

**THE RELEVANCE OF THE BARGAINING COUNCIL ON A GROUP OF
SMALL RESTAURANT ENTERPRISES IN PRETORIA**

by

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DEDICATION

I dedicate this research to a special person in my life: my late mother *Katjie Khanukani Masilela*.

With all the sacrifice, mental and moral support she provided for me, I dedicate this research to her. “*Ngiyathokoza kwamambala*”

THE RELEVANCE OF THE BARGAINING COUNCIL ON A GROUP OF SMALL RESTAURANT ENTERPRISES IN PRETORIA

ABSTRACT

This study explores the relevance of the Bargaining Council for the Food, Retail, Restaurant, Catering and Allied Trades (BCFRRCAT) on a group of small restaurant enterprises in Pretoria. An investigation into the functioning of the BCFRRCAT in Pretoria was done with special reference to their accommodation of small restaurant enterprises in the Bargaining Council (BC). The aim of the study was to determine if the BCFRRCAT understands the needs and problems of small restaurant enterprises in the industry and whether small restaurant enterprises adhere to the provisions of the main collective agreement of the BC.

The approach of the study was based on the fact that, in order to understand how the BC could be impacting on small restaurant enterprises, one needs to start by examining:

- the representativity position and coverage of the Council to put into perspective the number of employers and employees covered by the Council;
- Examine the actual process of extended BC agreement that is extended to non-parties by the Council;
- the enforcement capacity of the Council's inspectorates over collective agreements, and
- the nature of exemption system at the BC, reviewing the number of exemption applications received, the number of exemptions granted and the number of exemptions refused.

Against this background, the literature on BCs pointed out that the applicability of the BC system to small enterprises has come under considerable scrutiny since the 1980s. The trend has always been that the development of the BC system

has made it much more convenient for large employers to negotiate their interest at the Council level than for the small enterprises. Small enterprises tend to oppose BC activities and some of the issues that have been raised include the extent to which Councils are representative of small enterprises and accommodate their needs at the Council.

To address the main research objectives, semi-structured interviews were adopted as a specific type of qualitative research method. The mode of understanding qualitative research as an adopted research design has been analyzed on the basis of a practically orientated description around the research problem of the study. The motivation to carry out this study qualitatively was founded on the following characteristics:

- its ability to understand the phenomena from the perspective of the people being studied;
- its ability to provide detailed descriptions of specific settings under investigation, and
- its ability to allow the application and testing of concepts that produced a wealth of detailed data about a small number of people.

The immediate conclusion that emerged from the study was established through the examination of three measures of representativity (i.e., the number of covered employees at party employers as a proportion of all covered employees, the members of party trade union as a proportion of all covered employees and the party employers as a proportion of all registered employers).

Hence, the Council was found to be less representative on the third measure (i.e., party employers as a proportion of all registered employers). This appeared to be for the reason that the extension of collective agreement covers only a very small proportion of small restaurant enterprises.

A practical explanation for large numbers of unregistered small restaurant employers within the scope of the Council is placed on the lack of enforcement capacity of the Council's inspectorates to enforce a collective agreement to non-registered employers in terms of Section 33 (1) of the Labour Relations Act 66 of 1995 (LRA).

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LIST OF ABBREVIATIONS:

| | |
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| BC | Bargaining Council |
| BCEA | Basic Conditions of Employment Act 75 of 1997 |
| BCFRRCAT | Bargaining Council for the Food, Retail, Restaurant, Catering and Allied Trades |
| CCMA | Commission for Conciliation, Mediation and Arbitration |
| CCRAWUSA | Club, Caterers, Retail and Allied Workers' Union |
| COSATU | Congress of South African Trade Unions |
| CSBP | Center for Small Business Promotion |
| DOL | Department of Labour |
| DTI | Department of Trade and Industry |
| IC | Industrial Council |
| ILO | International Labour Office |
| IMSSA | Independent Mediation Services of South Africa |
| LRA | Labour Relations Act 66 of 1995 |
| NEDLAC | National Economic Development and Labour Council |
| NGO's | Non-Governmental Organisations |
| PCTEU | Pretoria Catering Trade Employees Union |
| PDCA | Pretoria and Districts Caterers' Association |
| PLCTEU | Pretoria Liquor and Catering Trades Employees' Union |
| RFIs | Retail Financial Institutions |
| SACCAWU | South African Commercial, Catering and Allied Workers' Union |
| SMME's | Small, Medium and Micro Enterprises |
| VAT | Value-Added Tax |

THE RELEVANCE OF THE BARGAINING COUNCIL ON A GROUP OF SMALL RESTAURANT ENTERPRISES IN PRETORIA

CHAPTER 1 INTRODUCTION

1 INTRODUCTION

The idea behind the concept of a “Bargaining Council”, hereafter BC is not new. It was originally established in 1924 as part of the Industrial Conciliation Act 11 of 1924 then known as an “Industrial Council” (IC), which means that a BC is governed by the regulations stemming from the Labour Relations Act 28 of 1956, which followed the Industrial Conciliation Act 11 of 1924 (Butcher & Rouse, 2001:351). A BC is established when the employer and the trade unions (employee bodies) in a particular sector and geographic area agree to engage in collective bargaining. The employer associations and trade unions that agree to engage in collective bargaining are called parties to the Council. To be registered at the Department of Labour (DOL) trade unions must prove that they represent a sufficient number (e.g. 50%) of the employees in the specific sector (Budlender & Sadeck, 2007:8).

Initially the passing of the Industrial Conciliation Act 11 of 1924 was to provide a voluntary system of national and industry based Councils that would provide self-government of industrial sectors by representative employer organisations and trade unions (Finnemore, 2006:176). Underpinning the principle of self-government, the Industrial Conciliation Act 11 of 1924 provided and allowed for the extension of collective agreements reached by the parties at ICs.

Apart from the extension of collective agreements, the major challenges for the system of ICs were that the Labour Relations Act 28 of 1956 did not provide a framework for the doctrine of voluntarism. The interest and organizing strength of the Council was left to the parties, i.e. the employer organizations and trade unions. They could decide whether an IC would be formed

in the geographical area and what the scope of the Council was going to be (Moleme, 2001:6).

The system of ICs under the Industrial Conciliation Act attempted to provide an orderly system for self-regulation through collective agreements in particular industries. It has shown to be successful in numerous ways. According to Godfrey (1992: 14) there were fewer strike actions by employees when compared to the period before 1924; ICs were formed in a number of sectors and the membership of registered trade unions rose rapidly.

