southern and Eastern Cape bargaining councils are still in existence however that existence is not guaranteed in the long term.<sup>288</sup> The Cape Council and the Kimberley Council are the only two fully functioning councils.<sup>289</sup> The collapse has been as a result of two things; first, LOSC's disregard for bargaining council agreements and second, low representivity. The Act only permits the Minister to extend a bargaining council agreement if the parties to the agreement represent the majority of workers in a sector. Unions have found it difficult to recruit members and thus they have been unsuccessful in their attempts to have bargaining councils agreements extended. This has ultimately undermined centralised bargaining within the sector. It is thus evident that the 1995 LRA is struggling to assist atypical workers in changing their working circumstances.

## **2.2 South Africa's retail sector**

Over the last couple of decades South Africa's retail sector has grown in size and diversity. Statistics in 2010 indicated that the sector now has 80 353 retailers, ranging

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<sup>286</sup> Cottle op cit note 263 at 4.

<sup>287</sup> Bezuidenhout et al op cit note 264 at 51.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

from 'large corporations listed on the Johannesburg Stock Exchange, to a myriad of small cafes and informal undertakings, largely in the townships...'.<sup>290</sup> The sector is made up of smaller sub-sectors covering 'food, clothing and furniture/household items'.<sup>291</sup> Historically, the retail sector has been highly competitive. Consequently, the sector has always altered the manner in which business has been conducted in order to maintain profitability since the 1960s.<sup>292</sup> The first significant changes began in the 1960s when chain-stores started to take-over smaller retailers. By the 1980s, these chain stores had expanded and become hypermarkets.<sup>293</sup> Although the structure of the retail sector altered, the changes implemented focused on the nature of the business and thus did not greatly impact upon labour until the late 1980s.

From the 1990s the retail sector began to experience increased pressure. This was due to the effects of globalisation on the sector. In order for retailers to remain competitive they needed to be able to address 'increased competition and the cyclical nature of consumer demand'. An increasing amount of convenience stores were established offering consumers their services for extended hours. Consequently, retailers had to extend their hours 'of opening on evenings and weekends' in order to attract these consumers. This affected the working hours of workers within the sector. Retailers had to increase their operational efficiency by dealing directly with manufacturers, thus minimising the role of the wholesaler.<sup>294</sup> 'Wholesalers are now mainly transacting with small businesses and informal traders, who buy directly from them'.<sup>295</sup> This has decreased the need for certain categories of staff within the retail store.

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<sup>290</sup> WRSETA at 55 available at [http://www.wrseta.org.za/downloads/WRSETA\\_SSR\\_2016\\_edited.pdf](http://www.wrseta.org.za/downloads/WRSETA_SSR_2016_edited.pdf) accessed on 30 September 2011. Bridget Kenny 'Labour market flexibility in the retail sector: Possibilities for resistance' in Tom Bramble & Franco Barchiesi (eds) *Rethinking the labour movement in the 'new South Africa'* (2003) at 172.

<sup>291</sup> Bezuidenhout et al op cit note 43 at 66.

<sup>292</sup> Jones & Muller op cit note 82 at 314-5.

<sup>293</sup> Ibid.

<sup>294</sup> WRSETA op cit note 290 at 7.

<sup>295</sup> Ibid.

These various pressures have impacted the nature of employment within the sector as retailers have tried to increase their declining profit margins by decreasing their wage bill.<sup>296</sup> This has been achieved through the casualization and externalisation of labour.<sup>297</sup> The casualization of the labour force within the retail sector has been increasing over the last two decades and in the larger retail stores casual workers now make up the 'largest percentage of workers in this category'.<sup>298</sup> The number of casual workers within the retail sector has more than doubled since 1997 with just over 40 per cent of the labour force being made up of casual workers.<sup>299</sup> These tend to be cashiers and packers.<sup>300</sup> The retail sector has used casualization to absorb the effects of the ebbs and flows of business. Casual workers are employed in accordance with the peak and off-peak periods a retail store might experience. The retail sector thus uses casual workers 'to staff their stores during peak periods, holidays and weekends and for late night shopping'.<sup>301</sup>

Externalisation within the sector takes the form of both outsourcing and sub-contracting.<sup>302</sup> Although retailers have been outsourcing 'non-core functions such as cleaning, security and maintenance' since the 1980s, the trend has increased in the last few decades.<sup>303</sup> In addition, the task of stocking shelves has now been sub-contracted to merchandisers.<sup>304</sup> The general practice is for manufacturers to employ merchandisers to stock the retailers' shelves.<sup>305</sup> This therefore means that although merchandisers are employed by the supplier, their workplace is at the premises of the retailers.<sup>306</sup> Thus a merchandiser might work at several retail stores in the space of a day, week or month. The externalisation of labour in the retail sector has meant that retailers are no longer

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<sup>296</sup> Kenny op cit note 290 at 172.

<sup>297</sup> Kenny op cit note 290 at 172.

<sup>298</sup> Bezuidenhout op cit note 43 at 69.

<sup>299</sup> COSATU Report at 280 at 83.

<sup>300</sup> Bezuidenhout op cit note 43 at 69.

<sup>301</sup> Ibid

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

largely responsible for paying the wages and benefits, such as pensions and medical aid, for externalized workers, this responsibility now falls on the shoulders of the sub-contractors and companies providing out-sourced services.

