

The role of bargaining councils in a collective bargaining framework in the garment industry: a lesson for Lesotho

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Abstract

The International Labour Organisation (ILO) is dedicated to achieving social justice throughout the world. It specifically recognises the right to collective bargaining as one of the main drivers of its ambitions. It desires to achieve social justice through various Conventions and Recommendations. South Africa as a member of ILO constitutionally recognises the right to engage in collective bargaining. The *Labour Relations Act* (LRA) advocates for the establishment of bargaining councils in various sectors in the country to effectively recognise this right. This study predominantly focuses on the efficiency of these councils as tools for collective bargaining. The study is intended to ultimately provide a lesson to Lesotho. Trade unions in Lesotho's garment industry are adamant that bargaining councils are the solution to the country's collective bargaining woes. Specific attention is paid to the history of collective bargaining in the two countries to firstly indicate the inter relation of the bargaining framework in the two countries and to trace the origins of the bargaining councils in South Africa's set up. The role of these councils is examined, with prime attention placed on the advantages and disadvantages of industry level bargaining. The Constitutions of the National Textile Bargaining Council and The National Bargaining Council for the Manufacturing Industry are examined to determine the roles these councils play in the collective bargaining framework of South Africa. Attention is also paid to the procedures required for the establishment of these councils. The challenges facing this form of bargaining are also outlined, with prime attention being given to the cases in South African courts that are a potential threat to the bargaining council system in South Africa. The study culminates in conclusions on the bargaining framework in South Africa and provides recommendations on ways to improve the collective bargaining framework in the country. This subsequently provides a platform for the lessons that Lesotho should learn from the framework in South Africa. The study ultimately concludes that bargaining councils are efficient tools for the promotion of collective bargaining. They, however, are not a desirable solution for the collective bargaining problems faced in Lesotho's context.

Key Words : Bargaining council, Collective bargaining, Garment Industry, Trade Unions, Labour

Opsomming

Die internasionale arbeidsorganisasie (IAO) is toegewyd om sosiale regverdigheid regoor die wêreld te behaal. Dit herken veral die reg tot kollektiewe bedinging as een van die hoof dryfkragte van die ILO se aspirasies. Dit beoog veral om sosiale regverdigheid te verkry deur verskeie Konvensies en Aanbevelings. Suid-Afrika as 'n lid van die ILO herken die reg tot kollektiewe bedinging en staan vir die stigting van bedingings-rade in verskeie sektore in die land sodat hierdie reg effektief aangespreek kan word. Hierdie studie fokus hoofsaaklik op die effektiwiteit van hierdie rade as 'n hulpmiddel vir kollektiewe bedinging. Die doel van die studie is om op die uiteinde 'n les aan Lesotho te verleen. Vakbonde in Lesotho se kledingsbedrywe is vasbeslote dat bedingingsrade die oplossing is vir die land se kollektiewe bedinging probleme. Aandag word veral gegee aan die geskiedenis van kollektiewe bedinging in die twee lande om eerstens die inter-verhouding van die bedingingsraamwerk in die twee lande aan te dui en om die oorsprong van die bedingingsrade in Suid-Afrika op te spoor. Die rol van hierdie rade is ondersoek met die primêre aandag op die voordele en nadele van bedinging op bedryfsvlak. Die Grondwette van die Nasionale Tekstiel Bedingingsraad en die Nasionale Bedingingsraad vir die vervaardigingsbedryf word ondersoek om die rolle wat hierdie rade speel in die kollektiewe bedinging raamwerk van Suid-Afrika te bepaal. Aandag word veral ook gegee aan die prosedure wat benodig word vir die stigting van hierdie rade. Die uitdagings wat hierdie manier van bedinging behels word ook uiteengesit met die fokus op gevalle in Suid-Afrikaanse howe wat 'n potensiële bedreiging kan wees vir die bedingingsraad sisteem in Suid-Afrika. Hierdie studie voorsien gevolgtrekkings oor die bedinging raamwerk in Suid-Afrika en bied aanbevelings oor maniere om die kollektiewe bedinging raamwerk in die land te verbeter. Dit bied gevolglik 'n platform vir die lesse wat Lesotho van die raamwerk in Suid-Afrika af kan leer. Die studie kom uiteindelik tot die gevolgtrekking dat bedingingsrade doeltreffende instrumente vir die bevordering van kollektiewe bedinging is. Dit is egter nie die mees geskikte oplossing vir die kollektiewe bedingings probleme in die konteks van Lesotho nie.

Sleutelwoorde : Bedingingsraad, Kollektiewe bedinging, Kledingstuk bedryf, Vakbonde, Arbeid

LIST OF ABBREVIATIONS

BCEA	<i>Basic Conditions of Employment Act 75 of 1997</i>
CCMA	Commission for Conciliation Mediation and Arbitration
COSATU	Congress of South African Trade Unions
FMF	Free Market Foundation
ILO	International Labour Organisation
<i>LRA</i>	<i>Labour Relations Act 66 of 1995</i>
NEDLAC	National Economic Development and Labour Council
UN	United Nations

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Chapter 1 - Introduction and Problem Statement

1.1 Introduction

This chapter involves an outline of the problem statement that necessitated the writing of this dissertation. In the process of stating the problem, the author will provide an overview of the position of the law in Lesotho regarding collective bargaining in general. This will be imperative as it provides an understanding of the current framework which will be pertinent in formulating whether bargaining councils have a role to play in Lesotho's labour legislation. An overview of South Africa's laws regarding bargaining councils will also be provided in this chapter. This is imperative as it provides a ground level understanding of the framework regulating bargaining councils which will help in ultimately making a determination of the exact role bargaining councils play in a collective bargaining framework.

1.2 Problem Statement

Lesotho is a Constitutional Monarch with a population of 1.8 million people. A bulk of this population is concentrated in the urban areas. This is mainly because people migrate to the urban areas in pursuit of employment. The unemployment rate in the country is currently very rife. It currently stands at 25.3%.¹

The garment industry plays a huge role towards combating the high unemployment rate and poverty level in the country. The Director of the International Labour Organisation (ILO) highlighted the pivotal role played by work in combating poverty.² There are currently 40 000 workers employed in the country nationwide. This makes up 80% of all the jobs in the manufacturing industry in Lesotho. This means that a staggering 2.23% of all Basotho are employed in the garment industry.³ The garment

1 Anon2012Lesothowww.africaneconomicoutlook.org.Anon2014 <http://www.tradingeconomics.com/lesotho/unemployment-rate> says this unemployment rate reached an all-time high of 39.30% in 1997 and a record low of 25.30% in 2008.

2 Somavia *Working Out Of Poverty* ILO 2003 stated "it is the world of work that holds the key to progressive and long lasting eradication of poverty, in that it is; i) through work that people are able to make choices to a better quality of life; ii) through work that wealth is created, distributed and accumulated; and (iii) through work that people find a dignified way out of poverty".

3 Anon 2012 Garment Industry Compliance Report. Betterwork.org/global.

factories in the country are run mainly by Taiwanese and South Africans. They, however, predominantly employ Basotho workers.

Lesotho exports its Garment products to an overseas market. Lesotho is the leading Sub-Saharan African exporter to the United States of America in value terms.⁴ Despite this magnanimous stature of the garment industry both in Lesotho and globally, working conditions in the country are currently below par. These conditions *inter alia* include;

- Occupational safety and health (management systems and chemicals and hazardous systems).
- Compensation (minimum wages, overtime wages, paid leave and social security).
- Freedom of association and collective bargaining (strikes and union operations).⁵

The *Lesotho Labour Code*⁶ is the primary legislation that governs the employment relationship in the private sector and to any employment by or under government or by or under any public authority. It was amended in 1997 and again in 2000. Ndumo⁷ maintains that the only pertinent amendments were the ones made in 2000 as they introduced concepts like the duty to bargain in good faith.⁸ The *Code of Good Practice*⁹ promulgated in 2000 by the Minister of Labour and Employment seeks to rectify the potential shortcomings of collective bargaining in the country. The explanatory note of the code states that the codes of good practice are 'soft law'. This means that there is no obligation placed on an individual to conform to the code. This in turn means that the employer can depart from the provisions of the code as long as he can justify his departure.¹⁰

The Military, Police and members of the Secret Service are, however, excluded from the code. The *Labour Code*¹¹ advocates for collective bargaining and the application

4 Manoeli *Lesotho After AGOA* 4 says "Lesotho's economy resembles that of most East Asian Tigers in so far as over 70% of its total exports consist of manufactured goods".

5 Anon 2012 Garment Industry Compliance Report. Betterwork.org/global.

6 *Lesotho Labour Code Order* 1992.

7 Ndumo *The Duty to Bargain and Collective Bargaining* 70.

8 S 198 (A) of *Lesotho Labour Code Order* 1992.

9 *Labour Code (Codes of Good Practice) Notice* 2003.

10 *Labour Code (Codes of Good Practice) Notice* 2003.

11 S 4 of *Lesotho Labour Code Order* 1992 .

of international labour conventions. Collective bargaining agreements in Lesotho assume a superior position to the law as long as they are consistent with the law.

The Labour Code provides that the standards contained therein are the minimum legal obligatory standards and are without prejudice to the rights of workers to bargain individually and collectively for higher standards. There is however no duty on employers to recognise trade unions in Lesotho, the employers are only obliged to bargain with particular representative trade unions.¹² The duty to bargain only arises where the employer and the trade union have concluded a recognition agreement for the purposes of collective bargaining. Once recognition has taken place, the duty to bargain becomes compulsory.¹³

Ndumo¹⁴ maintains that trade unions in Lesotho do not regard negotiations as the core union activity. They, however, focus on representing members on individual matters such as unfair dismissal which are heard by the Labour Court. The *Labour Code* makes no mention of bargaining councils as a tool for collective bargaining. However, trade unions in the garment industry have been vocal about their desire to have bargaining councils set up in the industry. The Government of Lesotho is yet to take any progressive measures to heed to the calls of the trade unions.¹⁵ This is despite both the magnanimous stature of the garment industry in the country and the fact that the *Collective Bargaining Convention*¹⁶ of the ILO which Lesotho has ratified urges member states to put in measures to ensure that bodies and procedures for the settlement of disputes contribute to the promotion of collective bargaining.

Collective bargaining in Lesotho occurs only at sectoral level. Both the government of Lesotho and International Organisations are aware of the country's shortcomings in collective bargaining structures. The government has subsequently through the Ministry of Labour and Employment (MoLE) engaged various experts to assist Lesotho to best comply with international labour standards. The experts have thus made findings that the establishment of bargaining councils would be pivotal towards the country best complying with International labour standards.

12 S 24(2) of *Lesotho Labour Code Order* 1992.

13 Ndumo *The Duty to Bargain and Collective Bargaining* 70.

14 Ndumo *The Duty to Bargain and Collective Bargaining* 70.

15 Mpaki 2013 Unions Pin Wages Hope on Parliament Publiceye.co.ls.

16 *Collective Bargaining Convention* 1981.

The government has hastened to express that, despite its willingness to gazette bargaining councils; it lacks the expertise to set up the bargaining councils. It, therefore, becomes necessary to investigate whether the setting up of bargaining councils is indeed the solution and if so, to shed some light on the manner to best set up the bargaining councils. South Africa has bargaining councils as part of its collective bargaining framework and seeing as Lesotho's labour law is influenced to a large extent by that of South Africa,¹⁷ it is therefore necessary that Lesotho's position be compared with that of South Africa in the proposed work.¹⁸

1.3 The Position in South Africa

South Africa seeks to conform to international labour standards of particularly the ILO by promoting collective bargaining.¹⁹ It has ratified *Protection of the Right to Organise Convention*,²⁰ *The Right to Organise and Collective Bargaining Convention*,²¹ and *Collective Bargaining Convention*.²² All these conventions embrace the right of an employee to engage in collective bargaining with a view to improving working conditions.

Section 23(5) of the *Constitution of the Republic of South Africa 1996*²³ gives all employees the right to belong to a trade union. Section 1 of the *Labour Relations*

17 Ndumo *The Duty to Bargain and Collective Bargaining* 3.

18 The Central Bank of Lesotho *Economic Review* 4 highlights that the employment relationship in South Africa has a bearing on that of Lesotho in a number of ways due to the economic relationship of the two countries coupled by the fact that Lesotho follows a fixed exchange rate regime under which Lesotho's currency is pegged one to one to the SA Rand. The unemployment rate in South Africa for instance also has a direct impact on Lesotho as Lesotho is highly dependent on South Africa as a destination for its exports.

19 The Constitutional Court in *re Certification of the Constitution of Republic of SA 1996* 1996 (10) BCLR 1253 & (1996)17 ILJ 1253 (CC) also quoted in Cheadle *Collective Bargaining and the LRA* 147 elaborated on what collective bargaining in the country entails by stating "collective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries...once a right to collective bargaining is recognised, implicit within it will be the right to exercise economic power against partners in collective bargaining. See also *NUMSA v Bader Bop(Pty) Ltd*(CC); (2003) 24 ILJ 305 where the Constitutional Court held that the Act sought to provide a framework whereby both employers and employees and their organizations could partake in collective bargaining and the formulation of industrial policy and that it sought to promote orderly collective bargaining with emphasis on bargaining at sectoral level, employee participation in decisions in the workplace and the effective resolution of disputes.

20 *Protection of Right to Organise Convention* 1948.

21 *The Right to Organise and Collective Bargaining Convention* 1949.