While the IC system proved to be successful in some instances, there were also many unsatisfactory developments and flaws that were revealed by the investigation of the Industrial Legislative Commission in 1935. These unsatisfactory consequences such as the exclusion of black workers from the definition of employee in the Act and the racial and skills divisions between employees created a deformed and stunted vision of a system that was nationally envisaged. The central concern of the Industrial Legislative Commission was the wide wage gap that existed in many industries between skilled workers and less skilled workers (Finnemore, 2006:176).

With the advent of Labour Relations Act 66 of 1995, hereafter referred to as LRA, that was the result of various Acts passed at different periods as discussed in chapter 2, the term “Industrial Council” was changed to “Bargaining Council” (Moleme, 2001:7).

This new system that was developed under the LRA 66 of 1995 was characterised by the local and regional BCs that provided for the establishment of differential wages for the regions that they covered and reflected differing labour market conditions. The wage difference for Councils was inherent in three categories of work; i.e. skilled, less skilled and unskilled. These wage issues were not the same in all industries, but depended on the type of industry and the negotiating power of trade unions and employer organisations.

1.1 BACKGROUND TO THE STUDY

The establishment and operation of BCs are governed in terms of section 27-34 of the LRA. Section 27 (1) (a) and (b) which states that a BC may be established by one or more registered trade unions and one or more registered employer organisations by adopting a constitution to meet the requirements of the LRA and obtaining registration of the Council.

According to Godfrey (1992: 5) the establishment and forming of a BC centres around four main features:

Firstly, the process of forming a BC is based on the principle of *voluntarism*. Parties to the Council can decide whether they want to establish or participate in a Council. It generally means that the parties that are interested in establishing a Council, whether it is on a national and industry basis or on a regional and sector basis, do so voluntarily. It also means that members of the Council can withdraw their membership from their respective Council at any time.

Secondly, the parties to the Council are expected to be *sufficiently representative* for the jurisdiction for which the Council is seeking registration. If the Council meets the requirement of being sufficiently representative, registration may be obtained by requesting the Minister of Labour to publish the agreement that has been reached in the Government Gazette. The agreement reached at the Council may be extended to cover non-party members of the Council and a wide range of matters of mutual agreement between the party members.

It is important to note that a collective agreement "...is not really an agreement or contract but a form of permitted domestic legislation which by the will of a statutory body is, by a majority vote, imposed on all members of a designated group of employers and employees, respective of any actual concurrence by the individuals of affected and notwithstanding any positive disapproval by any such individual" (Godfrey, 1992: 6). Once it has been published it is not compulsory that it should be re-negotiated at the next collective agreement meeting. Trade union parties are allowed to make proposals to improve certain aspects of the main collective agreement and the employer parties will be expected to respond.

The minimal state intervention in the functioning of BCs supports the principle of “self-governance” that is borne out by the legal framework. However, the state has an avenue to exercise its control over Councils. This generally takes place through the discretionary power that the Minister has with regard to the publication of the Council’s collective agreements in the Government Gazette and the extension of agreement to non-parties within the coverage of the Council.

In this case the principle of self-governance of the parties becomes limited in a sense that “...access to the fundamental benefits of the legislation, i.e. to have agreements made legally binding and have them extended to non-parties [it] is controlled at the absolute discretion of the Minister” (Godfrey, 1992: 7).

Thirdly, the aim of forming a BC is to *maintain industrial peace* within the jurisdiction or scope of the Council. Parties to the Council are charged with the task of maintaining industrial peace. They are expected to do so through the process of negotiating agreements that should prevent disputes from arising between the employer and the employee. Industrial peace can be ensured through the establishment of collective agreements.

According to Section 65 (2) (b) of the LRA this generally means that once an agreement is published, “...no dispute may be referred to the Council over an issue that is covered by the provision in an agreement where that provision has been in operation for more than 12 months” (Godfrey, 1992: 5). This also means that no strike action or lock out can be instituted over any issue covered by the collective agreement.

Fourthly, the forming of a BC also deals with *the participation of trade unions at the Council*. This means that no system will be prescriptive to trade unions in terms of participation at the Council. Registered trade unions that fall within the scope or jurisdiction of the Council should be allowed to take part in the formation of the Council.

An important factor that is required by the LRA is that trade unions should be sufficiently representative of employees of the employer members at the Council. This means that a wide range of trade unions of varying sizes and representing different interests to the Council can be accommodated in the process of forming a Council as long as they are sufficiently representative of the employees.

Section 30 (b) of the LRA states that the constitution of all BCs should include the representation of small and medium sized enterprises in order to accommodate small businesses.

Against this background, the applicability of the BC system to small enterprises has come under considerable scrutiny since the 1980s. The trend has always been that the development of the BC system has made it much more convenient for large employers to negotiate their interest at the Council level than for the small enterprises (Godfrey, Maree & Theron, 2005: 9). Small enterprises tend to oppose BC activities and some of the issues that have been raised include the extent to which Councils are representative of small enterprises and accommodate their needs at the Council (Du Toit, Godfrey, Goldberg, Maree & Theron, 1995:59).

In a study of 25 small firms by du Toit *et al.* (1995:95) 22 of the 25 firms indicated that BC agreements negatively affected their operations and 40% of the sample stated that the minimum wages set by the Councils were a problem for their enterprises. Since the BC is formed on a voluntary basis by representative firms and unions in an industry, irrespective of whether they participate in the negotiations, some business owners believe that such a centralisation is a condition for industrial peace, while others believe that it encourages inefficiency and creates unemployment (Moll, 2001:326).

Sections of employers continue to criticise the BC system and want it to be deregulated. There have been numerous complaints that small enterprises find certain requirements of the law and of BC agreements in particular impossible to implement. Consequently, small businesses have begun to oppose some regulations that are applicable to them. They argue

against strict regulations that are threatening the viability of many small enterprises, primarily because no account is taken of the problems experienced by small enterprises. In addition to this argument there is also the issue of the increase in unemployment and the view that small enterprises can contribute significantly to a decrease in unemployment (Moll, 2001:327).