The informal economy in the retail sector has undergone growth. By 2010 just under half of the workers in the retail sector were employed by informal businesses.<sup>307</sup> Retailers in the informal sector are made up of ‘unregistered general dealers, corner shops, [and] spaza shops’.<sup>308</sup> Although these enterprises are *de jure* regulated by the applicable laws within South Africa, most of these businesses ‘avoid...regulations such as the payment of tax and registering their employees for UIF and COIDA’.<sup>309</sup> Thus, the workers employed by informal businesses do not *de facto* enjoy the protection of ‘labour laws or minimum conditions meant to regulate the sector’.<sup>310</sup>

These changes introduced to the nature of employment within the retail sector have impacted negatively on the wages, benefits and working hours of employees. Generally, atypical workers within the sector earn less, have fewer benefits and work longer than their counterparts in standard employment relationships.<sup>311</sup> Atypical workers in this sector also enjoy less employment security. Casual workers are easier to fire than permanent workers, and the responsibility for firing externalised workers lies with their employer and not the retailer. For instance, a retailer can request a manufacturer to fire a merchandiser without dealing with the consequences. Atypical workers are thus more vulnerable and in need of improved wages and terms and conditions of employment.

Unions therefore, have role to play in improving the wages as well as the terms and conditions of employment for atypical workers. Although the retail sector is labour

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<sup>307</sup> WRSETA op cit note 290 at 48-9.

<sup>308</sup> Bezuidenhout op cit note 43 at 70.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> Bezuidenhout op cit note 43 at 71.

intensive, historically it has always been difficult to organise.<sup>312</sup> The fragmentation of the labour force has made it difficult for unions to recruit and retain members. Therefore, there has never been a bargaining council within the sector.<sup>313</sup> Bargaining has traditionally taken place between unions and individual firms, with the remainder of the workers within the sector being covered by ‘wage determination’.<sup>314</sup> This is still the case. SACCAWU, which is the biggest union operating in the sector, has tried establish a bargaining council within the sector for a number of years, with no success.<sup>315</sup> The union believes that the only way the wages and terms and conditions of employment of workers within the sector can be changed meaningfully is through a bargaining council.<sup>316</sup>

The 1995 LRA establishes mechanisms which facilitate collective bargaining and promote centralised collective bargaining. It does this by creating rules and procedures which facilitate bargaining between unions and employers as well as the establishment of bargaining councils within sectors. In order for a union to engage in meaningful centralised collective bargaining it must represent at least a ‘sufficient’ number of workers within the sector. In addition, the centralised bargaining must be supported by the extension of collective agreements to the rest of sector. In order to do this the parties to a collective agreement must cover the majority of workers within the sector. These facilitative structures established by the 1995 LRA have struggled to assist SACCAWU in creating a bargaining council.

Currently, the union’s representivity levels are extremely low with only five per cent of the workers in the sector represented by a union.<sup>317</sup> These low levels are due to a combination of factors. First, the manner in which the representivity of a union is

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<sup>312</sup> Bezuidenhout op cit note 43 at 66.

<sup>313</sup> Bezuidenhout op cit note 43 at 66.

<sup>314</sup> Godfrey, Theron, Visser op cit note 7 at 83.

<sup>315</sup> Ibid.

<sup>316</sup> Godfrey, Theron, Visser op cit note 7 at 91.

<sup>317</sup> Ibid.

calculated has made it difficult for unions to have high representivity levels. The representivity of unions in South Africa is calculated with reference to the employer's workplace. In the retail sector the employer's workplace consists of all the branches a retailer might have, whether this is within a city, a province or nationwide.<sup>318</sup> Therefore, the representivity levels of a union are calculated by looking at the number of members a union has in relation to all the workers a retailer has. This has made it very difficult for unions operating within the sector like SACCAWU to become representative.

The casualization and externalisation of workers within this sector has created a group of workers difficult to organise. Casual and externalised workers are difficult to access as they are mobile and frequently move from one workplace to another. The mobility of casual workers within the retail sector is detrimental to the calculation of a union's representivity levels as they tend to be at one employer's workplace today and at another employer's workplace tomorrow. Externalised workers do not work at their employer's workplace and move from one client's workplace to another thus making it difficult for unions to gain access to them for recruitment purposes. Workers located in the informal sector are also difficult to access. Some are located in small enterprises located throughout the country or at their employer's residential premises. Recruiting within this sector of retail is arduous as small numbers of workers are dotted throughout the country. Even if unions were to overcome all these obstacles, they would still face resistance from the atypical workers. Workers in non-standard employment are harder to persuade to join unions as they believe that unions cannot cater to both workers in standard as well as non-standard employment relationships.<sup>319</sup>

Therefore, the effects of casualization, externalisation and the informal sector have weakened the trade unions organising in the retail sector. The 1995 LRA has struggled to provide meaningful assistance to unions such as SACCAWU which desire

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<sup>318</sup> Ibid.

<sup>319</sup> Kenny op cit note 290 at 176-7.



to establish bargaining councils within the sector for centralised collective bargaining. Thus, the 1995 LRA has fallen short of its objective to promote centralised collective bargaining.