22 *Collective Bargaining Convention* 1981.

23 *Constitution of the Republic of South Africa Act* 108 of 1996.

*Act*²⁴ defines the purpose of South African labour legislation as to advance economic development, social justice, labour peace and the democratisation of the workplace by giving effect to and regulate the fundamental rights conferred by section 27 of the Interim Constitution of 1993 (now section 23 the 1996 constitution). This gives effect to obligations incurred by the Republic as a member state of the ILO and provides a framework within which employees and their trade unions, employers and employers organisations can collectively bargain to determine wages, terms and conditions and other matters of mutual interest and to formulate industrial policy and to promote orderly collective bargaining at sectoral level. It also seeks to improve employee decision making in the workplace and the effective resolution of labour disputes. Section 4 of the *LRA* goes further to grant employees the right to collective bargaining. Collective bargaining is a term used in reference to a process through which bilateral control of the enterprise by management and labour can be, and often is, established and by bargaining collectively, conflict in the workplace is contained and agreements are reached to resolve the conflict that has arisen.²⁵

It is evident that one of the building blocks of the South African Labour Market is collective bargaining. South Africa and Zimbabwe are the only countries in Southern Africa where collective bargaining occurs both at enterprise level and at sectoral level.²⁶ In South Africa, collective bargaining at sectoral level occurs through bargaining councils.²⁷

1.3.1 Bargaining Councils in South Africa

Bargaining councils consist of representatives from the major unions and employer groups within each sector.²⁸ The main purpose of bargaining councils is to reach consensus on terms and conditions in specific industries. *The LRA*²⁹ and *The Basic Conditions of Employment Act*³⁰ are the two pieces of legislation that regulate bargaining councils in South Africa.

24 *Labour Relations Act* 66 of 1995 (the LRA).
25 Du Plessis et al *A Practical Guide to Labour Law* 96.
26 Khabo *Collective Bargaining and Dispute Resolution* 5.
27 S 28 of the LRA.
28 S 27 of the LRA.
29 *The LRA*.
30 *Basic Conditions of Employment Act* 75 of 1997 (BCEA).

1.3.1.1 Regulation of bargaining councils by the *LRA*.

The *LRA* regulates collective bargaining,³¹ dispute resolution procedures and entrenches the right to strike as well.³² The Act also provides the requirements for the establishment of bargaining councils.³³ Registered trade unions are afforded the liberty to establish bargaining councils by the Act.³⁴ Section 27 also enables the state to be a party to a bargaining council if it is an employer in the sector and area in which the bargaining council is established. These parties wishing to establish a bargaining council have to apply to the registrar of labour relations for registration of the bargaining council.³⁵ The registrar is then required to publish a notice in the Government Gazette affording the public the opportunity to object the application. A copy of this notice is to be sent to the National Economic Development and Labour Council (NEDLAC). NEDLAC has the responsibility to evaluate the appropriateness of the sector and the area of the proposed bargaining council.³⁶ The Minister of Labour may also advise the registrar if NEDLAC fails to do so. When providing such advice, the Minister has to determine *inter alia* whether the constitution of the proposed bargaining council complies with the requirements set in section 30 of the *LRA*. The requirements of establishing Bargaining councils will be outlined in detail in Chapter 3 of this study.

The law also regulates the effect of collective agreements concluded at bargaining councils.

1.3.1.2 Bargaining Council Collective Agreements

Section 31 of the *LRA* gives collective agreements concluded at bargaining councils a binding effect. It provides that collective agreements concluded at bargaining councils subject to the constitution of the council and Section 32 of the *LRA* binds parties to the council and their members. Members of trade unions and employer organisations are only bound by the collective agreement if the agreement is with

31 The *LRA* allows centralised collective bargaining. It allows groups of employees in the same industry or sector bargain with the employers in that industry or sector.

32 *The preamble of the LRA.*

33 S 27.

34 S 27 (1).

35 S 29 (1).

36 S 29 (7).

regard to either the terms and conditions of employment or the conduct of employers and employees in relation to each other.³⁷ The Minister of Labour may extend the collective agreements to non-members upon the request of members.³⁸ Section 32 provides the requirements that have to be fulfilled before the Minister can extend the agreement to non-parties. The Minister also has the power to appoint at the request of the bargaining council, a designated agent of the bargaining council who has the duty to monitor and enforce compliance with collective agreements concluded at the bargaining council.³⁹ Section 34 of the *LRA* gives legal room for bargaining councils to amalgamate with one or more other bargaining councils.

Part D of the *LRA* provides for the establishment of bargaining councils in the Public Service.

1.3.1.3 Bargaining Councils in the Public Service

*The LRA*⁴⁰ advocates for the creation of *Public Service Coordinating Bargaining Council* (PSCBC) which will be a bargaining council for the whole of the Public Service.⁴¹ The PSCBC has the authority to designate a sector of the Public Service for the establishment of a bargaining council. The Council may also change the designation, amalgamate or dissolve existing public service bargaining

37 Anon <http://www.paralegaladvice.org.za> says these agreements set out terms and conditions of employment for a particular industry in a particular area. They also cover things like minimum wages (the lowest wages that an employer can pay an employee) and conditions of work (notice, annual leave, sick leave, and so on), in a particular industry in a particular area. It also should be noted that the conditions provided by these collective agreements may be better for employees than those in the BCEA. Employees may also agree to conditions less favourable than the BCEA provides, on condition that they do not affect certain core rights and the agreement is overly better for the employees concerned. (see section 49 of the BCEA).

38 S 32.

39 S 33.

40 S 35.

41 The powers and functions of the PSCBC are listed in S 28 of *the LRA* and also outlined in *Public Service Coordinating Bargaining Council Information Brochure* 3. The main purpose of the PSCBC is to provide a platform, both nationally and provincially, for Public Service parties to;

- Negotiate Resolutions on transverse matters, including terms and conditions of the employment of public servants;
- Prevent and resolve disputes through mediation and arbitration;
- Facilitate hearings to resolve disputes that arise in the Public Service (over which the PSCBC has jurisdiction) and to;
- Promote good governance, inclusive of research and strategic partnerships.

councils.⁴²The Act also provides for dispute resolution in-between bargaining councils in the public service.⁴³

The *Basic Conditions of Employment Act*⁴⁴ also provides legislative framework for bargaining councils in South Africa.

1.3.2 The BCEA and Bargaining Councils

The purpose of the *BCEA* is

To give effect to fair practices referred to in Sec 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member of the International Labour Organisation and to provide for matters connected therewith.⁴⁵

Section 49(1) attempts to achieve this purpose by making specific allowance for collective agreements concluded at bargaining councils to alter, replace or exclude any basic condition of employment. This is on condition that the collective agreement is consistent with the purpose of the *BCEA* and does not infringe on employees entitlement and rights set out in the *BCEA*.⁴⁶

Section 59 of the *BCEA* creates the Employment Conditions Commission which is tasked with advising the minister with matters involving amongst others basic conditions of employment, sectoral determinations and trends in collective bargaining. Bargaining councils are, therefore, included in the scope of matters which the Commission may advise the minister.

42 S 37.

43 S 38.

44 *Basic Conditions of Employment Act* 75 of 1997.

45 S 2 *Basic Conditions of Employment Act* 75 of 1997.

46 The BCEA allows variation of certain specified conditions in the BCEA through collective bargaining between a group of employees represented by a registered union working of the same employer (usually at one workplace) and the employer.

1.4 Conclusion

Both Lesotho and South Africa seek to promote collective bargaining through legislation. On the one hand collective bargaining in Lesotho is regulated by the *Labour Code*.⁴⁷ Despite the Code's attempt to best regulate collective bargaining, it, however, makes no mention of bargaining councils. This is not the case in South Africa. The *Labour Relations Act* and the *Basic Conditions of Employment Act*, regulate the operation of bargaining councils in South Africa. The next chapter focuses on the historical development of collective bargaining in both Lesotho and South Africa. The historical development in Lesotho is outlined predominantly to portray the influence that South Africa has on the collective bargaining set up in Lesotho. Specific attention will also be given to the history of bargaining councils in South Africa. The goal is to determine how they became part of South Africa's collective bargaining structures and the reasons that warranted such an inclusion.

47 *Lesotho Labour Code Order 1992.*

Chapter 2 – Historical Perspectives

2.1 Introduction

This dissertation is primarily focused on bargaining councils.⁴⁸ It is imperative to trace the development of these bargaining councils in South African law. It is through examining such history that a determination can ultimately be made pertaining to importance of such structures in South Africa's collective bargaining framework. It is also pertinent to examine the history of collective bargaining in Lesotho. The goal of this study is ultimately to provide a lesson to Lesotho on the importance of bargaining councils. Grogan⁴⁹ defines collective bargaining as:

The process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation. The dynamic of collective bargaining is demand and concession. Its objective is agreement unlike mere consultation, therefore collective bargaining assumes willingness on each side not only to listen and consider the representations of the other but to abandon fixed positions where possible in order to find common ground.

A distinct appreciation of the history of the process of collective bargaining in Lesotho will, therefore, be essential in determining whether bargaining councils can fit within the country's collective bargaining framework, specific reference being made to the garment industry.

48 See Chapter 1 Introduction.

49 Grogan *Workplace Law* 304. Harrison *Collective Bargaining within the Labour Relationship* 12. The term collective bargaining originated from the British labour movement but it was Sam Gompers, an American labour leader who coined its modern application in South Africa and said "Collective bargaining is defined as the continuous relationship between an employer and a designated labor organization representing a specific unit of employees for the purpose of negotiating written terms of employment". See also Khabo *Collective Bargaining and Labour Disputes Resolution* who outlines the benefits of collective bargaining and says "Collective bargaining has a great potential for minimizing conflict, and redressing confrontational attitudes and acrimony inherently associated with the employment relationship, thereby promoting industrial peace and ultimately economic growth. On its own, it can serve as a mechanism for labour dispute resolution by setting out procedures for resolution of labour disputes in collective bargaining agreements. One of the virtues of collective bargaining is that disputes are solved at source, a factor that does not leave the bitterness associated with such adversarial processes of dispute resolution as adjudication".

2.2 The history of collective bargaining in Lesotho

The industrial relations system in Lesotho was historically underdeveloped to a large extent.⁵⁰ The lack of democratic governance, political instability and the influence of the apartheid system in South Africa that prevailed at the time have been attributed as the reasons to the underdevelopment.⁵¹

Lesotho gained independence in 1966, where it ceased to be a British Protectorate. During the colonial era, industrial relations in Lesotho were administered from the Cape Colony through the *Master and Servant Act*,⁵² promulgated in 1856. Lethobane⁵³ avers that the statute recognised neither the rights of workers to join trade unions nor the duty to bargain. Much later in 1942, the *Trade Unions and Trade Disputes Proclamation*,⁵⁴ however, provided for the formation of trade unions.⁵⁵ The first trade union was subsequently registered under this new statute in 1952. *The Trade Union and Dispute Law*⁵⁶ repealed the 1942 Proclamation.⁵⁷ However it still made neither mention of neither the duty to bargain nor freedom of association. Rugege⁵⁸ pens that even though this was the case, the authorities in Lesotho were bound to observe the right to freedom of association by virtue of the country having ratified the *Convention on Freedom of Association*⁵⁹.

The *Regulation of Wages and Conditions of Employment Act*⁶⁰ was promulgated after Lesotho's independence. This legislation did not have the desired effect of institutionalising collective bargaining. The major cause of strikes in Lesotho's private sector has been documented to be union recognition and negotiations.⁶¹ Ndumo⁶² notes that there were hardly provisions in the legislation that promoted the processes and procedures of collective bargaining.

50 Fashoyin *Industrial Relations in South Africa* 1.

51 Fashoyin *Industrial Relations in South Africa*.

52 *Master and Servant Act* 1856.

53 Lethobane *Freedom of Association* 96.

54 *Trade Union and Trade Disputes Proclamation* 1942.

55 Ndumo *The Duty to Bargain and Collective Bargaining* 29.

56 *Trade Union and Dispute Law* 2 1964.

57 *Trade Union and Trade Disputes Proclamation* 1942.

58 Rugege *Workers Collective Rights* 932.

59 *Convention on Freedom of Association and the Right to Organise* 1948.

60 *The Regulation of Wages and Conditions of Employment Act* 1969.

61 Molefi *Labour Law and Industrial Relations* 31.

62 Ndumo *The Duty to Bargain and Collective Bargaining* 29.

The most comprehensive piece of legislation that to an extent provided collective bargaining procedures is the *Labour Code Order*.⁶³ The functions of collective bargaining processes under this code were initially very limited.⁶⁴ The code did not provide for the duty to bargain, recognition procedures or for conclusion of recognition agreements. These tools in labour law are imperative for the promotion of collective bargaining. Their absence, however, does not mean that the unions lacked remedies in labour disputes. Section 24(1)⁶⁵ gave the Labour Court the jurisdiction to entertain any other matter relating to industrial relations apart from trade disputes. The provision seems to have been in favour of collective bargaining. Ndumo⁶⁶ suggests that this provision did not assist the furtherance of collective bargaining in Lesotho. This provision denied parties the opportunity to solve details of a freely concluded recognition or collective agreement themselves. The parties instead had to rely on the Labour Department and Labour Court. Section 4 of the *Labour Code Order*⁶⁷ protected the legislation from the criticisms it received pertaining to its lack of promotion of collective bargaining. It brought much flexibility as it allowed the Labour Court to refer to and apply relevant provisions of the International Labour Conventions and Recommendations where there was ambiguity and difficulty in terms of interpreting its provisions.