Several studies have attempted to address and highlight the heated debates on the BC system in relation to small enterprises (Butcher & Rouse, 2001; du Toit *et al.*, 1995; Finnemore, 2006; Horwitz, Brosnan & Walsh, 1998; Moll, 2001; Godfrey, & Theron, 2002; Von Holdt, 1994). It appears that there is a need to consider each Council on its own instead of approaching the BC system as a whole. This is primarily because there is a difference in the structure and functioning of Councils in different sectors of the economy and this uniqueness requires different approaches.

It should be noted that the LRA does not provide a detailed model for BCs. It provides a skeletal framework for the establishment and functioning of BCs and leaves the details of the structure for the parties to negotiate. This explains why Councils have developed differentials in scope and area of coverage.

The principles as stated above are discussed in more detail in Chapters 2 and 3 with specific reference to their applicability to BCs.

1.2 CORE RESEARCH QUESTION

This study attempts to answer the following core research question:

What is the relevance of the Bargaining Council for the Food, Retail, Restaurant, Catering and Allied Trades on a group of small restaurant enterprises in Pretoria?

The point of departure is to carry out an investigation into the functioning of the BCFRRCAT in Pretoria, with special reference to the accommodation of small restaurant enterprises in the Council. It is also important to determine if the Council understands the nature and conditions of small restaurant enterprises and whether small restaurant enterprises understand and accept the provisions of the collective agreement reached at the Council.

1.3 RESEARCH OBJECTIVES

This study is guided by the following research objectives:

- To determine the representative position of the employer parties in the Council.
- To determine the extent of collective agreement coverage that is extended to non-parties by the Council.
- To evaluate the procedure followed for granting exemptions from a BC agreement, the criteria for exemptions and to what extent procedures are or should be based on principles of collective bargaining.
- To evaluate the extent of exemptions, particularly the way in which blanket exemptions or exemptions by application accommodate small restaurant enterprises.

- To determine how the BCFRRCAT inspectors implement the Council agreements.
- To describe the relationship between the BCFRRCAT and small restaurant enterprises, and the extent to which BC agreements expand or hamper the development of small restaurant enterprises.

1.4 UNITS OF ANALYSIS

Small restaurant enterprises are regarded as sub-units to the Council and the DOL is treated as an additional unit that was approached to supply additional information that was not obtained from the Council.

1.5 IMPORTANCE AND BENEFITS OF THE STUDY

The study of BCs has lately attracted a great deal of attention from researchers in the labour relations field. Researchers are still grappling with major questions and challenges faced by BCs in South Africa which include the proportion of registered and unregistered non-parties in certain sectors.

There are significant implications for the legitimacy and viability of BCs when the question of exemptions with particular reference to small enterprises is considered, (Du Toit *et al.*, 1995: 17). A review of the LRA indicates that research of the BC system in relation to small enterprises remains relevant in the field of labour relations. Legislation together with the BC attempts to address the needs of small enterprises, but there are differences of opinion about the sufficiency of these measures that need to be analysed.

BCs are considered to be a cornerstone of collective bargaining in South Africa (Belten, 1994:7). Several researchers (Butcher & Rouse, 2001; du Toit *et al.*, 1995; Finnemore, 2006; Horwitz, Brosnan, Walsh, 1998; Moll, 2001; Godfrey, & Theron, 2002; Von Holdt, 1994) have studied BCs with regard to compulsory centralisation and decentralisation of BCs in order to

provide an extensive understanding of BCs as a whole. Therefore, from a theoretical perspective, the contribution that this study can make to the body of knowledge is twofold.

Firstly, this study considers a single Council on its own, with the understanding that Councils are different in size, scope and functions. It is essential to study a single Council and generate detailed data on the structure and functioning of that particular Council.

Secondly, this study highlights the need to develop specific policies with regard to small restaurant enterprises and exemptions within the industry. It seems that Councils see no need to make special provision for employers that have always been regarded as small enterprises. In addition to this, there is a general perception that Councils are an impediment to small enterprises that cannot afford to comply with the minimum standards set by the Council. Coupled with this is the view that Councils are not well-disposed to the nature of small restaurant enterprises in general (du Toit *et al.*, 1995: 17-19).

From a practical perspective, the findings of this study can firstly assist in evaluating the current system of BCs on the basis of adjustments that are required to accommodate small restaurant enterprises.

Secondly, it can be useful for understanding and addressing the problems experienced by small restaurant enterprises and removing unnecessary obstacles that hinder growth.

Thirdly, it can indicate whether the councils have come to terms with small restaurant enterprises and small restaurant enterprises have come to terms with the Councils.

1.6 DELIMITATIONS AND ASSUMPTIONS

1.6.1 Delimitations

As there are a vast number of BCs and small restaurant enterprises in South Africa, this study specifically focuses on the BCFRRCAT and small restaurant enterprises in Pretoria which are both party and non-party employers within this industry. For the purpose of this study a small enterprise is defined as an enterprise where an employer does not employ more than seven employees as stipulated in the collective agreement of the BC (Bargaining Council for the Tearoom, Restaurant and Catering Trade, Pretoria, 2007:4). This definition is important since perceptions about what constitutes a small enterprise are varied.

1.6.2 Assumptions

The key assumptions for this study are the following:

- the LRA provides a legitimate avenue for the BC system (e.g. to provide for the procedures for exemption from a collective agreement). However it does not prescribe a comprehensive model for BCs;
- the structures and functioning of Councils which have been uniquely determined by the parties to the Council differ;
- the constitution of Councils is established along similar lines despite the difference in structure and functioning,
- the conditions of employment and minimum wages are contained in the main collective agreement;
- an exemption being granted or not granted is associated with an absence of clear exemption procedures to safeguard against the unfair granting of exemptions;
- the Councils are generally found to be reasonably representative of well-established business enterprises in the formal sector, and
- the usefulness of the BC system in democratic South Africa is contested by employers of small enterprises.

1.7 DEFINITION OF KEY TERMS

Two key terms are used in this research, namely: Bargaining Council and small enterprises. The context in which these key terms are defined for the purpose of this study is as follows:

1.7.1 Bargaining Council

According to Finnemore (2006:177) the concept “Bargaining Council” is defined as “an organisation, registered by the Department of Labour, comprising one or more registered trade unions and one or more registered employer organisations”. Both registered trade unions and registered employer organisations are termed “parties” to the Council (discussed in detail in chapter 2). More importantly, membership of the BC is on a voluntary basis. In this study, the term BC only refers to the BCFRRCAT in Pretoria, registered in terms of Section 29 of the LRA. In terms of Section 27 of the LRA, a BC may be established by one or more registered trade unions and one or more registered employer organisations for a sector and area by adopting a constitution that meets the requirements of Section 30; and obtaining registration of the BC in terms of Section 29.