## CONCLUSION

The South African economy has been exposed to the world economy since the early 1990s. The sections in the 1995 LRA establishing the collective bargaining system are facilitative in nature as they create the rules and procedures parties are to use when bargaining. Thus the Act regulates the market forces by creating rules of engagement. At the time the 1995 LRA was drafted this was sufficient intervention on the Act's part. The economy and labour force were sheltered from the effects of the world economy. The Act was thus created to function within the context of the labour-intensive primary and secondary sectors and standard employment relationships. Unions had been relatively successful in recruiting, organising and retaining membership in this type of economic context since the 1970s. They thus primarily needed legislation to assist them in facilitating bargaining processes between them and employers.

The drafters of the 1995 LRA did not fully anticipate the changes that globalisation would bring. The various processes introduced by globalisation changed South Africa's economy as well as the nature of employment. Globalisation has resulted in the primary and secondary sectors in South Africa's economy facing increasing pressure. This has led to a decline within these sectors as well as to the general change in the nature of employment thus altering the context within which the 1995 LRA operates. Globalisation has increased the number of atypical workers in South Africa. The empirical studies from the construction and retail sector show that these workers tend to work in employment situations which offer little job and wage security. Furthermore they typically earn less and are employed on less favourable terms than their permanently employed counterparts. It is therefore evident that the wages and terms and conditions of employment of atypical workers need to be improved.

However, the bargaining system established in the 1995 LRA has struggled to help atypical workers achieve this. In the building sector, the 1995 LRA has battled to assist unions and employers in maintaining the bargaining councils in the sector. Consequently, only two bargaining councils remain. In the retail sector, the 1995 LRA has struggled to facilitate the establishment of a bargaining council, despite the efforts of unions within the sector like SACCAWU. Therefore, the facilitative processes established by the Act are no longer enough to protect atypical workers from the negative effects of the market. The 1995 LRA has been unable to adequately adapt and protect atypical workers from the changes introduced by globalisation. There is thus a need to introduce more flexible forms of regulation that are able to adapt to the changes in the nature and employment and together with the 1995 LRA better protect atypical workers.

# CHAPTER FOUR

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## 1. INTRODUCTION

‘Labour markets involve a series of repeated exchanges...between capital and labour’.<sup>320</sup> They are affected by a host of cultural, institutional, legal and political mechanisms.<sup>321</sup> Together these mechanisms constitute labour market regulation.<sup>322</sup> The regulation of labour markets has an impact on ‘the rate of job creation and destruction, levels of employment and unemployment, productivity, wages, degree of social protection and justice afforded workers’.<sup>323</sup> In South Africa we use a combination of statutory regulation and collective voice regulation to regulate the labour market. The aim is to ‘advance economic development, social justice, labour peace and the democratisation of the workplace...’.<sup>324</sup> However, the current model is battling to achieve this, especially within the context of atypical workers. This chapter examines the various mechanisms which can be adopted to support the collective bargaining system established by the 1995 LRA as a collective voice regulatory mechanism and ensure the effective representation of atypical workers and their protection from the inequalities of the market forces as well as their ability to improve the terms and conditions of their employment.

## 2. LABOUR MARKET REGULATION

There are three main ways in which labour can be regulated.<sup>325</sup> Regulation can be ‘market based, statutory or based on collective voice’.<sup>326</sup> Market based regulation occurs when ‘authorities seek to maximise reliance on market forces and use legislation and other regulatory systems’ such as individual employment contracts.<sup>327</sup> This form of

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<sup>320</sup> Betcherman et al op cit note 658 at 1.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid at 2.

<sup>324</sup> Section 1 Labour Relations Act 66 of 1995.

<sup>325</sup> Betcherman et al op cit note 65 at 3.

<sup>326</sup> Ibid.

<sup>327</sup> Standing *Global labour flexibility* op note 257 at 42.

regulation relies on ‘power and control’ to govern the market,<sup>328</sup> therefore it promotes and exaggerates inequalities within the market.<sup>329</sup> Workers tend to be more vulnerable and thus they usually find themselves in positions of weakness within the labour market.<sup>330</sup> They occupy weak bargaining positions and thus have very little ability to improve their position within the market.<sup>331</sup> Consequently, workers end up being subjected to unjust treatment.<sup>332</sup>

The more common forms of labour market regulation make use of a combination of statutory and voice regulation.<sup>333</sup> Statutory regulation occurs when the state intervenes directly via statute.<sup>334</sup> Statutory regulation can refer to the ‘rules and procedures established by laws and decrees that govern aspects of the employment relationships’.<sup>335</sup> It can also include those rules that create substantive standards ‘which regulate the individual employment relationship for example, by setting minimum wages, maximum working hours, basic health and safety standards...’.<sup>336</sup> It is thus the classic understanding of regulation. Collective voice regulation, on the other hand, ‘refers to voluntary negotiation and administration of the employment relationship where workers (and sometimes employers) are represented collectively’.<sup>337</sup> It thus refers to those regulations which provide legal support for mechanisms of collective negotiation which allow collective bargaining to take place between employers and employees and create substantive standards through mutual agreement.<sup>338</sup>

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<sup>328</sup> Ibid.

<sup>329</sup> Betcherman et al op cit note 65 at 3.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid at 2.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid at 4.