Collective bargaining in Lesotho has, however, historically been characterised by bad faith bargaining including stalling, refusing trade union recognition and refusal to bargain even where this was objectively due to the union concerned.⁶⁸

The garment industry in Lesotho on the other hand surfaced in the 1980's due to the Multi Fibre Agreement (MFA), which had imposed quantities on the quotas of garments that garment firms in developing countries could export to developed countries.⁶⁹ Garment producers in quota filled countries had to move production to countries with unfilled quotas like Lesotho. Lesotho also became the destination of choice because of the *African Growth and Opportunity Act*⁷⁰ which allows Lesotho

63 *Labour Code Order* 1992.

64 Ndumo *The Duty to Bargain and Collective Bargaining* 30.

65 *Labour Code Order* 1992.

66 Ndumo *The Duty to Bargain and Collective Bargaining* 30.

67 *Labour Code Order* 1992.

68 Molefi *Labour Law and Industrial Relations* 31.

69 Better Work Lesotho *Baseline Report* 6.

70 *African Growth and Opportunity Act* 2000 (AGOA).

to export goods duty free to the United States of America (USA).⁷¹ Today, Lesotho boasts renowned international firms as producers in its garment industry. These firms fall into two broad categories. The first is comprised of Asian owned firms that mainly export to the USA market to major retailers such as Gap, Levis Strauss and Wall mart. The second category is that of South African owned firms that export mainly to the South African market to retailers such as Woolworths, Edgars and Foschini. The Table below illustrates these two categories.

Table 1 Garment Firms in Lesotho⁷²

No of Firms	Owner Origin	Export Market	Buyers
25	Asia	US	Gap, Levis, K Mart etc.
20	SA	SA	Mr Price, Foschini, Edgars, Woolworths etc.

Despite this colossal status of the industry in Lesotho, there continues to be many shortcomings in its collective bargaining structures. Many of the shortcomings in Lesotho's collective bargaining structures were largely due to the influence of the apartheid system in South Africa as indicated earlier in this study. It therefore becomes essential to examine the history of collective bargaining in South Africa.

2.3 History of collective bargaining In South Africa

The history of collective bargaining in South Africa is peculiar due to the notorious history of the country which was characterised by inequalities between black and white people.⁷³ Trade unions, the central pillars of collective bargaining were not

71 Better Work Lesotho *Baseline Report 6*.

72 Better Work Lesotho *Baseline Report 6*.

73 Vettori *Changing World of Work* 95. See also *Labour Relations Law 22*. Bendix *The History of Labour Relations* 27. South Africa was one of the founding members of the International Labour Organisation, but was later expelled for its apartheid policies. These policies which were part of the labour relations system until the late 1970's he says have left the country in a situation where it constantly needs to take quantum leaps in order to keep up with rapid developments elsewhere in the world.

recognised in South Africa until 1924 when the *Industrial Conciliation Act*⁷⁴ was enacted. This Act, however excluded trade unions which represented blacks.⁷⁵ Black Unions were only recognised in 1979 when all workers were given equal rights before labour laws.⁷⁶ It is essential, therefore, to trace the history of collective bargaining prior to 1979.

2.3.1 Period before 1979

The government had prior to 1924 enacted various pieces of legislation that limited collective bargaining. This maybe attributed to the prevailing employment relationship at the time. The Labour environment in South Africa was in the early 1900's characterised by strikes.⁷⁷ The government of the time reacted to this by enacting the *Riotous Assemblies Act*⁷⁸ which made it unlawful to embark on certain industrial actions. Strikes, however, continued to take place despite the enactment of this legislation. This culminated in a disaster in 1922 when the Rand rebellion took place.⁷⁹ In this infamous incident, 25000 white miners went on strike but were brutally crushed by the army which resulted in the death of 153 miners. This incident brought about a revolution in the government's approach to labour relations.⁸⁰ The government realised the strength of united workers and set up a commission of inquiry. This inquiry resulted in the enacting of the *Industrial Conciliations Act*.⁸¹ The main purpose of this act is documented as to contain industrial unrest by means of institutionalisation.⁸² This Act in essence created structures for collective bargaining as it advocated for a centralised system of collective bargaining where trade unions bargained with employers organisations.⁸³ The Act however only allowed employers to strike where the dispute resolution procedures provided by the Act had been exhausted. Vettori⁸⁴ says that this trend of collective bargaining continued for the next 50 years. Black people, however, were still excluded from the Act and this

74 *Industrial Conciliation Act of 1924.*

75 Vettori *Changing World of Work* 95.

76 Finnemore and Van rensburg *Contemporary Labour Relations* 35.

77 Finnemore and Van rensburg *Contemporary Labour Relations* 28.

78 *Riotous Assemblies Act 1912.*

79 Oberholzer *Die Randse Staking* 80.

80 Du Toit et al *Labour Relations Law* 6.

81 *Industrial Conciliations Act of 1924.*

82 Du Toit et al *Labour Relations Law* 6.

83 Du Toit et al *Labour Relations Law* 6.

84 Vettori *Changing World of Work* 96

meant that they still could not legally embark on strikes.⁸⁵ The *Minimum Wage Act*,⁸⁶ however, provided much needed assistance to black people as it put in place minimum wage rates for all employees irrespective of their race. This was to take effect where collective bargaining structures were not in place.

The aim of this legislation was, however, not to give black people the same status as the white colleagues in the workplace. This was evinced by the legislation that was passed by government in the late 1920's which particularly discriminated against black workers in the workplace. The *Native Administration Act*⁸⁷ for instance made it an offence to promote hostility between the races. The Civilised Labour Policy was also implemented. It entailed that white, Afrikaans employees be promoted to jobs with higher wages. Black employees, however, were still barred from engaging in collective bargaining. Vettori⁸⁸ notes that this, however, did not deter black people from creating and joining trade unions. This created an undesirable labour environment for the government. The National Party led government attempted to remedy this situation by setting up the Botha Commission in 1948.⁸⁹ The Commission made a number of recommendations. The government, however, refused to implement some of the recommendations. The Commission had *inter alia* recommended that black unions be recognised by government but they, however, be denied the right to strike. The government refused this recommendation on the basis that it did not desire to encourage black unions.⁹⁰ The bargaining situation continued in this fashion for some time but gradually began to change in the 1970's when black workers became increasingly aware of their collective might.⁹¹

2.3.2 Period after 1979

Black workers constituted the majority of the workforce at the time. Employers became conscious of this fact and consequently felt obliged to enter into recognition agreements with black unions at their workplaces. This led to an increase in the number of trade unions and in the late 1970's, trade unions had amassed a

85 Finnemore and Van rensburg *Contemporary Labour Relations* 31.

86 *Minimum Wage Act* 1925.

87 *Native Administration Act* 1927.

88 Vettori *Changing World of Work* 97.

89 Fourie et al *Principles and Practices of Labour Law* 327.

90 Bendix *Industrial Relations in the New South Africa* 86.

91 Vettori *Changing World of Work* 97.

population of over 650 000 workers.⁹² The government reacted to this situation by banning individuals who seemed to be promoting black trade unions. This resulted in a number of strikes and riots. The government opted to instead pass the *Black Labour Regulations Act*.⁹³ The aim of this Act was to evade black unionism among black workers. It advocated for the establishment of liaison committees that were designed specifically for black people.⁹⁴ The Act would have the effect of limiting the power of black unions as it restricted black employees from striking. The Committees did not have the desired effect as the majority of black employees refrained from joining such committees. The employees who joined the committees also lacked the expertise to represent their grievances effectively. Representation in these committees was also rendered ineffective by the fact that these committees only allowed five members per plant. This led to a different approach by the government. In 1977 the government consequently appointed the Wiehahn Commission.⁹⁵

2.3.3 Wiehahn Commission

This Commission was tasked with investigating the labour legislation of the country by government. The commission made numerous recommendations in this regard. The government adhered to these recommendations this time around as opposed to its earlier disregard of the Botha Commission's recommendations. It made various amendments to the legislation in line with the Wiehahn Commission's recommendations.⁹⁶ The report indicated that collective bargaining with regard to white people occurred at industrial councils while collective bargaining was primarily plant based for black people.⁹⁷ One of the most notable recommendations made by the commission was of the establishment of the Industrial Court.⁹⁸ This court was

92 Fourie et al *Principles and Practices of Labour Law* 327.

93 *Black Labour Relations Regulation Act* 48 of 1973.

94 Fourie et al *Principles and Practices of Labour Law* 327.

95 Du Toit et al *Labour Relations Law* 6.

96 Bendix *Industrial Relations in the New South Africa* 86. See also Mpariseni *Freedom of Association and Trade Unionism in South Africa* 70.

97 Report of the Wiehahn Commission of Enquiry into Labour Legislation (Wiehahn Report) Part I RP 47/1979.

98 Anon *Wiehahn Commission Report* <http://www.sahistory.org.za/> maintains that the commission believed that the following reforms were necessary to control the proliferation of black trade unions in the 1970s.

- Legal recognition of Black trade unions and migrant workers
- Abolition of statutory job reservation
- Retention of the closed shop bargaining system

given the power to interdict unfair labour practices.⁹⁹ The amendments just as the previous amendments made by government did not have the desired effect. Black unions were not keen on embracing their inclusion in the new form of centralised collective bargaining. They continued engaging in collective bargaining at plant level with the employers they had entered into recognition agreements with.¹⁰⁰ Some other employers however refused to enter into these recognition agreements at plant level. This resulted in an outbreak of a number of strikes. The impact of these strikes forced the hand of the employers. The employers became obliged to sign recognition agreements with black unions. Vettori,¹⁰¹ maintains that this practice was so effective that it continues to be entrenched in South Africa's labour legislation even today.

Subsequent to these developments, the legislature then confined collective bargaining within the ambits of a centralised collective bargaining system. Black unions, however, informally engaged in two forms of collective bargaining. Independent trade unions used the industrial system to bargain with employers at sectoral level. The industrial system became pivotal in collective bargaining. The industries however could not be used effectively on a wider platform as they only existed in industries where the union movement was stronger.¹⁰² The government, however, took a different approach in the 1980's. It insisted on withdrawing from labour matters and allowing employers and employees to forge their own relationship.¹⁰³ Employers did not favour this approach by government as they said it encouraged a surge of trade unionism. Government then succumbed to employer pressure and implemented amendments to curb trade union rising. The unions responded by engaging in mass protests which forced the government to repeal the amendments in 1991 through the *Labour Relations Amendment Act*.¹⁰⁴ South Africa's labour environment changed drastically in the 1990's.

The creation of a National Manpower Commission, and
The introduction of an Industrial Court to resolve industrial litigation.

99 Wiehahn Report p 22.

100 Vettori *Changing World of Work* 97.

101 Vettori *Changing World of Work* 106.

102 Harrison *Collective Bargaining Within the Labour Relationship* 2005.

103 Cameron et al *The New Labour Relations Act* 4.

104 *Labour Relations Amendment Act* 1991.

2.3.4 Period after 1990

The political situation that prevailed in the 1990's had tremendous influence on the collective bargaining framework of the country. Nelson Mandela was released from prison in 1990. Previously banned political parties were also unbanned. The international pressure that South Africa was receiving influenced the government's newly found corporate stance towards labour relations.¹⁰⁵ The turnaround, however, came in 1994 when a new African National Congress (ANC) led government was put into power. Du Toit *et al*¹⁰⁶ maintain that the fact that the ANC was supported by the Congress of South African Trade Unions (COSATU) and was bound to it by allegiance meant that the labour dispensation had to change post elections. This meant that special attention had to be paid to the industrial council system.

2.3.5 Industrial Council System

The industrial council system that was operative in the labour set up of South Africa had many shortcomings that hampered the efficiency of unions. Unions struggled not only in getting employers to set up industrial councils but also in persuading them to engage in negotiations.¹⁰⁷ This system also provided very little assistance to the black worker as it allowed the legislation of minimum wages for the black worker. The voluntary nature of the industrial councils system led to some employers refusing to recognise registered trade unions or have any direct contact with them.¹⁰⁸ Requiring employers to bargain at two levels became increasingly difficult. The problems in the industrial council system were also exacerbated by the fact that global trends appeared to shift to a more decentralised form of bargaining. The

105 Finnemore and Van Rensburg *Contemporary Labour Relations* 43.

106 Du Toit *et al Labour Relations Law* 17.

107 Du Toit *et al Labour Relations Law* 6; Butcher and Rose *Wage Effects of Unions and Industrial Councils in South Africa* 1 also maintain that "authors argue that a high union wage premium and the industrial council system are important causes of inflexibility in South Africa's labour market".

108 Du Toit *et al Labour Relations Law* 69. Bhorat *Analysing Wage Formation in South African Labour Market* 3 confirms this and says "an industrial council was formed when an employer, employers' organisation or a group of employers' organisations together with a registered trade union group of registered trade unions came together and agreed on the constitution for the council and then proceeded to register the council in terms of the Act. Once registered, an industrial council became a permanent bargaining institution. The establishment of an industrial council was voluntary and no provision was made for majority or proportional representation in the legislation".

unions, however, had two remedies available to them to try forcing the employer's hand to bargain:¹⁰⁹

- i) Unions could declare a dispute and apply for the appointment of a conciliation board.
- ii) The union could also lobby the wage board to conduct an investigation and ultimately produce a determination.