1.7.2 Small enterprises

When attempting to define small enterprises, international and South African literature differs vastly on what constitutes a small enterprise (du Toit *et al.*, 1995:44). One of the major difficulties experienced by researchers has been to formulate an adequate definition of a small enterprise. Therefore, the classification of small, medium and large enterprises by the parties to Councils and officials of Councils varies widely.

According to the economic definition of Storey (2005:9) three criteria must be met to be classified as a small enterprise. The enterprise

- will have a relatively small share of the market place;
- is managed by owners or part-owners in a personalised way, and not by a formalised management structure; and
- is independent in the sense that it does not form part of a large enterprise.

Godfrey and Theron (2002:31) point out that the difficulty to define small enterprises results from the fact that the nature of businesses that can be defined as small exhibits a vast range of differences. Therefore, the question that arises from this argument is whether BCs can systematically address the problem of small enterprises if they are unclear about what a small enterprise is. This suggests that no careful thought has been given as to what constitutes a small enterprise. In some industries nearly all the firms or enterprises are considered micro or small as defined by the Department of Trade and Industry (DTI).

What is known as a small and medium enterprise may range from a township "spaza" shop to the retail outlet that may be the front of the big business, from a workers' co-operative to a high-tech manufacturing concern that is small by virtue of the number of employees. The prevailing way of differentiating between what is defined as a small and a medium enterprise is the number of employees engaged in service, i.e. businesses with relatively few employees and which are generally owner-managed. In South African literature employee size is generally taken into consideration when small enterprises are defined. However, in some cases analysts regard businesses with fewer than 200 employees and assets valued not more than R2 million as small (Department of Trade and Industry, 1994:31).

The following categories of business enterprises suggested by du Toit *et al.* (1995:45) and Chalera (2007:85) are considered in this study when differentiating between categories of business enterprises:

Micro enterprises refer to very small businesses that comprise only an owner and/or family or up to two employees. They lack some form of formality when it comes to business licensing, value-added tax (VAT) registration, formal business premises, operating permits and accounting procedures. Usually they have a limited capital base and business skills among their employees (Chalera, 2007:85).

Small enterprises refer to a bulk of established businesses with employment capacity that ranges between 5 to 50 employees. This type of enterprise is usually owner managed, most

likely found on industrial premises, tax registered and meet other formal registration requirements (Chalera, 2007:85).

Medium enterprises constitute a maximum of 200 employees with capital assets of R10 million and are predominantly owner/manager-controlled (Du Toit *et al.*, 1995:45).

Large enterprises are not specifically but presumably all companies above 200 employees or if less than 200 where capital assets exceed R10 million (Du Toit *et al.*, 1995:45).

The focus of this study is limited to a group of small restaurant owners employing not more than 7 employees. Primarily because the main collective agreement of the BCFRRCAT defines a small enterprise or employer as an organisation not employing more than seven employees at any time (Bargaining Council for the Tearoom, Restaurant and Catering Trade, Pretoria, 2007:4).

1.8 THE STRUCTURE OF THE STUDY

This study has been divided into seven chapters:

Chapter 2: Structure and functions of Bargaining Councils

In this chapter an overview of the structure and functions of BCs are discussed. This overview provides greater detail around key features of the LRA that bind the operation of BCs to small enterprises. The approach in this chapter is based on the idea that in order to understand how legislation and BC agreements can impact on small restaurant enterprises, one needs to understand the legislative framework that binds the establishment of BCs, the representativeness and coverage of the Council.

Chapter 3: Small enterprises in relation to BC

While small enterprises are seen to be of great importance in the South African economy, this chapter recognizes that small enterprises face certain difficulties from the BC system which

do not apply to large enterprises. It also highlights the arguments around the requirements and restrictions that threaten the existence of small enterprises.

Chapter 4: Research methodology

This chapter outlines the nature and structure of the research methods used in this study. The mode of understanding the qualitative research method as an adopted research design has been analyzed on the basis of a practically orientated description around the research problem.

Chapter 5: Collective bargaining at the Bargaining Council

This chapter briefly lays down a foundation for findings by providing the scope of collective bargaining as the study rests within the theme of collective bargaining functions and later unfolds the nature of collective bargaining in the Food, Retail, Restaurant, Catering and Allied Trades in Pretoria.

Chapter 6: Research findings on the BCFRRCAT in Pretoria

This chapter reports on the findings of research done at the BCFRRCAT by emphasizing research objectives that the study is set out to achieve in section 1.3.

Chapter 7: Research findings on small restaurant enterprises

This chapter presents the findings of semi-structured interviews conducted among owners or managers of small restaurant enterprises who allowed access to their premises for the purpose of conducting interviews. Semi-structured interviews were conducted for both party and non-party employers to the Council, so that it would not only be possible to identify problems faced by small restaurant enterprises but also to reach an understanding as to whether small restaurant enterprises have come to terms with the BC's collective agreement.

Chapter 8: Conclusion and recommendations

In this chapter a final discussion on research conclusions, recommendations, limitations and problems encountered are discussed.

CHAPTER 2

STRUCTURE AND FUNCTIONS OF BARGAINING COUNCILS

2 INTRODUCTION

BCs have an extensive range in South Africa from very big Councils covering the entire country and a number of sectors and sub-sectors, national Councils with a fairly narrow sectoral focus, regional Councils that cover a reasonable proportion of an industry to small local Councils that cover only a few hundred workers. It is not only the approach to staffing that varies considerably from council to Council but also the main collective agreements of Councils. Some are long and extremely complex, full of particulars build up over years of negotiations, while others are brief and straightforward (Godfrey *et al.*, 2005:4).

In this chapter, a detailed analysis of the structure and functions of BCs is done around the key features of the LRA that bind the operation of BCs to small enterprises. In order to understand how legislation and BC agreements are impacting on small restaurant enterprises, one needs to understand the legislative framework that binds the establishment, the representativity and the coverage of BCs.

2.1 BARGAINING COUNCIL SYSTEM AND SET OF LAWS

The development of labour relations and collective bargaining at BCs has undergone numerous changes in South Africa. The development process is seen in the light of four historical phases which are characterised by focusing on various Acts and major events that occurred.