<sup>336</sup> Simon Deakin & Frank Wilkinson ‘Labour law and economic theory: A reappraisal’ in Hugh Collins, Paul Davies & Roger Rideout (eds) *Legal regulation of the employment relation* (2000) 32.

<sup>337</sup> Betcherman et al op cit note 65 at 4.

<sup>338</sup> Deakin & Wilkinson op cit note 366 at 32 and Valodia op cit note 66 at 11.

Statutory regulation and collective voice regulation tend to be concerned with intervening in the market and trying to counteract its inequalitarian consequences. These regulations are usually protective and therefore ‘designed to prevent those in strong positions from abusing those in weak positions’.<sup>339</sup> This form of regulation is supposed to limit ‘unfair competition’ between employers and provide them with guidance on labour standards’.<sup>340</sup> It is also supposed to ‘enhance effective labour participation’ and provide employment security by protecting workers from ‘the arbitrary loss of employment’. In addition it is meant to ensure that workers earn a subsistence wage at the very least, as well as create ‘the secure capacity to bargain and influence the character of employment’.<sup>341</sup> Therefore, statutory and collective voice regulation protect both employers and workers within the labour market.

Statutory regulation and collective voice regulation are often used together and to support each other as regulatory devices, as they each have their inherent strengths and weaknesses. Statutory regulation although ‘predictable, transparent and equitable’ can in certain instances be ‘rigid’, ‘complex’ and ‘prone to bureaucracy’.<sup>342</sup> Collective voice regulation tends to be more flexible and able to ‘reduce the excesses of market forces and the rigidities of statutory regulation’.<sup>343</sup> However, it is ‘time consuming’ since it ‘involves explicit bargaining’ and it could also ‘intensify labour market inequalities and insecurity if the institutions exclude the interests of the more vulnerable groups’.<sup>344</sup> These two regulatory mechanisms used together complement each other as they balance each regulatory mechanism’s strength and weaknesses.

In South Africa the newly elected government in 1994 was committed to ‘redress the worst legacies of apartheid [by] facilitating community and economic development

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<sup>339</sup> Standing et al *Restructuring the labour market* op cit note 59 11.

<sup>340</sup> Standing et al *Restructuring the labour market* op cit note 59 at 130.

<sup>341</sup> Standing et al *Restructuring the labour market* op cit note 59 at 9.

<sup>342</sup> Standing et al *Restructuring the labour market* op cit note 59 at 43.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

to reduce the inequalities and poverty that were so severe'.<sup>345</sup> One way to accomplish this was by instituting a combination of statutory as well as collective voice regulation as a form of labour market regulation. Statutory regulation is facilitated through the 1995 LRA, the Basic Conditions of Employment Act,<sup>346</sup> the Employment Equity Act,<sup>347</sup> the Skills Development Act and the Occupational Health and Safety Act<sup>348</sup> which have been enacted to ensure that the inegalitarian consequences of the South African labour market are addressed. Collective voice regulation, on the other hand, is established by the 1995 LRA.<sup>349</sup> The bargaining mechanism set up by the Act is both facilitative<sup>350</sup> and protective<sup>351</sup> in nature. It is facilitative in nature as it enables voluntary collective bargaining between employer(s) and unions representing employees to take place, by providing organisational rights available to 'sufficiently representative' and majority unions as well as a protected right to industrial action. It is also protective as it promotes centralised collective bargaining. This is done by ensuring that the collective agreements concluded at bargaining councils by parties representing the majority of workers within a sector are extended to all workers thus ensuring that all workers within a sector are protected.

### 3. Possible solutions

Collective bargaining as a means of regulating the market has exhibited certain weaknesses in the face of the changes introduced to the workplace by globalisation. The facilitative rules and procedures established by the 1995 LRA have struggled to adapt to the non-standard employment relationships that are growing within the South African labour market. Consequently, the structures created by the 1995 LRA to assist unions bargain like organisational rights and the protected right to resort to industrial action; are becoming increasingly harder for unions to access. Unions are also finding it difficult to recruit, organise and retain atypical workers therefore they have found it increasingly

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<sup>345</sup> Act 75 of 1997.

<sup>346</sup> Act 55 of 1998.

<sup>347</sup> Act 97 of 1998.

<sup>348</sup> Act 85 of 1993.

<sup>349</sup> Chapter III Act 66 of 1995.

<sup>350</sup> Standing et al *Restructuring the labour market* op cit note 59 at 11.

<sup>351</sup> Ibid.

difficult to represent atypical workers and aid them in improving their wages and terms and conditions of employment. The bargaining system is thus under pressure. One way of ensuring that the bargaining system is able to cater to atypical workers is by instituting some changes to the definition of 'workplace' in the 1995 LRA. The second way is through unions adopting new recruiting and bargaining strategies. These two changes might help the collective bargaining system adapt to and accommodate atypical workers.

### **3.1. Legislative changes**

The 1995 LRA defines 'workplace' in section 213 as

'the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.'

This definition bases the idea of workplace on the notion of a standard employment relationship between workers and employers. The assumption made by the definition is that when workers perform their duties they will do so at the premises of their employer. This might have been the general state of affairs at the time the 1995 LRA was drafted, however this is no longer the case. The pressures of globalisation have led to changes in the nature of work and consequently not all workers work at the premises of their employer. They can be found performing their duties in other spaces. For instance, in the construction sector workers employed by LOSCs work at the client's workplace and not their employer's workplace. Similarly, merchandisers in the retail sector work at the retail store and not at their employer's premises. Thus, within one location there can be a number of workers discharging their duties despite being employed by different employers.