Du Toit *et al*¹¹⁰ maintain that despite the remedies available, trade unions have traditionally been reluctant to engage in this form of bargaining. White mineworker unions for instance had always expressly shown preference of *ad hoc* bargaining arrangements that were provided by conciliation boards. The absence of councils in this sector today is a clear indication of the attitude of unions on this sector to this form of bargaining.

A change in the country's political spectrum in the early 1990's necessitated that the collective bargaining system changes also.¹¹¹ Three areas needed particular attention when effecting such transformation:¹¹²

- i) Collective bargaining in councils needed effectively to bridge the wage gap between skilled and unskilled workers. This, however, had to be done in a diligent manner as work was being restructured in a manner that reduced the demand for unskilled workers at the time. Recklessly raising wages for unskilled workers would defeat the purpose of collective bargaining. Thousands of people would be left unemployed due to the reluctance of employers to have unskilled workers in their employ.
- ii) The voluntary nature of the industrial council system and the refusal of employers to bargain on two levels had to be addressed. Trade unions

109 Du Toit *et al Labour Relations Law* 69.

110 Du Toit *et al Labour Relations Law* 76.

111 Ferreira *Developments in Labour Relations in South Africa* 197 highlights that Labour relations were important in engineering the much-needed transformation at the time and that Labour relations were now to be conducted in an environment where labour and capital had to be harmonised to achieve industrial peace and to improve productivity. In an attempt to provide transparent socioeconomic decision-making processes, the government had to create institutions such as the National Economic Development and Labour Council (NEDLAC). The new legislative framework had to include democratic labour relations policies. Four primary Acts were then formulated to regulate employment relationships in South Africa.

112 Du Toit *et al Labour Relations Law* 77.

found it difficult to undertake their mandate in this form of collective bargaining.

- iii) The extension of council agreements also had to be better managed. Unemployment had been rife in the 1970's. The gravity of unemployment was, however, lessened by the surfacing of small business enterprises in the 1980's. The extension of industrial council agreements was widely seen as an impediment to the growth of these enterprises. Ministerial discretion of extending council agreements had to be regulated better as representivity of councils would be undermined if the small businesses withdrew from the council system.

There were three major positions pertaining to how these issues would be addressed in the new legislation.¹¹³

2.3.5.1 The Position of the ANC

The African National Congress (ANC) socio economic policy was centred on the Reconstruction and Development Programme (RDP).¹¹⁴ The ANC suggested a collective bargaining framework that would articulate between national, industrial and workplace levels. Labour issues would be redistributed between the levels of the new setup. It also suggested that the centralised bargaining forums set limits for negotiations at lower levels of the set up. The ANC was unequivocal about its support for the continuation of the industrial councils and the extension of their agreements. It further proposed that in the new dispensation, industry level forums be empowered to negotiate industrial policy, job creation schemes and educational policies.¹¹⁵ This stance had both similarities and differences with the position of Congress of South African Trade Unions (COSATU).

2.3.5.2 The Position of COSATU

The position of COSATU was expressly laid down at the 1994 Campaigns Conference.¹¹⁶ COSATU boldly expressed its desire to have a law that compelled centralised bargaining. It also wanted centralised bargaining forums in all sectors.

113 Du Toit *et al Labour Relations Law* 81.

114 ANC *The Reconstruction and Development Programme* 114.

115 ANC *The Reconstruction and Development Programme*.

116 COSATU "Policy on Collective Bargaining" 25- 7.

This would be achieved through the process of amalgamating certain councils, getting the ANC to establish a coordinated system of collective bargaining in each sector and to intensify pressure on employers for centralised bargaining where such forums did not exist. COSATU also favoured multi-level bargaining but, however, stated that bargaining twice at local level and at industry level on a single issue should be prohibited. It further proposed that minimum standards that were agreed to at industry level could be strengthened at plant level through workplace negotiations. COSATU shared the sentiments of the ANC with regard to industrial councils. It, however, expanded its view by purporting that the industrial council system includes negotiation of issues such as industrial strategy and the incorporation of the industry, education and training boards within the very councils. COSATU's position was succinctly outlined in the proposals of the National Labour and Development Institute (NALEDI).

2.3.5.3 NALEDI Proposals

NALEDI is regarded as the research arm of COSATU.¹¹⁷ It firstly proposed that 30 bargaining structures spread across 11 industries as follows:

Table 2 NALEDI Proposals¹¹⁸

Industry	Sectoral Bargaining Structures
Mining	Mining; Energy
Food	Food; Beverages
Clothing	Clothing; Textiles; Leather
Paper	Paper; Wood: furniture; Printing
Chemicals	Heavy Chemicals; Consumer Chemicals; Glass; Plastic conversion
Metal	Engineering; Automobile

117 Du Toit *et al Labour Relations Law* 83. Naidoo <http://www.policyinnovations.org> mentions that NALEDI is an initiative of COSATU formed in 1993. Its mission is to conduct policy relevant research aimed at building the capacity of the labour movement to effectively engage with the challenges of the new South Africa.

118 Du Toit *et al Labour Relations Law* 84.

Construction	Building material ; Construction
Transport	Transport; Transnet; Posts; Telecommunications
Services	Commercial; Hospitality; Finances ;General services; Domestic services
Public Sector	Public Service Commission; Social Services(private):Local authorities
Agriculture	Plantation Workers: General agriculture

NALEDI insisted that establishing sectoral bargaining structures should be mandatory. It also supported the extension of council agreements to non-parties. It, however, went a step further by introducing the concept of framework agreements. Du Toit *et al*¹¹⁹ state that

Framework agreements are being utilised in a number of countries. They generally prescribe a limited set of minimum conditions and rights at a central level and allow for bargaining over actual conditions and rights at firm or plant level.

This meant that council agreements would be extended to non-parties but would only set basic conditions which would allow for negotiations at plant level. The negotiations would be over the issues that were not dealt with in the framework agreement. This would have the desired effect of fewer exemption applications from small enterprises as they would have less pressure.

The agreements would also bring an end to dual level bargaining as there would be no bargaining at different levels over one issue. NALEDI, however, ruled out blanket exemptions, but instead insisted that special schedules for small enterprises be included in the agreements. The schedules would *inter alia* avail concessions to small and medium enterprises for a limited time. The position of NALEDI as an arm of COSATU did not differ in totality with the position of businesses.¹²⁰

119 Du Toit *et al Labour Relations Law* 83

120 Du Toit *et al Labour Relations Law* 83

2.3.5.4 The Position of Business

Business South Africa (BSA) also laid down its position regarding its desired collective bargaining system. It did it through the publication of a paper.¹²¹ In this paper, the BSA advocated for a system that retained the basic principles that were present in the industrial council system. It advocated for the retention of the enabling statutory framework based on self-governance and voluntarism. It, however, differed from COSATU's position on certain features of the new dispensation. It refused to entertain the possibility of a compulsion to bargain at a certain level on set topics. It preferred that such issues be voluntarily determined between parties by agreement or by exercise of power. BSA also advocated for single level bargaining. It proposed that employers be protected from industrial action in instances where they refused to bargain at multi levels.¹²²

BSA also expressed its position regarding extension of industrial council agreements. It advocated for the continued extension of such agreements but maintained that these agreements should only be extended where appropriate. Du Toit *et al* maintain that this position held by BSA laid the foundation of the current *LRA*.¹²³ It, however, indicated the difference of positions of the three stakeholders that led to establishment of a presidential commission in 1995.¹²⁴

2.3.5.5 Labour Market Commission

This commission was tasked with investigating the development of a comprehensive labour market policy. The work of this commission ran side by side with the ministerial task team that was tasked with drafting the new *LRA*. The commission was unequivocal in its support for sectoral bargaining. It insisted that wage rates should be set at enterprise level, however, minimum rates should be set at sectoral level.¹²⁵ It also sought to protect smaller firms. It argued that wages set at bargaining councils should not be generalised across the board. The reason for this contention was that bargaining councils are seen to be representative of employers and workers

121 BSA "A Framework for Redrafting the Labour Relations Act"

122 Du Toit *et al Labour Relations Law* 83.

123 The *LRA*.

124 Du Toit *et al Labour Relations Law* 83.

125 Report of the Commission "Restructuring the South African Labour Market".83.

of larger capital intensive firms. It highlighted the need to protect the labour intensive small firms because they were vulnerable to increase in labour costs. The work of the Commission was significant to the ministerial task team that was duty bound to draft the new labour legislation.

2.3.5.6 Ministerial Task Team

The task team identified a number of problems with the then existing industrial council system. It noted a number of areas that needed specific attention.

- Industrial Court's inconsistent jurisprudence
- Criteria for representativeness of councils
- Minister's discretion to extend agreements
- The bureaucratic structure of councils
- The procedure for the granting of exemptions.
- Enforcement of agreements by criminal prosecution

The Task Team also highlighted that a new law was needed to deal with these issues. It would achieve the desired status by giving effect to the right to collective bargaining and the duty of the state to comply with relevant ILO provisions. The government shortly thereafter ratified a number of conventions including *Freedom of Association and the Right to Organise*,¹²⁶ *Right to Organise and Collective Bargaining*¹²⁷ and *Discrimination (Employment and Occupation) Convention*.¹²⁸

The task team considered a number of bargaining models but decided to adopt a voluntarist system which entailed that the parties had the liberty to determine their own arrangements through agreement or the exercise of power. This was then included in the *Labour Relations Bill* ¹²⁹ and was legislated.

126 *Convention on Freedom of Association and the Right to Organise* 1948

127 *Right to Organise and Collective Bargaining* 1948

128 *Discrimination (Employment and Occupation) Convention* 1958

129 GN 97 in GG 16259 of 10 February 1995(*Labour Relations Bill*)

2.3.5.7 The Bill

The *Labour Relations Bill* differed to an extent from the 1956 *Labour Relations Act*.¹³⁰ The Bill, just like the *Labour Relations Act*, stated that in order for a council to be registered, employers and unions had to be sufficiently representative. It, however, went a step further by giving the criteria for measuring 'sufficiently representative'.¹³¹

- i) A majority of employees employed within its registered scope are members of the trade union parties to the council.
- ii) The members of one or more employer's organisations which are party to the council employ at least x percent of the employees employed within its registered scope. The bill gave the National Economic and Development Labour Advisory Council (NEDLAC) the task to determine the value of x.

The criteria for representivity were also pertinent for purposes of extending council agreements. Council agreements could now be extended on two grounds. If the council met the criteria set for representivity and if the Minister was satisfied that failure to extend the agreement would undermine sectoral collective bargaining.¹³²

The Bill also required councils to make provisions for the representation of small firms in their constitutions. This would go a long way towards encouraging the small enterprises to join the councils as they would be guaranteed against total domination in councils by larger firms. The new framework also allowed councils to be used as a platform for providing input to the government's policy. The input of the councils was to be submitted to NEDLAC.¹³³ The new framework also included constitutional and international law duty to promote collective bargaining. This meant that no legislative barriers could be placed on collective bargaining. Councils were, however, given the authority to determine by means of collective agreement matters which could not be sufficient to warrant a strike or a lockout in the workplace. The proposed statute by and large gave primacy to centralised bargaining.¹³⁴ It is imperative to note that in the new framework. Industrial councils would now be referred to as bargaining

130 *Labour Relations Act* 28 of 1956.

131 The Bill 121 – 122.

132 The Bill 124.

133 Draft Bill 126.

134 Du Toit *et al Labour Relations Law* 87.

councils. The reason for this being that the new legislation included non-industrial sectors such as agriculture, domestic sector and the public sector.¹³⁵

2.4 Conclusion

The history of collective bargaining in South Africa shows that centralised bargaining has traditionally been voluntarist. This has not been ideal for unions as they have to make concessions in order to encourage the employers to bargain. This, however, does not spell complete doom for unions. They were customarily on the alternative forced to maintain strong shop floor structures. This compelled the employers to engage in centralised bargaining in fear of facing strong enterprise level bargaining from employees if they opt to withdraw from councils.

The country, however, does not have a rich history of enterprise bargaining. Before the 1970's and 1980's, almost all forms of collective bargaining took place in industrial councils. Enterprise bargaining only got notable recognition in recent history. The history of the industrial council system was to a large extent influenced by the political history of South Africa. Activity in this system was limited to businesses, white labourers and the government. Black people were excluded from collective bargaining laws and for a long time could not legally engage in strikes. The situation changed after the Wiehahn Commission was appointed in 1977 to investigate the labour legislation. It is after the recommendations of this commission that black workers were included in centralised collective bargaining. Despite this, black unions continued to informally engage in two types of bargaining.

The political developments of the 1990's had much bearing on the current collective bargaining framework. The ministerial task team that was mandated to draw the new labour framework had to balance the interests of unions, employers and government. This culminated in a number of changes from the old industrial council system. Industrial councils ceased to be known as such and were known as bargaining councils.

The notorious historical background of South Africa had a large influence on the underdevelopment of Lesotho's labour legislation. It is imperative, therefore, to appreciate the reasons that necessitated the current framework of bargaining

135 Du Toit *et al Labour Relations Law* 90.

councils in South Africa. This knowledge is ideal when making a determination of whether bargaining councils should be included in Lesotho's labour legislation.

The next chapter of this study focuses on the advantages and disadvantages of industry level bargaining. The challenges facing the bargaining council system in South Africa will also be outlined. Focus will ultimately be put on the bargaining councils in the garment industry in South Africa. The functions of these councils will particularly be outlined in a bid to determine ultimately whether they truly do act as tools to more efficient collective bargaining.