The first phase started with the adoption of the Industrial Conciliation Act of 1924. The second phase was the Labour Relations Act 28 of 1956 (Butcher & Rouse, 2001:351). The third phase is the period known as the Wiehahn period that emerged from the recognition of the

Wiehahn Commission. The fourth phase is referred to as the Labour Relations Act 66 of 1995, i.e. the post-1994 period with the realisation of the democratic government in 1994.

2.1.1 Industrial Conciliation Act 11 of 1924 (phase one 1924-1950s)

The legislation framework that provided for the establishment and operation of ICs now known as BCs was introduced by the Industrial Conciliation Act 11 of 1924. “This legislation came into being from the wake of industrial unrest and conciliation for trade unions and employers, a failure that culminated in 1922 strike and uprising on the Witwatersrand” (Godfrey, 1992:11).

The main aim of the Act was to provide a suitable framework for the regulation of collective bargaining and industrial conflict. It provided for the establishment of ICs by representative, registered employer organisations and trade unions. This phase was a period when collective bargaining became a new and accepted practice in the industrial system of South Africa. However, the Act did not include black workers in the definition of employees, with the result that black employees were excluded from any labour relations activities that involved interaction between employers and employees (Moleme, 2001:5-6).

In terms of the Black Labour Relations Act of 1953, the representation of workers was extended to black workers in the form of work committees and coordinating committees. The committees served to communicate the interest of black employees to management at the firm level, to recognise the solidarity of employees irrespective of race and to integrate black employees into the union’s economic life without restraints. The committees were also instrumental in placing all workers on an equal footing and in giving all racial groups an equal say with regard to determining their wages and conditions of employment (Godfrey, 1992:25).

The Black Labour Relations Act of 1953, however, led to a division of employees’ representation based on racial terms. Representation was limited to employers and white, Indian and coloured employees only. This meant that the IC system was not representative, since black employees were not included (Moleme, 2001:5-6).

2.1.2 Labour Relations Act 28 of 1956 (phase two)

The LRA 28 of 1956 emanated from the Industrial Conciliation Act 28 of 1956 (Butcher & Rouse, 2001:351). This new Act left the IC system largely intact but sought the break-up of trade unions along racial lines. This meant that no mixed race trade unions, i.e. trade unions with white, coloured and Indian members could be registered. Existing mixed race trade unions had to establish separate branches for white, coloured and Indian members and hold separate branch meetings, but only white members could be part of the union's executive body. The racial line and labour movement statutory division of white, coloured and Indian employees diminished the united force and strength of trade unions when they confronted employers because in most cases they now represented only a small section of the workforce (Godfrey, 1992:24).

2.1.3 Wiehahn period (phase three 1980s)

In 1977 the State appointed the Wiehahn Commission to investigate the labour legislation. This commission did not give great attention to the Industrial Council system, but made a significant recommendation that would fundamentally affect the operation of the IC system. It recommended that African workers be allowed to belong to registered trade unions and that unions should be allowed to admit members from any racial group. In terms of this recommendation African workers would be allowed direct representation on ICs and in 1979 the State adopted the recommendation made by the commission and amended the definition of employees in the Industrial Conciliation Act to include black employees with permanent urban residence rights. Again, in September 1979 the Act was amended because of criticism raised by the independent trade union movements to include African contract workers and commuters in the definition of employees (Godfrey, 1992:8).

New trade unions and existing ones were expected to register with the IC for participation and to become part of the collective bargaining units in various industries. Among black trade unions that existed there was a lack of unity in terms of registration with the IC. While some were willing to register with the Council, others were rejecting the offer to register based on the fact that registration with the Council would lead to state control. Those trade unions that

accepted the offer to register with the Council seemed to grow in strength and membership in spite of their non-participation in industrial relations activities (Moleme, 2001:8).

2.1.4 Labour Relations Act 66 of 1995 (LRA) (phase four post-1994 period)

One distinguishing feature of the post-1994 period is that for the first time in the history of labour relations in South Africa, black workers were able to influence the formation of the Act that was to affect them. More importantly, the emphasis on the development of small enterprises was taken into consideration, necessitated by a number of factors in the economy of which one was the failure of big enterprises to provide employment to a large number of unemployed people. As a result the regulation of the small enterprise sector inevitably had to be developed in such a way that the problem of unemployment was taken into consideration (Moleme, 2001:37).

The new LRA 66 of 1995 has partially taken into account the representation of small enterprises in the BCs. For instance, Section 30 (1) (b) stipulates that "the constitution of every BC must at least provide for the representation of small and medium enterprises". In addition to this section, Godfrey *et al.* (2005:14) state that the group responsible for drafting the new LRA was aware that many small enterprises were opposed to the extension of BC agreements to non-parties and were unhappy with the exemption system of the Councils in general. They also had to take into consideration the demands of trade unions for greater centralisation of collective bargaining.

The application for registration of a BC must go to the National Economic Development and Labour Council (NEDLAC) or to the Minister of the DOL for consideration.

An important factor that has to be taken into account for the registration of a Council is that adequate provision be made in the constitution of the Council for the representation of small and medium sized enterprises.

Section 29 (1) (a) (b) and (c) of the LRA requires that the BC must submit the following documents when it applies for registration and for the extension of collective agreements to the DOL:

- "the prescribed form that has been properly completed;
- a copy of its constitution, and
- any other documents that may assist the registrar to determine whether or not the BC meets the requirements for registration".

Section 29 (2) also stipulates that "the registrar may require further information in support of the application from the Council to make decisions with regard to the registration of the Council and application for extension of agreements".

The requirement is that the Council should provide the data with respect to the representation of the parties in the BC when applying for registration of the Council and when requesting the Minister to extend a collective agreement. The application for registration of the Council is done on LRA Form 3.3 and for the extension of agreement it is done on LRA Form 3.5 (appendices C and D contain examples of these forms). In order to assess the representation of the parties in the Council, applicant parties have to provide the following information as stipulated on both these forms (Godfrey *et al.*, 2005:21):

- the total number of employers within the proposed scope of the Council;
- the total number of employees within the proposed scope of the Council;
- the total number of employees within the proposed scope of the Council employed by the members of the party employer organisations, and
- the total number of employees within the proposed scope of the Council that belong to the party trade unions.