This has made it difficult for unions to recruit and organise workers. For example if a union like SACCAWU wished to recruit merchandisers and exercise the organisational rights in the 1995 LRA, it would have to do so at the manufacturer's workplace and not at the retailer's workplace despite the fact that the merchandisers are mainly located at the retailer's premises. The definition of 'workplace' is thus making it difficult for workers and unions to organise. The definition of workplace needs to shift its focus from the binary standard employment relationship. This can be done by amending the definition of workplace so it can accommodate several employers operating within one locale. The definition of workplace can thus be amended as such;

'The place where an employee or employees devote most of their working time; if an employee has duties of an itinerant nature the place where the employee returns to conduct administrative matters.'

This definition of the workplace focuses on the location rather than the relationship between employer and worker, consequently it allows for a multiplicity of employers in one location. For instance, a union can recruit and organise merchandisers who spend most of their time at a retailer's store at the premises of the retailer. The union's representivity levels can thus be calculated by referring to the place where the workers spend most of their time working rather than all the locations an employer might have. This would greatly assist unions as it would make it easier for them to access the rights in the 1995 LRA which support the voluntary duty to bargain. In the case of workers who travel from one job site to another, like those employed by LOSCs, unions could recruit workers where the LOSC's offices are located, or even the premises of the contractor, depending on the nature and duration of the relationship between the LOSC and the contractor. Shifting the focus from the employer to the physical space within which workers perform their duties thus makes it easier for unions to access workers for recruitment and organisational purposes.

### **3.2. Changing union strategy**



Collective voice regulation refers to ‘the constructive role that collective bargaining between employees and employers play in resolving disputes and thereby promoting productivity and economic growth’.<sup>352</sup> The notion of ‘voice’ however, is broader than that of collective voice regulation. The idea of voice was first used by Albert Hirschman in his ‘classic study of African Railways’ in 1970.<sup>353</sup> Hirschman used the idea of voice to describe an avenue available to customers who wished to express their dissatisfaction with a service provider.<sup>354</sup> Hirschman defines ‘voice’ as,

‘any attempt to change, rather than escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing change in management or through various types of actions and protests, including those that are meant to influence public opinion’.<sup>355</sup>

The concept of voice regulation was originally used to discuss the ways in which customers or members tried to change the ‘practices, policies, and outputs’ of the entity from which they made their purchases.<sup>356</sup> It was therefore a mechanism used to analyse the behaviour of dissatisfied customers and members who did not have the option of leaving their service provider. Fourteen years later the concept of voice regulation was adopted by labour academics.<sup>357</sup> Since then it has been used within the context of labour law and industrial relations by numerous academics and human resources management practitioners.<sup>358</sup>

Although Hirschman gave voice a specific meaning in his text, the meaning of voice in terms of labour has been used to ‘refer to a whole variety of processes and structures which enable and at times empower employees directly and indirectly to

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<sup>352</sup> Valodia op cit note 66 at 11.

<sup>353</sup> Dundon op cit note 231 at 5.

<sup>354</sup> Albert O. Hirschman *Exit, voice and loyalty: Responses to decline in firms, organisations and states* (1970) 4.

<sup>355</sup> Hirschman op cit note 354 at 30.

<sup>356</sup> Ibid.

<sup>357</sup> This was first done by Richard B. Freeman and James L. Medoff in *What do unions do?* (1984).

<sup>358</sup> Dundon op cit note 231 at 4.

contribute to decision making in the firm'.<sup>359</sup> Voice within a company or within the labour market can either be formal or informal. It can also be motivated by a range of intentions. These motivations can be simple, for instance the need to impart information, or more complex such as a joint consultative process where employers and employees share responsibility for decisions.<sup>360</sup> Academics and practitioners have also made the distinction between 'mandated voice' where employers and workers are required to speak and 'voluntary voice' where the relevant parties can choose to meet.<sup>361</sup> These various forms of voice can be implemented in different ways. They can be through 'trade union membership, recognition and representation; indirect or representative participation mechanisms such as joint consultation; [or] direct employee involvement'.<sup>362</sup>

The collective voice regulation mechanism established by the 1995 LRA has struggled to facilitate collective bargaining amongst atypical workers and thus these workers have been unable to use their collective voice to counter the negative effects of the market. In order for this collective voice regulation to 'lead to redistributive justice' within the market place the collective voice of atypical workers will have to find a way to be heard and effect change.<sup>363</sup> This can be achieved by revisiting the broader notion of voice. Hirschman's definition of voice includes the idea of using voice to influence public opinion and thus helping to create change within the organisation.<sup>364</sup> Unions have traditionally targeted employers when attempting to effect change at the workplace. Despite the changes introduced by collective bargaining employers will always remain the primary focus of unions when trying to improve their members' working conditions. However, unions can benefit from the growing importance of corporate governance to assist them in effecting greater change. Corporate governance is based on the idea that

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<sup>359</sup> Nick Wilton 'Employment Relations' (2010) at 286 available at <http://www.sagepub.com/Wilton/Chapter%2010%20-%20Employment%20Relations.pdf> accessed 19 September 2011.