Chapter3 - The Role of Bargaining Councils

3.1 Introduction

In South Africa, collective bargaining at industry level normally occurs at bargaining councils.¹³⁶ Statutory councils created by the *LRA*¹³⁷ also provide a means of collective bargaining. Bargaining out of the statutory system, however, occurs at plant level, enterprise level and centralised bargaining forums.¹³⁸ Bargaining councils however, remain the main mechanism for collective bargaining in South Africa.¹³⁹ The main purpose of this section is to evaluate the importance of these councils particularly in the garment industry. This will be done by firstly outlining the advantages and disadvantages of bargaining councils in general. 'Industry level bargaining' will be loosely used in this section to refer to bargaining council as the former occurs at the latter in South Africa. Specific attention will later be given to outlining the structures and functions of bargaining councils in the garment industry. The legal challenges that have arisen within the scope of operation of these councils will also be discussed in the process.

There are various levels of bargaining in South Africa. Prime focus in this study is, however, placed on industry level bargaining. The table below illustrates the different types of bargaining in the country.

Table 3 Levels of Bargaining in South Africa¹⁴⁰

Level	Structure	Functions	Actors	Scope
National	NEDLAC	To carry out negotiations between state employers and employees.	<ul style="list-style-type: none"> - Government - Business - Workforce - Community 	National Socio economic and labour policy
Industry	Bargaining councils and Statutory Councils	Arrange to include employer and	<ul style="list-style-type: none"> - Registered trade unions - Registered 	Wages and working conditions

136 Harrison *Collective Bargaining Within the Labour Relationship* 78.

137 The *LRA*.

138 DPRU Policy Brief Series *The State of Collective Bargaining in South Africa* 2008.

139 S 28 the *LRA*.

140 Harrison *Collective Bargaining Within the Labour Relationship* 88.

		employee representatives for the whole industry	employer organisations	for the entire industry
Regional	Union structures and employer organisations	Assist in the bargaining process	<ul style="list-style-type: none"> - Registered trade unions - Registered employer organisations 	Wages and working conditions at a regional level
Firm/Companies within a group company	Employee representative/union and the employer	To represent employees in a particular firm	<ul style="list-style-type: none"> - Trade unions - Trade union representatives - Employer - Community groups 	Wages and working conditions and procedural issues at the level of the firm
Plant	Shop stewards and management	To negotiate about terms and conditions of employment	<ul style="list-style-type: none"> - Trade unions - Trade union representatives - Employer - Community group(in specific circumstances) 	Wages and working conditions and procedural issues at the level of the individual plant

3.2 Industry Level Bargaining

The *LRA*¹⁴¹ also advocates for the creation of statutory councils.

Statutory Councils

These councils were intended to be a stepping stone to bargaining councils.¹⁴² statutory councils are at times referred to as “trainee bargaining councils. They are

141 S 39.

vested with powers to perform the functions of a bargaining council. They, however, do not have the powers to extend wage agreements to non-parties. Statutory councils can be established in industries where employers or employees have a representation of 30 percent.

The *LRA*¹⁴³ also creates the Public Service Coordinating Bargaining Council which may perform functions of a bargaining council in respect of matters which arise within the public service.¹⁴⁴ Bargaining councils as the main mechanisms through which collective bargaining occurs at industry level have a number of advantages. Harrison¹⁴⁵ succinctly provides a number of advantages to this type of bargaining.

3.2.1 Advantages of Industry Level Bargaining¹⁴⁶

- I) Industry level bargaining does not weigh heavily on the pockets of employers and trade unions. This is because negotiations are conducted by representatives of organisations in respect of a particular industry or part of an industry.
- II) Collective bargaining at industry level focuses on the major issues that occur at the workplace. This has the effect of ironing out issues that may hamper efficiency at the workplace.
- III) The general nature of outcomes of collective bargaining at industry level allow for flexibility. They tend to be given in a general nature that will allow for variation to take place at the workplace. Most outcomes set the minimum standard that should be observed in the workplace.
- IV) Industry level bargaining breeds healthy competition. It sets reasonable standards applicable to all employers in a market. This in turn guarantees that competition is won purely based on productivity and not on the exploitation of workers which includes low wages and extension of working hours.

142 DPRU Policy Brief Series *The State of Collective Bargaining in South Africa* 3. See also Harrison *Collective Bargaining Within the Labour Relationship* 78. Webster *Contribution of Collective Bargaining to Employment Protection* 7 states that the aim of setting up the councils was to break the deadlock in negotiations on voluntary versus mandatory centralised collective bargaining.

143 S 36 (1).

144 S 36 (2).

145 Cheadle *et al South African Constitutional Law: The Bill of Rights* 395.

146 Harrison *Collective Bargaining Within the Labour Relationship* 79.

- V) Strikes that occur in markets that engage in industry level bargaining are less damaging to employers. They occur rarely due to constant negotiations. In the event that they do occur, they become less damaging to employers because competitors are also subjected to similar strikes or lock outs.
- VI) Benefits that are put in place at industry level allow for a greater degree of labour mobility.
- VII) The voluntary nature of industry level bargaining makes it desirable in a free country like South Africa.¹⁴⁷
- VIII) Research by Budlender and Sadeck¹⁴⁸ uncovered a benefit of bargaining councils that most authors seem to be oblivious to. They found that twenty seven private sector bargaining councils in South Africa administer a hundred and nine benefit funds which cover about fifty thousand employers and eight hundred thousand workers in the private sector. Pension or provident schemes, sick pay funds and sick benefit funds are the most common benefit funds. A fewer councils also provide holiday pay funds. These benefit employers as they provide a cheaper alternative to the *Basic Conditions of Employment Act*.¹⁴⁹ The research¹⁵⁰ showed that the bargaining council benefit funds provided good value for money and are efficiently administered. These funds are more effective because they have been designed to meet the requirements of relatively low paid workers in a particular industry.

There are also a number of disadvantages to this form of bargaining. Nel¹⁵¹ notes these disadvantages.

147 Cheadle et al *South African Constitutional Law: The Bill of Rights* 395.
 148 Budlender and Sadeck *Bargaining Councils and Other Schemes* 21.
 149 *Basic Conditions of Employment Act* 75 of 1997.
 150 Budlender and Sadeck *Bargaining Councils and Other Schemes* 21.
 151 Nel *South African Employment Relations* 141.

3.2.2 Disadvantages of Industry Level Bargaining

- i) Nel¹⁵² acknowledges that industry level bargaining is beneficial to both unions and employers because it sets competitive wages. He, however, says that there may be a downside to this as the wages may be set at a minimum rate which may be disadvantageous to unions.
- ii) Industry level bargaining ordinarily results in fewer strikes due to the involvement of the stakeholders in the industry in collective bargaining. The downside to this, however, is that the industrial action occurs on a wider scale in the event that it does occur. This is due to the fact that the employees in the sector have a common ground and will strike on the same issues.
- iii) The fact that the bargaining occurs on a larger platform where diverse interests are represented means that collective bargaining will be less flexible. Smaller unions and employers may also possibly be smothered in this process and this may decrease the possibility of democratic decision making by the smaller unions and employers.

Bendix¹⁵³ adds further that this form of bargaining is disadvantageous to individual employers because they are unable to deal with unions on a personal basis and obtain agreements which are suitable for their specific organisation. She also adds¹⁵⁴ that the setting of wages at industry level may potentially be disadvantageous not only to trade unions but also to employers. The wages may be set higher than the smaller employers may afford. She avers that the smaller employers have consequently been complaining that bargaining councils are dominated by larger employers who conclude agreements which suit them but are to the detriment of the smaller unions. Bargaining councils have also been criticised for being fragmented in nature and poorly resourced.¹⁵⁵ Despite the indifferences pertaining to the importance of the bargaining councils, the law provides a detailed procedure for setting up the councils.

152 Nel *South African Employment Relations* 141.

153 Bendix *Labour Relations* 139.

154 Bendix *Labour Relations* 140.

155 DDPRU *Understanding the Efficiency and Effectiveness of Dispute Resolution* 7.

The *LRA*¹⁵⁶ provides the process which has to be followed when registering a bargaining council.

3.2.3 Registration of bargaining councils

One or more registered trade unions and one or more registered employer's organisations may establish a bargaining council for a sector or area by either adopting a constitution that meets the requirements of section 30 or by obtaining registration of the bargaining council in terms of section 29.¹⁵⁷

Section 29¹⁵⁸ requires that parties to the council should submit a properly completed form, a copy of its constitution and any other information that may assist the registrar to determine whether or not the bargaining council meets requirements for registration. The registrar upon receiving the application has to publish a notice of the application in the government gazette and send a copy to NEDLAC. The public is then afforded 30 days to object to this application.¹⁵⁹ The applicant may then respond to this objection within fourteen days.¹⁶⁰ NEDLAC then considers this application within ninety days and gives a report to the registrar in writing. The registrar then has to consider the application and determine whether¹⁶¹

- i) The applicant has complied with the provisions of this section;
- ii) the constitution of the bargaining council complies with section 30;
- iii) adequate provision is made in the constitution of the bargaining council for the representation of small and medium enterprises;
- iv) the parties to the bargaining council are sufficiently representative of the sector and area determined by NEDLAC or the Minister; and
- v) there is no other council registered for the sector and area in respect of which the application is made.

If within thirty days, the applicant meets these requirements, the registrar must register the council.¹⁶² The *LRA*, however, does not define in the requirements for

156 S 29.

157 S 27.

158 *Labour Relations Act* 66 of 1995.

159 S 29(3)(b).

160 S 29 (6).

161 S 29(ii)(b).

162 S 29 (13).

registration what 'sufficiently representative' entails.¹⁶³ Failing to provide a definition of the term may leave it open for interpretation. Legal experts¹⁶⁴ have held that the term is determined by factors such as:

- the degree of union and employer organisation in the sector and area of the proposed council;
- the nature of the sector;
- the number of employees employed by members of the employers' organisation; and
- the ability of the unions and employers' organisations to represent the different interests of employers and employees to be covered by the proposed council.

There are a number of further challenges to the South African bargaining council system that have been documented.¹⁶⁵

3.3 Challenges to bargaining council system

- i) The *LRA*¹⁶⁶ allows the Minister of Labour to extend bargaining council agreements concluded in the council to non-parties to the collective agreement that are within the scope of the bargaining council upon its request. The section¹⁶⁷ places a threshold for the extension of agreements. It stipulates that it is only one or more employer organisations and trade unions commanding the majority of employers falling within the scope of the bargaining council that may apply for extension. This requirement is a challenge as the representivity of parties has been said to be falling.¹⁶⁸ This in turn contributes to the in formalisation of the

163 Lapan *Employment Case Law Update* 14

164 Unknown *Centralised Collective Bargaining* www.westerncape.gov.za. Lapan *Employment Case Law Update* 13 says factors that were not previously considered should be considered when determining what the term entails. These include "the composition of the work-force in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on fixed term contracts, part-time employees or employees in other categories of non-standard employment.

165 Development Research Unit *The State of Collective Bargaining in South Africa* 2008

166 S 32.

167 S 32(i) and (ii).

168 Development Research Unit *The State of Collective Bargaining in South Africa* 3.

workforce. It creates difficulty for the extension of agreements when low numbers of employees and employers join employer organisations and trade unions that are party to the council. The threshold for extension cannot be easily met when this happens. Employers who are not parties to the council may have an edge over employers who are parties to council. This may lead to the exodus of employers from the council and ultimately to the collapse of the council.

- ii) The *LRA*¹⁶⁹ grants bargaining councils the power to prevent and resolve labour disputes. These are functions ordinarily vested on the Commission of Conciliation, Mediation and Arbitration (CCMA). Bargaining councils assist the CCMA to perform these functions.¹⁷⁰ It has, however been established that the subsidy provided by the CCMA to the councils is insufficient to cover all costs that are akin to dispute resolution.¹⁷¹ This in turn weighs heavily on the resources of the bargaining council.
- iii) The initial intention of the setting up of bargaining councils as indicated earlier in the second chapter of this work was to facilitate training. The *Skills Development Act*¹⁷² however has separated this function from the ambit of the bargaining council. Even though this is a deviation from the initial purpose of the bargaining councils, the *Skills Development Act* advocates for bargaining council officials to be invited to Sectoral Education and Training Authority (SETA) boards for training. SETA has the responsibility for the development of an overall training strategy for the industries that it covers and also for developing and integrating a developing skills plan and to facilitate and promote learnerships. SETA would, therefore, help to perform part of the initial purpose of bargaining councils. It has, however, been established that the operations between

169 S 28(1).

170 Harrison *Collective Bargaining Within the Labour Relationship* 2 states that the bargaining council arbitrator has all of the powers of a Commissioner of the Commission of Conciliation, Mediation and Arbitration hence may also determine any dispute about the application or interpretation of a collective agreement. He may also make any appropriate award, including an order that any person pay an amount owing in terms of a collective agreement or may impose a fine for a failure to comply with an agreement. It should be noted however that the Arbitrator's award is subject to review by the Labour Court.

171 Development Research Unit *The State of Collective Bargaining in South Africa* 5.
172 *Skills Development Act* 97 of 1998.

the two are not as smooth as expected.¹⁷³ This becomes a setback to this arm of bargaining councils.