In addition to this information, Section 54 (2) (f) introduced a requirement for BCs to provide the Minister with the following data which should be supplied in LRA Form 3.20B (appendix E contains an example of this form) :

- the number of employees that are employed by small enterprises within the scope of the Council and the number of employees of those enterprises who are members of trade unions;
- the number of employees employed by small enterprises that are covered by the extension of an agreement;
- the number of small enterprises that are members of the employer organisations that are parties to the Council,
- the number of applications for exemptions received from small enterprises; and
- the number of applications for exemptions that were granted and rejected.

The importance of these forms as far as representativity of the parties is concerned, is that they require the total number of employers within the Council's scope and of employers within the scope that belong to the party employer organisations. The assumption is that it would make it easy for the Minister to assess the representativity of the employer organisations based on the number of their members rather than on the number of employees their members employ. It is not quite clear what the data would be used for since it is not explained in the Act (Godfrey *et al.*, 2005:23), but it is likely that the Minister will take the information into consideration with respect to the application for exemptions and the extension of agreements.

After registration the BC can have its collective agreement extended if the Minister is satisfied with the information provided with respect to Section 29 (1) (a) (b) (c) and Section 54 (2) (f) as outlined above. Thus the agreement will be applicable to all the employers and employees within a council instead of only being applicable to the members of the party organisation (Budlender & Sadeck, 2007:8). It is also important to highlight that within a particular Council an exemption system must be put in place for small enterprises to apply for some or all exemption provisions made available in the collective agreement (Webster, 1983:48). An independent committee has to be established by the BC to review the applications and the appeals where exemption applications have been rejected.

It should be noted that the registration of the BC rests extensively on the concept of "*sufficient representative*". Godfrey *et al.* (2005:14) state that the concept of "*sufficient representative*" is

neither clearly defined in the LRA nor has it been in any case law under the new LRA that has given the term concrete meaning. However, one recent change is that NEDLAC has the authority to decide on the appropriate sector and area for which the BC should be registered. As a result of this, the sector could be adjusted by narrowing the sector or area to exclude non-parties and to ensure that the parties are representative in nature.

2.2 THE STRUCTURE AND FUNCTION OF BARGAINING COUNCILS

Section 28 (1) of the LRA sets out all the functions of BCs. For instance, it stipulates that "the powers and functions of a BC in relation to its registered scope include to conclude collective agreements; to enforce collective agreements; to prevent and resolve labour disputes and to perform the disputes resolution functions".

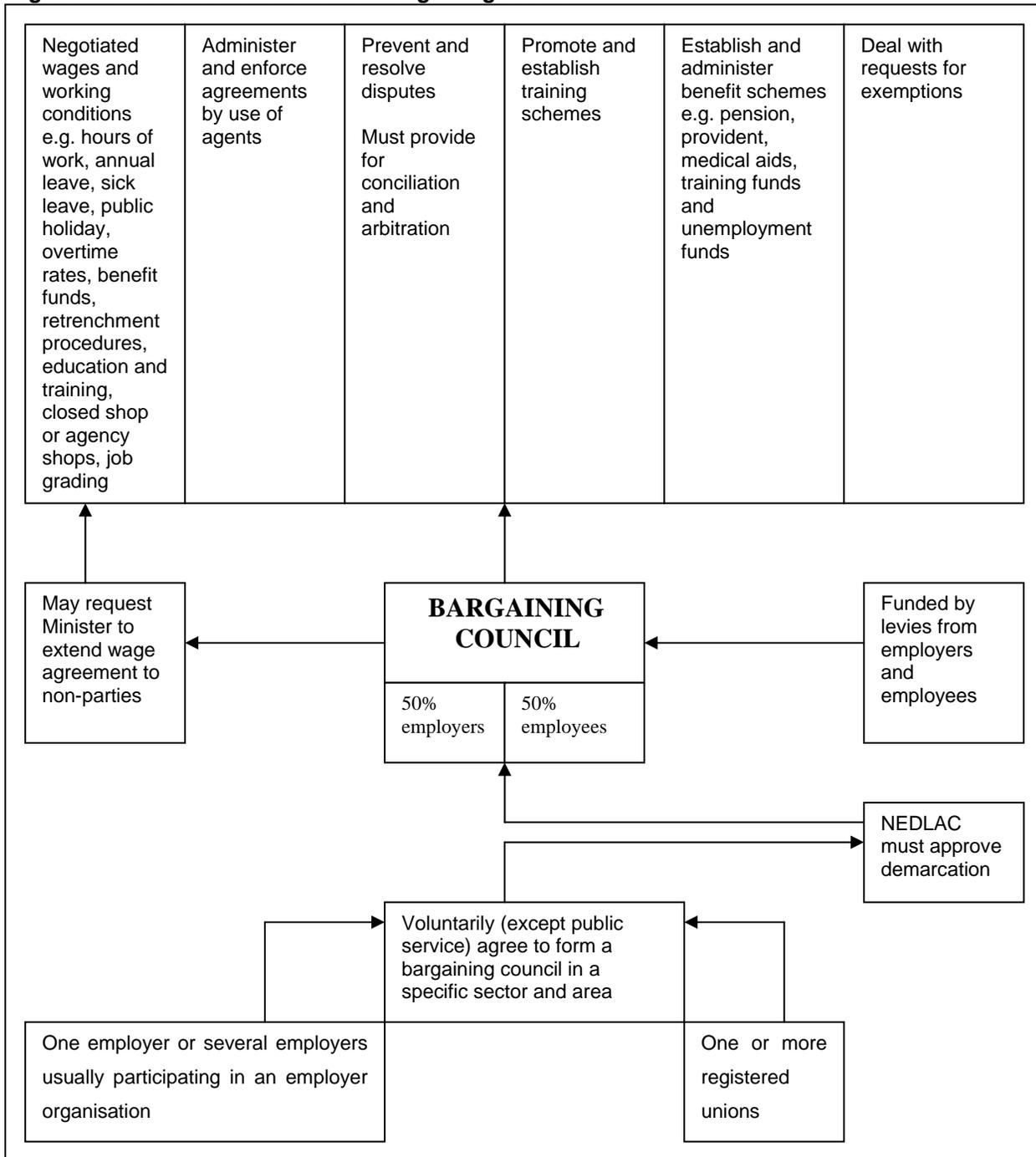
Bendix (2001:273) provides more comprehensive functions and duties of BCs by pointing out that it is the duty of the BC to “ ... within the undertaking, industry, trade or occupation and in the area in respect of which it has been registered, endeavour, by the negotiation of agreements or otherwise, to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers or employer organisations and employees or trade unions and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employer organisations and employees or trade unions”.