<sup>360</sup> Wilton op cit note 359 at 287.

<sup>361</sup> Dundon op cit note 231 at 5.

<sup>362</sup> Dundon op cit note 231 at 6.

<sup>363</sup> Standing et al *Restructuring the labour market* op cit note 59 at 178.

<sup>364</sup> Hirschman op cit note 354 at 30.

the perceptions of the public can affect the reputation of a company.<sup>365</sup> This can have either a positive or negative impact on the company. Unions can thus use corporate governance as an additional tool to pressurise companies into improving the terms and conditions of employment of workers like atypical workers.

### 3.2.1 Corporate governance as a regulatory device

Globalisation has resulted in the ‘breaking down of national economic boundaries, the liberalisation of international trade, finance and production activities and the growing power of transnational corporations (TNCs) and international financial institutions’.<sup>366</sup> Globalisation has led to the increasing influence of non-state actors such as companies within nations. This has meant that states no longer have the sole monopoly on creating and instituting policies which affect and influence their economy and labour market. The greater role that companies now play within countries has meant that their policies and actions affect economies and labour markets to a greater extent than before. However, this increased influence on the economy and on the labour market has not been accompanied by an increase in companies’ accountability for the impact they have on economies and labour markets.

One way in which companies have impacted the nature of work negatively is by using their workforce to absorb the risk the company would normally face. Therefore, the ‘risks of fluctuating demand are no longer absorbed by companies; they are displaced on their workforces’.<sup>367</sup> This is usually done through casualization and externalisation, thus resulting in the flexibilisation of labour. Companies regulate the flexibilisation of labour through the contracts they conclude with their workers as well as through the commercial contracts they concluded with entities that supply them with labour such as sub-contractors or a TES. Although companies conclude these contracts with individuals these contracts have a secondary effect as they not only affect the

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<sup>365</sup> King III op cit note 347 at 46-7.

<sup>366</sup> Elsabe Loots ‘Globalisation, emerging markets and the South African economy’ (paper presented at the International Jubilee Conference of the Economic Society of South Africa, Glenburn Lodge, Johannesburg, 14 September 2001) at 4.

<sup>367</sup> Sanjiv Sachdev & Frank Wilkinson ‘Raising the stakes: Stakeholding and the organisation of work’ in Hugh Collins, Paul Davies & Roger Rideout (eds) *Legal Regulation of the Employment Relation* (2000) at 565.

parties directly involved, but they also impact the workforce in general. Therefore the contracts companies enter into end up affecting workers even though there might not be privity of contract between the company and the workforce. These inequities within the labour market are not a new phenomenon per se. States have been regulating these imbalances through various forms of market regulation for a while now. However, what has changed is the increase in the flexibilisation of labour and the decrease in the ability of the regulatory systems set up to cope with the changes in the nature of employment. Thus, atypical workers are increasingly exposed to the negative and inequitable effects of the market. In light of this it has now become necessary for companies to assume responsibility for these negative effects and intervene.

When it comes to increasing the accountability of companies within the labour market place corporate governance might provide a suitable solution. Corporate governance has undergone some significant changes from the late 1980s and early 1990s. Corporate governance is now

‘concerned with holding the balance between economic and social goals, with the result that corporate governance should be seen as the system by which organisations are or ought to be governed or controlled with the contribution of and for the benefit of all stakeholders.’<sup>368</sup>

Stakeholders are defined widely and include ‘employees and others potentially qualifying as stakeholders in the business such as suppliers, lenders, customers and perhaps society at large’.<sup>369</sup> Therefore directors must run the company in the interests of shareholders as well as stakeholders. This position departs from the common law which states that directors must act in the interests of the company where the company is defined as the shareholders of the company.<sup>370</sup> In South Africa the King Code of Governance for South Africa (King III) has made it clear that directors now owe their

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<sup>368</sup> Mongalo T ‘Corporate governance and the Constitution: A case for broadening the stakeholders’ in *Constitutional democracy in South Africa 1994-2004: Essays in honour of the Howard College School of Law* at 172.

<sup>369</sup> Ibid.

<sup>370</sup> Mongalo op cit note 368 at 169.

duties to the company which is made up of both shareholders and stakeholders. King III is a code of good practice and thus does not change the common law position regarding the duty of directors; however it is a code advocating good governance, an aspect that is becoming increasingly important in business.

King III also introduces the idea of corporate citizenship. The company is viewed as being responsible for financial social and environmental issues. Thus when companies compile their financial report they must include an ‘integrated report’ which focuses on the company’s financial performance as well as its impact on the community within which it operates and the environment.<sup>371</sup> This is known as triple bottom line reporting.<sup>372</sup> The report must include an account of the company’s ‘positive and negative impact’ of the company’s operations as well as ‘plans to improve the positives and eradicate or ameliorate the negatives in the financial year ahead...’<sup>373</sup> The ‘community’ can include employees as well as the ‘local community in which the company carries on its business’.<sup>374</sup> This idea of corporate citizenship ultimately embraces the notion that ‘the pursuit of economic objectives must be constrained by social and environmental imperatives’.<sup>375</sup>

Integrated reporting can act as a flexible regulatory device for atypical employment. The term ‘community’ is broad enough to encompass all forms of employment whether typical or atypical. First, it can encompass those workers in standard employment relationships as well as atypical workers in casualised forms of employment such as fixed term contracts and seasonal migrants. Therefore, when the company compiles its integrated report it must include the positive and negative impact it has had on this group of workers. If the manner in which the company is run has had a negative impact on these workers then the company is obligated to create a plan that ‘eradicates or ameliorates’ these negative outcomes. In order for the company to be aware of the impact it has had on its workforce as well as create plans for improvement

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<sup>371</sup> The King Code of Governance for South Africa (2009) at 11.