- iv) Small firms prefer to abstain from registering with bargaining councils. This creates much difficulty for the bargaining council when enforcing agreements. This situation is exacerbated by the ratio of agents to the total number of employers.¹⁷⁴ A single agent spends a very long time tracking down unregistered firms. The enforcement capacity of the councils tends to decrease as the size of the council increases. This means that the larger the bargaining council, the weaker its enforcement mechanisms become and the greater the number of unregistered firms it is unable to track. Research¹⁷⁵ has also shown that the level of non-registration in the garment is amongst the highest. This makes it difficult for the Department of Labour to calculate precisely the number of unregistered firms. This in turn leads to bargaining council agreements being extended on the false assumption that the council is ‘sufficiently representative’.

The number of bargaining councils in South Africa has been on the decrease in recent years. The number of employees covered by these councils has contrarily been on the increase. The table below illustrates this situation.

Table 4 Bargaining Councils and Employee Coverage¹⁷⁶

Year	Bargaining Councils	Number of Employees covered
1984	104	1 171 724
1992	87	735 533
1996	77	810 589
2000	78	-

173 Development Research Unit *The State of Collective Bargaining in South Africa* 5.

174 Development Research Unit *The State of Collective Bargaining in South Africa* 130.

175 Development Research Unit *The State of Collective Bargaining in South Africa* 100.

176 Nel *Towards New Collective Bargaining* 75.

2004	57	2358012012(1075 967 in the public sector
2008	48	2315 297
2010	47	2 290 600

It is undisputed that the amalgamation of councils that took place in recent times in South Africa is the reason behind the drop in number of councils. Regional clothing councils and a few other related councils for instance merged to form the National Clothing Manufacturers Bargaining Council. Writers are, however, divided over what a drop in the number of bargaining councils actually means. Du Toit et al ¹⁷⁷ suggest that the drop means that centralised bargaining is getting stronger. Evidence, however shows that the view held by Godfrey *et al*¹⁷⁸ is more precise. The drop in the number of bargaining councils may also be attributed to the collapse and the registration of a number of councils. This view is supported by the view of the CCMA which suggests that the number of bargaining councils may collapse further in future.¹⁷⁹

In order to make an evaluation of the role of these councils in the garment industry, specific attention should be paid to the work of these councils in the industry.

3.4 Bargaining councils in the garment industry

The National Textile bargaining Council and the Clothing Manufacturers Bargaining Council are the two bargaining councils that will be examined in this paper as operative in the garment sector. The National Bargaining Council for the Leather Industry may be deemed to fall within the scope of the garment industry, however, it bears no reference in this work as it is irrelevant for purposes of providing a lesson to Lesotho.

177 Du Toit et al Labour Relations Law 44.

178 Godfrey et al Industrial Law Journal 731 – 752.

179 LEP and NALEDI *Support for Bargaining Councils and Centralised Bargaining* 20.

3.4.1 National Textile Bargaining Council

There are a number of objectives which this council seeks to achieve. These objectives are not only confined to performing functions that are set out in section 28 of the *LRA*.¹⁸⁰ These objectives are outlined as:¹⁸¹

- To encourage party cooperation to advance the interests of the industry;
- regulate collective bargaining and industrial action in the industry in the subsectors and in any sections, and
- to promote cohesion and representation among employees and avoid fragmentation of centralised bargaining, social equity, viability, fair labour standards and skills development.

The powers and functions of the council that will help it achieve the above mentioned goals are succinctly set out in section 4 of the council's constitution. They include;

- to conclude collective agreements;
- to apply to extend collective agreements to non-parties identified in such application:
- to enforce those collective agreements;
- To prevent and resolve labour disputes;
- to perform the dispute resolution function referred to in Section 51 of the *LRA*.
- to establish and administer a fund to be used for resolving disputes;
- to promote and establish training and educational schemes;
- to establish and administer pension, provident, health care, holiday, unemployment and training schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;
- to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the industry or area.

180 The *LRA*.

181 S 3 Constitution of National Textile Bargaining council.

- to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or lockout at the work place;
- to confer on workplace forums additional matters for consultation;
- to provide industrial support within the industry and subsectors;
- to extend services and functions of the bargaining council to the informal sector and home workers;
- to establish procedures and requirements to exempt parties or non-parties from collective agreements and permissible legislation provisions;
- to impose levies on employees and employers who fall within the registered scope of the bargaining scope and administer these on behalf of the bargaining council;
- to conclude contracts and perform juristic acts;
- to consider and deal with any other matter that affects the interests of the parties;
- to perform any other act necessary that will render the council efficient and financially viable;
- to protect and adhere to the principles in the Constitution and¹⁸²
- to set the terms of admission to, and admit additional parties to the bargaining council provided the additional parties meet the admission criteria set out in the constitution of the council and any other further guidelines set by the council.

The structures of the bargaining council are designed to give effect to the objectives and functions of the council.

3.4.1.2 Structures of the Council

The bargaining council has a distinct legal status from the parties who constitute it.¹⁸³ It has eight registered employer organisations as founding parties. (Carpet manufacturing employer's association, national worsted manufactures employers

182 The Constitution of South Africa, 1996.

183 S 12 *Constitution of National Textile Bargaining council*.

association, woven crotchet and knitted narrow fabric manufacturers employers association, South Africa wool and mohair processor employers association, South African cotton textile processing employers association and national textiles manufactures association). The South African Clothing and Textiles Workers Union (SACTWU) is the only trade union given founding member status in the council's constitution.¹⁸⁴ Trade unions and employer organisations falling within the registered scope of the council may however apply to the secretary of the council for admission as party to the council.¹⁸⁵ The Secretary is then mandated to process the application and notify the parties in the affected sub sector or section within 10 days.¹⁸⁶

There are five different structures to the council.¹⁸⁷ The Council, an Executive Committee, Sub sector chambers and sections, an exemptions committee and other committees as determined from time to time by the council and required by the constitution of the council. The Council is the main structure of the bargaining council as it is empowered by the constitution to perform the bulk of the functions of the bargaining council.¹⁸⁸ The Council consists of employer representatives and employee representatives as nominated or elected by each.¹⁸⁹ The representatives hold office for twenty four months and may be re-appointed when their term is over.¹⁹⁰ This term may end before twenty four months elapses if the representatives fail to show up for three consecutive council meetings without good cause,¹⁹¹ or through application from the parties they represent.¹⁹²

The Council meets at any time it considers appropriate and holds a general meeting in the month of March.¹⁹³ The Council in this meeting has to elect a Chairperson and Deputy Chairperson from its pool of representatives who will hold office for a period of two years. This coincides with the period of twenty four months which representatives have as part of the bargaining council. This means that the Chairperson and his deputy may not hold office as such even though they have ceased to be representatives of parties to the bargaining council.

184 S 5.2 .
185 S 5.3.
186 S 5.3.
187 S 6.
188 S 7.
189 S 8.1.
190 S 8.7.1.
191 S 8.8.2.
192 S 8.8.1.
193 S 9.

The bargaining council may formally have people under its employ. It has to appoint a secretary and other officials on terms and conditions it deems appropriate to work with to assist the bargaining council and its structures.¹⁹⁴ These officials are subject to normal rules regulating employees in labour law.¹⁹⁵

The constitution of the bargaining council gives effect to dispute resolution measures as one of the main purposes of bargaining councils. The bargaining council is mandated to adopt a dispute resolution procedure in its constitution within twelve months of its registration.¹⁹⁶ The council has to perform its dispute resolution function in accordance with the *LRA* and the *CCMA*.¹⁹⁷ In the event that a dispute is referred to arbitration, the proceedings must be conducted in accordance with the provisions of section 138 and 142 and if applicable sections 139, 140 and 141 of the *LRA*,¹⁹⁸ read with the changes required by the context.

The constitution of the bargaining council also provides succinct rules pertaining to the conclusion of collective agreements.

3.4.1.3 Collective Agreements

Parties to the council also have the liberty to introduce proposals for the conclusion of collective agreements.¹⁹⁹ Sub sector chambers or sections are also given the liberty to conclude agreements in the event where no employer organisation exists in the section.²⁰⁰ These agreements are, however, concluded with assistance from the council. The bargaining council upon receiving proposals appoints a negotiation committee to conclude a collective agreement for that sub sector on behalf of the council on terms determined by the Executive Committee of the bargaining council.

The bargaining council has the power to give full force and effect to collective agreements concluded in any of the structures of the councils. It may also apply to

194 S 14.

195 S 14.1.2.

196 S 17.1.

197 S 17.2.

198 These sections of the *LRA* pertain to general provisions for arbitration proceedings, powers of commissioner when attempting to resolve disputes, special provisions for arbitrating disputes in essential services, special provisions for arbitrations about dismissals for reasons related to conduct or capacity and resolution of disputes if parties consent to arbitration under auspices of Commission respectively.

199 S 18.1 *Constitution of National Textile Bargaining Council*.

200 S 18.3.

the Minister of Labour to extend the agreement to non-parties and enforce the agreements.²⁰¹ The bulk of litigation that involves bargaining councils is mainly due to the dissatisfaction that arises due to this extension. These will be discussed at a later stage.²⁰² Businesses are given the opportunity to apply to the bargaining council to be exempted from a collective agreement. They must do so to the Council of the bargaining council setting out relevant information. The application will then be considered by an Exemptions Committee appointed by the Council.²⁰³ Bargaining councils, however, can effectively refuse to accept such applications. In *Subaru Pretoria (Pty) Ltd v Motor Industry Bargaining Council and others*,²⁰⁴ the bargaining council had granted the applicant employer exemption from its provident fund agreement but later withdrew the exemption upon realising that it had falsely believed that the applicant's fund would provide its employees with adequate and suitable alternative retirement benefits. This decision was upheld on an internal appeal. The Labour Court also held that the council had applied its mind to the matter and had exercised its discretion properly and reasonably

Accountability is also of prime importance to the council. The council has to open and keep an account in its name at a bank of its choice in South Africa. All payments made from this account must be approved by the Council.²⁰⁵ To ensure maximum accountability, the Secretary of the Council has the responsibility to prepare monthly statements showing the income, expenses, assets, liabilities and financial position of the bargaining council in general.²⁰⁶

The National Bargaining Council for Clothing Manufacturing Industry is the other of the bargaining council operative in the garment industry in South Africa.

3.4.2 The National Bargaining Council for Clothing Manufacturing Industry

The structures of the National Bargaining Council for Clothing Manufacturing Industry are similar to those of the National Textiles Bargaining Council. The only notable difference is with regard to representation requirements. The council was initially made up of six employers organisations (Cape clothing association, Eastern

201 S 32 the LRA

202 See heading 3.5.

203 S 19.

204 (JR 2068/2010)[2014] ZALCJHB 10.

205 S 20.

206 S 20.5.

Province clothing manufacturers association, Transvaal clothing manufacturers association and the Northern decentralised clothing manufacturers association) and the South African Clothing and Textiles Workers Union as the only trade union.²⁰⁷ Additional trade unions and employer organisations may apply to the council in writing for admission as a party whereupon the Council will consider the application within ninety days and base itself on the proportional representation principles including appropriate thresholds as agreed to by the parties to the council from time to time when granting admission.²⁰⁸

The bargaining council is comprised of twenty two representatives. Half of these are appointed by the employer party and the other half by the union.²⁰⁹ The constitution of the council does not prescribe the criteria the union should use for electing its representatives. It only requires that, when appointing employer representatives, each employer organisation is entitled to elect a representative and the rest of the representatives be appointed by agreement between the employers organisations party to the council on the principle of proportionality.²¹⁰ Office bearers in the council assume office for a period of one year as opposed to the twenty four months applied in the National Textile Bargaining council.

The functions of these councils in the garment industry have, however, been subject to scrutiny in recent times.

3.4 Relevant case law

There have been a number of court cases involving bargaining councils in the garment industry.²¹¹ The most important of these cases is *Valuline CC and Others v*

207 S 5 *Constitution of National Bargaining council for Clothing Manufacturers* .

208 S 6.1.

209 S 8.1.

210 S 8.2.1.

211 There have been challenges to the Minister's decision to extend agreements in other industries. In *NEASA v Minister of Labour* JR3062/2011 where the court allowed an Application to declare invalid the extension to non-parties of a collective agreement concluded by a bargaining council on the basis that the Minister failed to establish representivity within the scope of agreement as required by Section 32(3)(b) and (c). The respondents in the case had relied on a certificate of representivity issued by the registrar in terms of section 49. The court held that the certificate was only relevant to the representivity of the parties within its registered scope and it was not sufficient to requirement of representivity within scope of agreement upon extension. The Minister's decision was therefore set aside.

*Minister of Labour and Others.*²¹² The Constitutional Court in this case found that the Minister had incorrectly relied on a certificate of representivity issued to the bargaining council. The Minister should have based himself on the representivity of the parties to the collective agreement at the time that the agreement was submitted to the department. The court in granting its decision highlighted that it was aware that:²¹³

Authors like Godfrey, Du Toit and Theron :Collective Bargaining in SA and Du Toit *et al*, Labour Relations Law: a Comprehensive Guide state that the powers of the first respondent to extend collective agreements of bargaining councils to non-members within a bargaining council's registered scope is of critical importance in ensuring the continued existence of the bargaining council system.