At the BC these functions and duties discussed above occur in two main functions, i.e. a *collective bargaining function* and a *dispute settlement function*. The latter function does not apply only to parties at the Council but also to all the employers and employees in the industry, trade, occupation or area in which a particular BC has jurisdictions. However, for the present this study focuses on the collective bargaining function.

Figure 1 below provides an overview of the structure and function of a BC. As an organisation registered with the DOL, comprising of one or more registered trade unions and registered employer organisations its membership is on a voluntary basis except in the public service.

When it comes to its function, it covers a range of tasks and is funded by levies paid by employers and employees. As indicated in Figure 1 a BC may negotiate agreements on a range of issues. However, these agreements may be extended to all employers and employees in the Council's registered scope of representativity as long as all the requirements as mentioned in section 2.1.4 are met. If these requirements are met, the Council may request the Minister to extend agreements to non-parties of the BC.

Figure 1: Structure and function of Bargaining Council.



Source: Adapted from Finnemore (2006:17)

2.3 THE REPRESENTATIVITY OF BARGAINING COUNCILS

It is often argued that BCs are not representative of small businesses (Moleme, 2001:26). According to Du Toit *et al.* (1995: ix-4) BCs were found to be fairly representative of the formal sector in terms of most numerical measures. For example, in 1995 an average of 45% measurement of representativity of BCs was established in their study. In addition, employer organisations at BCs seem to represent mainly the larger firms where in a number of sectors the average firm size is relatively small.

2.3.1 Bargaining Councils and representativity in the informal sector

The extension of BC agreements (as discussed in section 2.4 below) however, provides no guarantee that the terms and conditions set out will be complied with by all firms in the industry concerned. The informal sector has been growing in recent years. This growth has been facilitated by an increase in sub-contracting, outsourcing, home working arrangements and schemes turning small enterprises into independent contractors. Although these arrangements do not necessary result in small enterprises not registering, in most cases this has been the case in the informal sector and it has a significant impact on the representativity position of the BCs. Some key BCs such as the Gauteng Building Bargaining Council have collapsed because of their unrepresentative position and their inability to attract small enterprises (Godfrey *et al.*, 2005:18).

However the LRA of 66 of 1995 makes it possible for BCs to attract small enterprises. Section 28 (1) (g) (k) of the LRA states that Councils now have the power “to provide industrial support services within the sector...” so that they can be developmental in "offering a range of services such as pension, provident, medical aid, sick pay, holiday, unemployment and training schemes..." to small and medium sized enterprises to encourage them to register with the Council. Section 28 (1) (l) of the LRA also allow Councils “to extend the services and functions of the BC to workers in the informal sector and home workers”. In other words, this means that the Councils have the power to extend their support services with its functions to

the informal sector. However, if small enterprises want to have access to the support services of the BC, they will have to register with the BC.

Du Toit *et al.* (1995:7) are of the opinion that when the issue of representativity is considered, it has to be viewed in the wider context of the size of the informal sector in that particular industry, and the existence of sub-contracting and outsourcing arrangements that may avoid the obligations prescribed in the Council's agreement. The problem that arises from addressing this issue is based on the fact that it is very difficult to measure representativity of the informal sector which operates outside official records as it predominantly consists of small enterprises.

In terms of employment, large enterprises account for approximately the same number of people as the informal sector. Therefore the formal sector is regarded as more important than the informal enterprises in terms of total employment. A distinguishing feature of the informal sector is that it is unregulated by the institutions of society. Apart from not complying with BC agreements or labour legislation, it is also believed that the informal sector does not pay tax (Theron, 1993:60).

2.3.2 The representativity of small scale enterprises and large enterprises

Representation of small enterprises in BCs is a contentious issue as representativity is one of the criteria used for extending agreements negotiated in BCs. Moleme (2001:26) suggests that the arguments relating to representativity emanates from the allegation that BCs are not representative of small enterprises and that they are dominated by large enterprises.

The representation of parties in the BC happens through employer associations and trade unions. It is argued that employer associations are dominated by large enterprises and they have a tendency to serve their interest at the expense of small enterprises. This is primarily because the interest and needs of small enterprises are different from those of large enterprises as large enterprises are usually capital intensive whereas small scale enterprises are labour intensive in nature.

Section 49 (1) of the LRA states that, the registrar when considering the representativeness of the parties to the Council, "must consider the nature of the sector and the situation of the area in respect of which registration is sought". In addition to this, Section 30 (1) (b) of the LRA further states that the constitution of every BC must provide for the representation of small and medium enterprises.

Godfrey *et al.* (2005:17) state that when the concept of representativity is put into practice, the Act does not provide guidelines as to what form such a provision should take nor does it require some minimum level of representation for small enterprises. It only indicates that small enterprises themselves should organise and represent their own interests. How this should be done is omitted. However, if more small enterprises were to be involved in the BC it should lead to agreements that better accommodate their interest and to some extent it would improve the representative position of the BCs.

Representativity is of considerable importance to the operation of BCs, as it is considered to be one of the criteria for the extension of agreements, and as such it has important implications for the entire jurisdiction of each Council (Rosenthal, 1996:53). According to Moleme (2001:27) critics of BCs are of the opinion that the concept of sufficient representativity of small enterprises does not offer a practical solution to the problem. This implies that the current framework of determining conditions of work in industries through BCs is not appropriate for small business needs. Therefore, the LRA does not address the concerns of small businesses sufficiently as far as representation is concerned.

2.4 EXTENSION OF COLLECTIVE AGREEMENTS

Section 213 of the LRA defines a collective agreement as: "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions and one or more employers and/or registered organisations". According to Section 23-26 of the LRA a collective agreement may also refer to a BC agreement and any work place agreements between employers and employees that regulate terms and conditions of employment or the conduct of employers and employees.

One of the aims of the LRA as stated in Section 1(d) (i) and (ii), is to promote orderly collective bargaining at sectoral level. Collective agreements may be concluded at the BC level or at statutory Council level. An essential and important requirement is that collective agreements must be put in writing (Nel, Kirsten, Swanepoel, Erasmus & Poisat, 2008:123).