<sup>372</sup> King III op cit note 371 at 11.

<sup>373</sup> King III op cit note 371 at 49.

<sup>374</sup> Mervyn E. King *The corporate citizen: Governance for all entities* (2006) at 63.

<sup>375</sup> Mongalo op cit note 365 at 179.

it must communicate with its workforce. The method of communication used will most likely make use of some form of collective voice regulation within the workplace such as a joint consultative forum. This therefore gives workers in standard employment relationships as well as atypical workers within the workplace a voice that represents their needs and can adapt to the changes in workforce composition within the workplace.

Second, the notion of community is also broad enough to encompass those workers who are not in an employment relationship with the company, but are nevertheless affected by the manner in which the company conducts its business. This notion of community would thus include workers who are employed by subcontractors who are hired by the company and those workers provided by a TES. For instance, a company that operates within the building sector might choose to minimise its labour costs by outsourcing some of its labour requirements to LOSCs. However if the LOSCs the company utilises undercut wages and do not comply with collective agreements setting minimum wages within the sector then the manner in which the company conducts its business will have a negative impact on the community. This means that the company will be obligated to remedy the situation. This can be done by ensuring that the company does not do business with those sub-contractors that do not comply with the minimum wages set by collective agreements. This has the effect of offering workers in atypical employment some form of protection as well as supporting the centralised collective bargaining scheme established in the 1995 LRA, thereby ensuring that collective voice within the sector grows stronger.

### **3.2.2. Community unionism**

Industrial trade unions developed within the context of the standard employment relationship as a result they are designed to function within the context of a standard employment relationship. Within this context the collective voice of employees is used to bargain with the employer. The employees' collective voice is represented by industrial unions which tend to represent specific categories of people within a specific industry. Industrial unions therefore best cater to the traditional notions of work and employment. They struggle to accommodate and meaningfully articulate the needs of

those workers that do not find themselves employed in a standard employment relationship. In atypical employment workers are constantly moving from workplace to workplace and from one employer to the next. Consequently industrial unions have struggled to recruit, organise and represent atypical workers. A new form of organisational structure might assist unions reach and recruit hard to access workers.

The collective voice does not need to consist solely of employees. It can be more inclusive. For instance, South African unions could use ‘reciprocal community unionism’ as a type of collective voice.<sup>376</sup> Reciprocal community unionism is based on the notion that unions can create relationships with community groups and together the two entities can help each other ‘improve local life as well as [foster] trade union growth’.<sup>377</sup> Community organisations can assist unions in

‘[mobilising] pressure, and perhaps [generating] resources, which can counteract the destructive impact of global competition and global corporations’.<sup>378</sup>

This form of organisation thus promotes the use of a collective voice representative of all the relevant parties. Linking unions with communities offers two primary advantages. First, it shifts the identity of the union from the traditional employment relationship and redirects it to a more multi-party approach. This allows for both flexibility and representation within the labour market place. This is particularly useful in the case of an employment relationship based on a TES where there is a “nominal” employer and a “real” employer. A multi-party approach will ensure that both employers are involved in negotiations. Unions that work together with community organisations are also useful within the informal sector. The informal sector has a number of parties connected either through commercial contracts, employment contracts or through law, as is the case with local government. Partnering with community organisations allows these various parties

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<sup>376</sup> Jane Wills and Melanie Simms ‘Building reciprocal community unionism in the UK’ at 66 available at <http://one.sagepub.com/content/28/1/59.full.pdf+html> accessed on 1 October 2011.

<sup>377</sup> Ibid.

<sup>378</sup> Richard Hyman ‘An emerging agenda for trade unions?’ (Labour and Society Programme Discussion Papers 98/1999, 1999) at 9 available at <http://www.ffw.org.ph/RESEARCH/Emerging%20agenda%20of%20trade%20unions%201999.pdf> accessed 19 September 2011.

to be included in bargaining thus ensuring that all the relevant parties have an opportunity to express their voice. This ensures that no one is excluded from the bargaining process thus guaranteeing that workers in standard employment relationships as well as atypical employment are included.

Second, this approach acknowledges that the pressures of globalisation have altered the nature of the workplace. It is no longer the place where workers primarily congregate nor is it the place where workers build strong relationships and identities.<sup>379</sup> For instance, atypical workers within the retail sector move from one workplace to the other and from one employer to the next depending on the availability of employment. Therefore it is no longer the case that identities and social units that used to form at a workplace are still being formed in the context of atypical employment.<sup>380</sup> Identities can, however still be formed within a community.<sup>381</sup> There are a number of aspects that can be used to identify a community such as geographical location, gender and age. Connecting a union within a community captures a broader category of workers than an industrial union focused on a specific skill within a specific industry could accommodate. This makes it easier for unions to reach those workers that are hard to access like casual workers who tend to move from one employer to another. It also ensures flexibility within the union. Including such a broad category of workers ensures that the community based union is able to accommodate and adapt to any changes that might occur within the labour market. This ensures a stronger and more representative voice which is able to effect change.