The court verified the applicant's contention that, when extending a collective agreement to non-parties, the Minister is obliged to consider the impact of such extension, particularly the potential of job losses in the sector concerned.²¹⁴ The Minister has accepted this judgement and has enjoined the Department of Labour to accept the judgement setting aside the Minister's extension of the main agreement on the National Bargaining Council for the Clothing Manufacturing Industry in December 2010.²¹⁵ The court in handing out the judgement, however, may have opened the flood gates of litigation. The court unequivocally stated that the Minister enjoys no discretion when extending bargaining council agreements as far as section 32 is concerned. The Minister, having satisfied himself as to the threshold requirements in section 32(3) (a) to (g), must extend the agreement by publishing in a gazette within sixty days. This formal pronouncement by the court may have potentially triggered the downfall of the bargaining council system in South Africa.

There are number of cases flow from the above stated judgement. Free Market Foundation (FMF) has currently instituted a constitutional challenge to the bargaining council system *Free Market Foundation v Minister of Labour and Others.*²¹⁶ FMF seeks to particularly challenge the constitutionality of section 32 of the *LRA*. The section mandates the Labour Minister to extend bargaining council agreements to non-parties when a bargaining council makes an agreement, provided that the parties to the council are sufficiently representative of the industry. FMF claims that

212 CC Case No: 5642/2011.

213 Para 42.

214 Para 47.

215 Ramutloa 15 March 2013 www.gov.za.

216 13763/2013.

the section distorts the provisions of majority rule as it permits the minority to coerce the majority into complying with a standard set of terms and conditions of employment. FMF further claims that the Minister does not have the discretion to decide not to extend the agreement or to exclude certain clauses. This was the effect of the ruling in *Valuline CC and Others v Minister of Labour and Others*. FMF claims that extending agreements that are reached between private parties in bargaining councils in this fashion to those not involved in the decision making is unconstitutional.

The Constitutional Court should exercise great caution when delivering the judgement in this case. Holding that the extension of agreements is unconstitutional could on one hand hamper the efficiency of the whole bargaining council system. Bargaining councils assist in the setting of competitive wages.²¹⁷ This means that upon the extension of the agreement, even workers from rural parts of the country that are not part of the council receive the benefit of decent wages. They will cease to benefit from such extensions should the Constitutional Court hold section 32 to be unconstitutional. Furthermore, FMF in its founding papers appears to be fighting a battle that is greater than purely fighting against the extension of council agreements. It rather seems to be focusing on the extension of agreements as the head of the bargaining council system its ultimate intention is to kill the whole bargaining council system in the country.

3.5 Conclusion

There are many of challenges facing the bargaining council system in South Africa. There has recently been a spate of cases before the courts, challenging this system. Section 32 of the *LRA*²¹⁸ has particularly been subject to criticisms. This section regulates the extension of collective agreements concluded in a bargaining council. In terms of the LRA, a bargaining council can request the Minister of Labour in writing to extend a collective agreement to non-parties which fall within its jurisdiction. It has been argued that these extensions place unnecessary burdens on small and new businesses and contribute to the high unemployment rate in the

217 S 28 (h) the LRA.

218 The *LRA*.

country.²¹⁹ The effect of extending agreements to non-parties is overstated. Legislation affords non-parties to apply for exemption from the agreement. Section 30 of the *LRA* requires the constitution of a bargaining council to describe the procedures to be followed for a company to obtain exemption from some or all the clauses of an agreement. The benefit of extending these agreements also outweighs the disadvantages. It helps non-parties to the bargaining council to also benefit from the array of benefits that are attached to the council. Furthermore, the Minister of Labour has proposed changes to the legislation currently regulating bargaining councils. These amendments seek to strengthen the position of non-parties to whom such agreements have been extended, and also propose a quicker and more efficient exemption procedure for non-parties.²²⁰

The bargaining councils in the garment industry are fully equipped with the tools to achieve the purpose of labour law in the country. The purpose is:²²¹

to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are(...)to provide a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and formulate industrial policy.

The voluntarist nature of the bargaining councils is particularly ideal in a country that affords its citizens a range of liberties like South Africa. The next chapter seeks to conclude whether the bargaining council system as used in South Africa would be ideal for a country like Lesotho.

The next chapter is the penultimate section of this study. It focuses on the conclusions that can be drawn from the bargaining council framework in South Africa. It also provides a list of recommendations for the collective bargaining set up in South Africa. A brief discussion of the international trends in collective bargaining will also be made. This will be pertinent in assisting to ultimately prove lessons that Lesotho should learn from the South African experience.

219 DPRU *Analysing Wage Formation in the South African Labour Market* 1.

220 Botes and Kelly Unknown www.labourguide.co.za.

221 S 1 the LRA

Chapter 4 - Conclusions and Recommendations

4.1 Introduction

The history of collective bargaining in South Africa shows that bargaining councils emanated as an offspring of the industrial council system. Great caution should be exercised when comparing the two as the latter was characterised by a wider industrial relations system than South Africa currently has.²²² The two also existed in different economic and political times. The industrial council system existed as an alliance between white government as the central figure, white businesses and white labour. This ordinarily created barriers to international competition which meant that the system was immune to global influences.²²³ In the 1960's until the late 1980's the National Party Government introduced a range of measures that were intended to develop the internal manufacturing in the clothing and textiles industry.²²⁴ High tariff walls at the time effectively prevented imports from penetrating the local market place. This beckoned by the sanctions placed by the international community in protest of South Africa's apartheid policies also helped to isolate the garment industry in the country from global pressures.

South Africa after years of isolation had to be re-integrated as a member of the global community after it renounced apartheid. This meant that it could now participate in international trade. This in turn meant that the labour structures had to bend to accommodate this development. The new structures put in place involved the promotion of centralised collective bargaining mainly at bargaining councils.²²⁵ The purpose of this part of the study is to evaluate whether bargaining councils are the ideal vehicles for promoting collective bargaining. Suggestions will also be made pertaining to the best means for promoting collective bargaining in the country. The ultimate intention is to determine the best system which promotes collective bargaining, a system that Lesotho as country can be advised to copy. The history of

222 Godfrey and Bama *The State of Centralised Bargaining and Possible Future Trends* 222.

223 Godfrey and Bama *The State of Centralised Bargaining and Possible Future Trends* 222.

224 Bennett *Organising the Informal Economy : A Case Study of the Clothing Industry in South Africa* 10.

225 Ferreira *Developments in Labour Law in South Africa* 201 maintains that labour dispensation post re – integration was shaped in several pieces of legislation that constitute the country's labour legislative framework. The *LRA* was one such legislation. It recognises collective bargaining as the most acceptable means of resolving disputes of mutual interest and encourages and provides the means to reach agreement.

collective bargaining in both countries indicates that the labour regulations structures in Lesotho are influenced to a great extent by the dispensation in South Africa.²²⁶

4.2 Promotion of collective bargaining in bargaining councils

Bargaining councils in South Africa share the same characteristics. The councils in the garment industry particularly have very few differences. They have a common architecture and set of objectives and functions. The CCMA concludes that this system of bargaining councils enables diversity.²²⁷ This is due to the fact that its principles centre on principles of governance and voluntarism. The parties have the liberty to structure the councils in a manner that best suits the sector. This is in line with the purpose of collective bargaining. Cheadle,²²⁸ maintains that there are three components to the right to collective bargaining.

- There is a freedom to bargain collectively – this is a negative right. It is a right normally raised against a government passing legislation prohibiting collective bargaining or having the effect of doing so.
- There is a right to use collective economic power in a pursuit of a demand.
- There is a positive right with the concomitant duty to bargain. This the model used in the US, Canada and Japan.

It is safe to conclude, therefore, that the voluntary nature of centralised collective bargaining is essential in order to give effect fully to the right to collective bargaining. The bargaining council system is, however, facing many challenges.

4.2.1 Challenges to Bargaining Council System

It has been established that the number of bargaining councils in South Africa is dropping drastically by the years. Nel,²²⁹ suggests that this situation with bargaining councils necessitates that the collective bargaining framework in the country be reviewed. He also attributes the potential downfall of this sector to

- i) Employers who use the voluntarist nature of centralised bargaining in a manner that is contrary to the intention of the voluntary system. Employers stay out of the bargaining council or threaten to collapse it in order to force a framework that is favourable to them.

227 LEP and NALEDI *Support for Bargaining Councils and Centralised Bargaining* 20.

228 Cheadle *Collective Bargaining and the LRA* 147.

229 Coleman *Towards New Collective Bargaining* 76.

- ii) Employers who undermine the impact of bargaining council agreements. They use a number of strategies to achieve this effect. They use mechanisms like the proliferation of atypical forms of work, informalisation and refusal to register et cetera
- iii) Large numbers of workers who are left outside the system by large scale exemptions.
- iv) Employers who are exploitative of the conditions and the position of workers in vulnerable sectors of the country. They constantly pressure for below par wages by threatening to collapse centralised bargaining.
- v)

Nel's analysis goes to show that employers are at the heart of the challenges facing the bargaining council system. This position is further proven by the fact that employers have recently waged incessant attacks on the collective bargaining framework in South Africa. Employers in the clothing sector have specifically challenged centralised bargaining at bargaining councils in the courts. There is, however, likelihood that the bargaining council system in the country may remain unaltered post the court cases. This may be undesirable as it is apparent that the collective bargaining system in the country as it stands is failing to meet its objectives. Labour law authorities believe that the *LRA* has failed to achieve its objective of establishing comprehensive collective bargaining institutions. Cheadle for instance,²³⁰ who was instrumental in the drafting of the *LRA* says:

The policy of deepening and expanding the coverage of bargaining councils is not achieved by legislative fiat – it requested the social partners and particularly the state to drive the implementation of the policy. The sorry state of sectoral bargaining eight years after the commencement of the *LRA* is testimony of the failure to do so. The first problem that required attention was the fragmentary coverage of bargaining councils with most workplace not covered by sectoral bargaining. Most councils were not truly sectoral...there is a continuing failure to provide the subsidies to provide the dispute resolution functions effectively. There is little evidence of the council giving effect to many of their roles and it falls to the department to develop programmes to assist councils.

Authors like Cheadle ignore the efficiency of bargaining councils in relation to dispute resolution. They focus on the minor negatives without taking the broader positives in to consideration. One of the *LRA*'s main objectives is to promote collective bargaining as a means of regulating relations between management and labour and

230 Cheadle *Regulated Flexibility and Small Business* 29.

as a means of settling disputes between them.²³¹ Bargaining councils are well equipped to perform this function. They have the responsibility to resolve disputes that arise from collective agreements. A bargaining council does not necessarily have to be accredited to the CCMA in order to perform dispute resolution functions regarding parties to the council.²³² If the council applies to the CCMA for accreditation, the CCMA may grant it similar powers to CCMA of conciliation. It has been shown that disbursement of funds to the bargaining council by the CCMA is at times delayed. This hampers the efficiency of the council to perform such functions. Critics to bargaining councils are quick to raise this as a challenge to the system. They, however, turn a blind eye to the fact that the council may perform dispute resolution effectively in the sector without the assistance of the CCMA. Dispute resolution in bargaining councils is effective. The lack of a bargaining council in the mining sector may prove to be one of the major factors behind the recent striking calamities in the sector.²³³

This, however, does not take anything away from the fact that the bargaining council system is in dire straits. This necessitates that recommendations of improvement to the system be made.

4.3 Recommendations

George Santayana asserted that those who do not learn from history are doomed to repeat it.²³⁴ In order to avoid the mistakes of the past, any recommendation made on the improvement of centralised bargaining in South Africa, should begin by highlighting these mistakes.

231 S 1 the LRA .

232 DPRU *Understanding Efficiency of Dispute Resolution* 7.

233 Hlongwane *Daily Maverick* 1 notes that there is no sector wide bargaining council in the mining industry. Negotiations occur at operational level and are haphazard and scattered. This results in disparities in wages paid by different mines. This was at the heart of the infamous Marikana strike in August 2012. Hlongwane notes that the department of labour has pushed through a plan to establish a bargaining council under the auspices of the chamber of mines. It has got companies and unions to sign a document to create a temporary structure for bargaining. This would entail the replacement of the recurrent relationship of unions negotiating on behalf of workers at a certain company and would also institute sector wide limitations on wages.

234 Clairmont 2013 Bigthink.com/the-proverbial-skeptic.

4.3.1 Industry Restructuring

The ILO pens down that industry restructuring that occurred in South Africa post democracy had a drastic impact on jobs in the garment industry.²³⁵ Between January 1995 and 2001 almost 115 000 people in the garment industry lost their jobs. Of these workers, more than 10 000 workers employed in 100 factories lost their jobs due to factory closures. Retrenchment also primarily affected women workers as the industry is female dominated. It follows, therefore, that if a complete overhaul of the system should be implemented, vast job losses are imminent. This would be a very undesirable position for a country with a very high unemployment rate.

Furthermore evidence shows that employers find ways to manipulate the situation when major restructuring of the bargaining council system takes place. Employers in South Africa retrenched their workers in order to re-engage them as independent workers when restructuring took place.²³⁶ This would enable them to avoid paying wages and providing conditions of work stipulated by the bargaining council. This is disadvantageous to workers as it denies them a range of benefits and wages that they would be entitled to as formal employees. Some companies during the restructuring opted to relocate production to rural areas in order to avoid paying higher urban area wages. The employers also assisted retrenched workers to set up their own clothes making businesses in residential areas.²³⁷ This increases the burden of monitoring these offspring businesses by government. Monitoring these businesses would particularly be strenuous for a country with limited resources like Lesotho.

This, therefore, necessitates any restructuring that takes place should not amount to a complete overhaul of the system. Policies that are put in place should also be followed.²³⁸

235 Bennet *Organising in the Informal Economy : A case Study of the Clothing Industry in South Africa* 10.

236 Bennet *Organising in the Informal Economy : A case Study of the Clothing Industry in South Africa* 10.

237 Bennet *Organising in the Informal Economy : A case Study of the Clothing Industry in South Africa* 12.

238 The South African Planning Commission's Diagnostic Report, released in June 2011, set out South Africa's achievements and shortcomings since 1994. It identified a failure to implement policies and absence of broad partnerships as the main reasons for slow progress. This report also and set out a number of challenges South Africa is facing. These *inter alia* included: too few people work, infrastructure is poorly located, inadequate and under maintained, the economy is unsustainably resource intensive and SA remains a divided

To determine the best form of collective bargaining for the garment industry, an overview of the international position regarding both collective bargaining and the garment industry itself should be made.

4.3.2 Global garment manufacturing industry

The global garment industry has undergone considerable changes over the years. The rapidly changing world economic environment has led to significant adjustment pressures.²³⁹ These pressures have also been caused by a shift of clothing production to some developed countries. Asia and America have had considerable clothing outputs over recent years. Studies undertaken by the ILO in the clothing, textiles and footwear industries show that the United Kingdom, Italy, Australia and Canada have had a shift towards home based production.²⁴⁰ Developing countries in a bid to retain a mark of share of global garment production have been compelled to take heed to ways to reduce costs. The ILO notes that this has resulted in Latin American countries resorting to widespread production in the informal economy.²⁴¹

South Africa too has to follow suit, find and attempt to find cost effective means of collective bargaining. This necessitates that the international position in this light be observed.

4.3.3 International Trends in Collective Bargaining

The international community is gradually moving towards allowing the state to play a more significant role in minimum wage regulation. The list of countries opting for this approach ranges from developing economies to developed countries of Western Europe.²⁴²

The ILO notes that the trend increased after the global crisis which led to employers, workers and delegates from ILO member states to adopt a Global Wage Pact in

society. The Draft National Development Plan was subsequently drawn in order to address these challenges.

239 Bennet *Organising in the Informal Economy : A case Study of the Clothing Industry in South Africa* 8.

240 S 1.1.1 ILO Report 2000.

241 ILO Global Wage Report 2010.

242 ILO Global Wage Report 2010.

June 2009 at the International Conference.²⁴³ The Global Jobs Pact encouraged governments to consider options such as minimum wages to reduce poverty and inequality. This would also increase demand and contribute to economic stability. The Pact places importance on the need to regularly review and update minimum wages in member countries. Central and European countries took voluntary steps to improve on this pact. These countries recognised in November 2009 that the development of wage institutions was insufficient. They then agreed on the need to have minimum wages as a wage floor in order to protect the most vulnerable worker. Countries in Central Asia also followed suit.²⁴⁴ Both Lesotho and South Africa are recommended to follow this example. They need not abandon their current legislation framework. The ILO maintains that the national minimum wages and collective bargaining are complementary. They are not parallel despite the fact that they serve different purposes.²⁴⁵ The national minimum wage sets the basic floor and may be asserted as a basic right which will prevent a race to the bottom by exploitative employers.

Collective bargaining on the other hand would serve to improve on the wage structure and help to improve on a host of other non-wage structures. This would mean that both Lesotho and South Africa would be able to retain the structures of their current systems.

Coleman,²⁴⁶ pens that this dual approach has been proven to be effective by the Brazilian success story. He notes that Brazil consolidates national minimum wages and collective bargaining. This has led to a rise in people's standards of living in the country. Strides are being made to reduce poverty and create decent work over a short period of time.

Congress of South African Trade Unions (COSATU) claims that one of the driving factors behind the Brazilian success story was the central role government played in driving and financing development. The government reversed privatisation and drove a state led industry strategy.²⁴⁷ It, therefore, becomes advisable for governments of both Lesotho and South Africa to play central roles by setting minimum wages and

243 Coleman *Towards New Collective Bargaining* 8

244 Coleman *Towards New Collective Bargaining* 9

245 Coleman *Towards New Collective Bargaining* 9

246 Coleman *Towards New Collective Bargaining* 9.

247 COSATU "Secretariat Report on the 11th National COSATU Congress".

then allow parties to bargain collectively on improved wages. The current manner of setting of wages is almost similar in the two countries. Employers and employees are allowed to set their own minimum wages. The governments merely assent to the wages by gazetting it. In Lesotho, the minimum wage for a skilled garment industry worker has remained fixed at \$100 per month since October 2008.²⁴⁸ This is despite the fact that each year, the Lesotho government through the Wages Advisory Board calls both the employers' associations and trade unions within each sector to negotiate on the minimum wage to be set for the following year. This is similar to the manner in which minimum wages are set in South Africa, either through sectoral determinations or bargaining councils.

A recommendation is therefore made for governments of both countries to unilaterally set minimum wages as the basic floor and then allow both employer and employee to negotiate thereon. This will not be a deviation from collective bargaining which is advocated for by both countries.

It is imperative that recommendations address the centralised bargaining problems that are specific to South Africa's industries.

4.3.4 Centralised Bargaining Solutions

It is undisputed that South Africa's bargaining council system is facing potential crisis. There is evidence showing that members in some sectors of some councils are becoming alienated from centralised bargaining because of the inadequate participation of workers. These members benefit very little from collective agreements.²⁴⁹ Trade unions have to redevelop their strategies to ensure that members benefit from agreements. These strategies should involve more defined sectoral developments and wage policies. The CCMA gives three options as a solution to this problem.²⁵⁰

The first option focuses on increasing the Department of Labour, employer and union parties in bargaining councils as opposed to amending the *LRA*. Suggestions are made that the department should take a more flexible approach to what constitutes 'sufficient representivity'. It has been highlighted in this work that the *LRA* fails to

248 Anon www.lesotho_textiles.com.

249 Coleman *Towards New Collective Bargaining* 79.

250 LEP and NALEDI *Support for Bargaining Councils and Centralised Bargaining* 63-64.

define succinctly the term 'sufficiently representivity'. The CCMA suggests that parties to the council can contribute to improving representivity.²⁵¹

The second option the CCMA gives relies on court enforcement of the duty to bargain. It suggests that organisational rights regime should be dropped, the definition of workplace to be amended and a duty to bargain to be introduced. Under this regime, the Labour Court would be empowered to issue an advisory order regarding the level at which bargaining should take place. Framework agreements would explicitly be articulated with workplace bargaining. Such agreements would automatically be extended. This option further entails that productivity bargaining be promoted at workplace level in order to complement framework agreements. NEDLAC and Millennium Labour will also have a bigger role in coordinating sector level bargaining and macroeconomic objectives. Conciliation boards should also be introduced to support bargaining arrangements that fall short of bargaining council requirements.

The third option raised by the CCMA study suggests compulsory centralised bargaining. The Minister of Labour should be vested with the power to prescribe sectors for collective bargaining. Policy could then be developed to promote collective bargaining in each sector. This would give the sectors the liberty to determine their own thresholds for purposes of bargaining. The government is yet to respond to these proposals even though they were submitted as way back as 2010.

Consideration of these suggestions should be made by government. Government, however, does not need to adhere strictly to one suggestion. It may pick relevant parts of the three suggestions to formulate one concrete framework that would improve on the current set up. The first option provided by the CCMA even though it does not respond to the problem of employers undermining bargaining councils framework raises an important suggestion. It alludes to retaining the model of voluntarism which is pertinent to the notion of collective bargaining. The two other options raise important suggestions like affording both the Minister of Labour and the Labour Court more powers. These could be used to improve on the voluntarist model.²⁵²

251 LEP and NALEDI *Support for Bargaining Councils and Centralised Bargaining* 63-64.

252 "Voluntarism is generally based on good faith and enables trade unions and employers to regulate their own relations without interference from public authorities. It subscribes to the

The current system of voluntarism has failed to an extent but can constructively be improved upon. Van Niekerk²⁵³ maintains that self-governance is a legitimate and most desirable mechanism to establish terms and conditions of employment and resolve disputes. Furthermore, businesses have unequivocally expressed that they would resist a shift from the voluntarist approach as they fundamentally support the manner in which the *LRA* regulates collective bargaining and they will be opposed to any proposals to introduce a duty to bargain.²⁵⁴ This, therefore, means that it is imperative to bring businesses to the table in whatever restructuring that takes place. The government in the new collective bargaining structure should provide incentives to businesses which adhere to principles of the bargaining council system. These may include tax incentives, specialised tax rates and access to targeted assistance programmes that will only be available if the employer complies with various policies and has registered as a member to a bargaining council in the relevant sector.

Rigorous studies should also be further done on the labour market before improvements are made. The Presidential Labour Commission in 1996 followed the finalisation of the *LRA*. The study should have, however preceded the legislation as many critics now claim that the drafter of the *LRA* blindly opted for a voluntarist model without having considered other alternatives.²⁵⁵ If such a Commission should be set up, it should be efficient and quick to release its findings. Undue delays are undesirable when effecting change to legislation.

The recommendations for South Africa can be summarised in short as follows:

- The voluntarist model should be retained but improved;
- The government should take a more active role in centralised bargaining;
- Resourced structures backed by effective state programmes to formalise and regulate the market should be put in place;
- Support for bargaining councils should be embedded in government's furtherance of collective bargaining;

principles of three ILO conventions". Freedom of Association and Right to Organise Convention (1948), Right to Organise and Collective Bargaining Convention(1949) and Tripartite Consultation Convention (1976).

253 Van Niekerk *Regulating Flexibility and Small Business* 51.

254 Coleman *Towards New Collective Bargaining* 79.

255 Coleman *Towards New Collective Bargaining* 84.

- Minister of Labour should prescribe sectors for collective bargaining;
- The government should have an explicit mandate to address wage and income inequalities;
- The government should set floor minimum wages and let parties bargain on increases thereon;
- More incentives should be given to businesses to persuade them to join bargaining councils; and

It has been established that the legislation in South Africa influences the legislative framework in Lesotho to a great extent. The lesson Lesotho should learn from the South African experience can be summarised as follows

4.3.5 Lessons for Lesotho

The main aim of collective bargaining is to maintain good industrial relations and labour peace between the employer and employee. Collective bargaining was established with the prime intention of ensuring that there is equal power between the employer and employee and also to ensure that they focus on mutual matters of interest. Collective bargaining occurs at many levels and at industrial level in South Africa it occurs at bargaining councils. Bargaining councils are naturally suited to promote collective bargaining. The bargaining council system in South Africa, however, is not without fault. Upon analysing this market, one can learn that

- Bargaining councils are enemies to small businesses and job creation.²⁵⁶
- Bargaining councils cover a small proportion of employers in an industry.
- Employers are reluctant to join bargaining councils.
- Bargaining councils are especially suited for the South African labour market as they offer a range of benefits that are specific to the country.
- Extension of bargaining council agreement to non-parties, especially in the garment industry is particularly controversial.

256 Payne *Clothing Industry Sheds Jobs* <http://mg.co.za/article/2012-02-17> reported that the clothing manufacturing industry was on a knife edge after the announcement of the retrenchment of about 1900 by two big employers in the industry. Smaller companies also indicated that they would face closure if the writs enforcing bargaining council agreements on them were executed. The United Clothing and Textile Association also indicated that wages set by bargaining councils were the reason for the large scale retrenchments in the industry. He particularly indicated that Seardel which had been forced to retrench a lot of workers in South Africa, had not retrenched any workers in its Lesotho operations where it could pay lower wages.

- Legislative industry overhauls result in massive job losses.

These lessons coupled by Lesotho's delicate position in the global context show that Lesotho should not opt for an overhaul of its collective bargaining structures and desist from switching to a bargaining council system. It should consider the fact that the majority of investors who do business in Lesotho's garment industry do so to take advantage of duty free exports that are enjoyed by Lesotho by virtue of being party to AGOA.²⁵⁷ This Act, however, is set to expire in 2015. This eminent end influences investors currently to refrain from long term projects in Lesotho's garment industry.²⁵⁸ It, therefore, becomes highly probable that an overhaul of the collective bargaining system in Lesotho may lead to an exodus of the already sceptical investors from Lesotho.

The South African experience shows that even though bargaining councils promote collective bargaining to a great extent, they are, however, not the solution for Lesotho. The majority of the benefits akin to the bargaining council system are already present in Lesotho's collective bargaining framework, even though not contained in one single structure like is the case in the bargaining council system. Organisations like Better Work in Lesotho for instance have dedicated their resources in the garment industry in Lesotho, like is done in South Africa through SETA boards and bargaining councils.²⁵⁹ The prime focus should be directed towards setting acceptable minimum wages in the sector. The solution to this lies with the government taking a more active role in setting standard minimum wages in the whole industry. The Brazilian experience that South Africa is advised to learn from has already evinced that this approach bears fruitful dividends.²⁶⁰

257 Better Work Lesotho *Baseline Report* 6.

258 Better Work Lesotho *Baseline Report* 6.

259 Better Work Lesotho *Baseline Report* 6.

260 See Heading 4.2.3. Coetzee *Business Day Live* notes that in Brazil, the minimum wage is adjusted annually by the inflation rate. He writes further that President Jacob Zuma in his state of the nation address 2014 called on social partners to deliberate on wage inequality and committed government to investigate the possibility of a national minimum wage. He however makes a warning that large scale unemployment may continue if the minimum wage is set too high especially if it is set with regard to a living wage or the average income of workers without also taking into account productivity, affordability and the need compete in international markets.

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