The idea of linking community organisations with unions is not new. It was present during the 1970s and 1980s. During this period South Africans were living under a repressive government and thus they were unhappy with the political and economic situation. Africans who lived in the townships formed community organisations aimed at addressing political and socio-economic issues in the townships. Unions were involved in this. For instance in 'in 1979 many of the township based

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<sup>379</sup> Hyman op cit note 378 at 10.

<sup>380</sup> Ibid.

<sup>381</sup> Ibid.



community organisations began organising working class constituencies and succeeded in attracting workers in increasing numbers'.<sup>382</sup> However, the relationship between community organisations and unions became strained over time as they failed to properly coordinate mass action boycotts in support of one another.<sup>383</sup> If unions and community organisations are able to work together successfully, the reciprocal relationship between the two entities could assist unions access those workers that are difficult to organise and grow their membership.

### **3.2.3. Limitations:**

The amended definition of 'workplace' allows unions to reach a those atypical workers that are difficult to reach, however it has its shortcomings. The amended definition would mainly assist those workers who are employed by sub-contractors or a TES. The amended definition relates primarily to location thus assisting those workers who find themselves working in one location for a significant period of time despite being employed by another employer. It does not fully address those workers who are at one location for a shorter period of time like casual workers for instance, who tend to be more mobile.

Corporate governance provides a solution to the problems experienced by the collective bargaining mechanisms established by the 1995 LRA. However, it is not a panacea. It too has its limitations. The first is that compliance with King III is voluntary, therefore, there is no statutory duty compelling companies to apply it. Second, it is a "top-down" solution as it relies on companies to create solutions. Therefore, the workforce is at the mercy of the company as compliance and enforcement of any plans are based on the general goodwill of the company. In addition, this "top-down" approach might affect the quality of the workers' voice as any consultations or negotiations that take place again occur at the goodwill of the company. If corporate governance is to assist collective bargaining in a meaningful way it must be monitored by strong unions.

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<sup>382</sup> Maree op cit note 242 at 210.

<sup>383</sup> Ibid.

Uniting unions and community organisation tries to effect change by involving more bargaining parties than the two traditional bargaining agents. The various bargaining parties and the inclusive bargaining agenda could result in negotiations becoming extremely time consuming as parties try to accommodate all the different agendas and interests. The idea behind linking unions and community organisations is mutual support. This includes supporting each other when striking or protesting. In South Africa persons who embark on industrial action and are not employees might lack the protection afforded to striking workers by the 1995 LRA; however it is possible to use section 77 of the 1995 LRA<sup>384</sup> to protect some atypical workers. This section permits workers to take part in protest action which ‘promotes or defends the socio-economic interests of workers’.<sup>385</sup> Ultimately, the success or failure of community based unions as a concept is dependent on the levels of trust that exists between union members and the community. If there is a lack of trust individualism rather than collectivism will be promoted within the thus limiting the ability of the collective voice to effect change.

## CONCLUSION

Labour market regulation is directed towards intervening in and countering the negative effects of the market. When South Africa gained democracy in 1994 it aimed to address the inequalities in the labour market through the use of the two most common forms of labour market regulation, statutory and collective voice regulation. The 1995 LRA established the mechanism for collective voice regulation. The Act was, however drafted within the context of the standard employment relationship and thus it was designed to cater to the standard employment relationship. The changes introduced by globalisation to the economy led to changes in the nature of work and the growth of atypical workers. The system of collective voice regulation established by the 1995 LRA is struggling to recruit, organise, retain and represent these workers.

If the collective bargaining mechanisms established by the 1995 LRA are to *de facto* apply to atypical workers some changes need to be made. First, the definition of

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<sup>384</sup> Act 66 of 1995.

<sup>385</sup> Act 66 of 1995.

‘workplace’ would have to be amended in such a way as to shift from the paradigm of standard employment relationship to that which includes standard and non-standard relationships. This would make it easier for unions to recruit, organise and retain atypical workers.

King III which creates a corporate governance code of good practice for companies states that companies must report on three aspects in their financial reports; finances, the and the company’s impact on the community and the environment. This report must include how the company has impacted the community within which it is operating as well as plans for remedying any negative impacts that might have resulted as a consequence of the way in which the company conducts its business. The notion of community is a broad enough to include workers in standard and non-standard employment relationships which means that the duty created by King III to report on the company’s effect on the community can be used to improve the working conditions of both standard and atypical workers.

Furthermore, collaboration between community organisations and unions can be used to organise workers and effect change within the labour market place. The two entities could focus on recruiting and retaining people within a community rather than workers in a traditional employment relationship. This aids those atypical workers that have to negotiate with a number of parties. It also makes recruitment easier as union activity can be located within the community rather than the workplace.

Although the abovementioned solutions have their own limitations they do assist the collective bargaining mechanism and introduce a flexible form of voice regulation within the labour market.

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