While it is still arguable whether the parties should sign the collective agreement or not, the agreement must, however be in a written form. Apart from this, BCs act as negotiators of agreements on a range of issues which include wages, conditions of work, benefits, training schemes, and disciplinary and grievance procedures (Nel, Kirsten, Swanepoel, Erasmus & Poisat, 2008:123).

Ehlers (2004:97) indicates that the BC's main collective agreement may be extended to all employers and employees in the council's registered scope of representativity as long as the requirements in Section 32 (1) (a) (b) are met, "i.e., if, one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the BC vote in favour of the extension; and one or more registered employers organisations, whose members employ the majority of the employees employed by the members of the employers organisations that are party to the BC, vote in favour of the extension".

Some critics of BCs argue that the extension of agreements helps to strengthen the employer associations and thereby maintains sectoral or industry bargaining, and without them employers would find themselves at a competitive disadvantage. Other critics have challenged this argument by pointing out that the extension of agreements is particularly burdensome to small employers, as it leads to closure and discourages start-ups, and generally interferes with the normal dynamics of the entire labour market as a whole (Butcher & Rouse, 2001:350; Budlender & Sadeck, 2007:8).

Du Toit *et al.* (1995:7) believe that the dissatisfaction with extension of agreements was fuelled by media publicity around individual cases of hardship suffered by small enterprises. This in turn leads to an increasingly strong argument for the exclusion of small enterprises

from BC agreements. It is clear that small enterprises view employer organisations as dominated by large enterprises and that the interests of small enterprises are not represented at Council negotiations.

2.4.1 The request for the extension of agreement

The LRA supports the establishment of a BC within a defined sector of the economy based on a voluntary agreement between employers and trade unions (Finnemore, 2006:177). Section 11 (b) (iv) of the LRA requires that the parties to a BC (the member employer organisations and the trade unions) must be sufficiently representative of all employers and employees employed in the work place. Once registered, a BC can request the Minister of Labour to make its agreement legal and to extend those agreements to cover non-parties that fall within the Council's jurisdiction (employers and employees who are not members of any of the organisations that are parties to the Council).

The Minister will only extend an agreement to non-parties if it is deemed necessary to do so and more importantly if he or she is satisfied that the parties to the agreement are sufficiently representative of all the employers and employees within the Council's jurisdiction. After extension of the agreement all firms operating within this jurisdiction of the Council must be registered with the Council (Bargaining Council for the Tearoom, Restaurant and Catering Trade, Pretoria, 2007:18).

Godfrey *et al.* (2005:15) disagree with the basis of extension of collective agreements by the Minister pointing out that the new LRA has made an attempt to clarify the position regarding the extension of collective agreements. The Minister has discretion to extend an agreement at the request of a Council if the requirements in Section 32(3) are met. Section 32(3) of the LRA stipulates that the Minister may not extend an agreement unless satisfied that after extension of a collective agreement the majority of employees covered by the Council are members of the party trade union and the members of the party employer organisation employ the majority of the employees.

Godfrey *et al.* (2005:15) believe that the failure to include a third criterion (i.e. that the party employer organisation(s) must represent at least 50% of the total number of employers), constitutes an injustice against the representation of small enterprises. What underpins this argument is that an employer organisation that has as its members a few very large enterprises that have the capacity to employ the majority of employees in a respective sector will meet the requirements of Section 32 (3) of the LRA as referred to previously.

Godfrey *et al.* (2005:15) suggest that if the third criterion was included in this section the employer organisations will be compelled to get more members in order to remain representative. Employer organisations will not only organise the smaller enterprises but also retain them as members of the Council which will in turn force the employer organisations to be more accommodating of the smaller enterprises' interest not only within the Council but also within the entire sector. One possible explanation for the relatively low support for the extension of agreements is that many employers are so firmly entrenched within the institutional framework that they are unaware of its importance for the stability of the bargaining structure.

2.4.2 Binding nature of collective agreements concluded by Bargaining Councils

A collective agreement that is concluded at the BC only binds the parties to the BC and members who are parties to the collective agreement. Non-members of the BCs are not automatically subjected to their agreements, unless the agreement is extended by ministerial declaration in terms of Section 32 of the LRA (Grogan, 2007:371). As indicated in section 2.4.1 the BC may ask the Minister in writing to extend a collective agreement to non-parties within its registered scope. According to Nel *et al.* (2008:121) an agreement will only be extended if:

- the majority of all the employees who upon extension of the agreement, will fall within the scope of the agreement, are members of the trade unions that are parties to the BC;
- the parties are sufficiently representative within the registered scope of the Council and
- the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sector level or in the public service as a whole.

Section 32 (3) (e) (f) (g) of the LRA stipulates the following requirements that must be met before agreements can be extended:

- the BC agreement cannot be extended by the Minister unless he or she is satisfied that provisions are made in the agreement for an independent body to hear appeals against the rejection of an exemption by the Council of the non-party 's application for exemption or the withdrawal of an exemption by the Council;
- the collective agreement to be extended must contain criteria that will be applied by the independent body when it considers an appeal (the criteria must be fair and promote the objective of the Act), and
- the terms of collective agreements must not discriminate against non-parties.

2.5 BARGAINING COUNCIL EXEMPTIONS

In theory, trade unions and employers can apply for exemptions by agreement. Du Toit *et al.* (1995:63) draw a clear distinction between the registration of employers with a BC and membership of an employer association represented on a BC. Registration is legally required of non-party employers as well as party employers in terms of BC agreements which are binding on all employers in that industry, but membership of an employer association should be voluntary. Small employers can join registered employer associations by two different means, namely *compulsion* or *inducement*. Compulsion would entail legally requiring an employer who wants to continue with business to belong to an appropriate employer association. Inducement would entail making it attractive in financial and other terms, such as tax incentives and specialised tax rates, for small employers to comply with policy requirements.

BCs are found to adopt different approaches to exemptions. In section 2.5.1 the major categories of exemptions that are utilized by the BCs are discussed. A view that is frequently expressed by employers of small enterprises is that Councils are impediments to small enterprises that cannot afford to comply with the minimum standards set by the BC (Butcher & Rouse, 2001:353). Stapelberg (1999:32) points out that in most cases, applications for

exemption from agreements extended to them are seldom granted and generally it is not worthwhile for small enterprises for the following reasons:

2.5.1 The major categories of exemptions utilized

To relate the question of exemption to a broader debate about deregulation in the context of the developments of small enterprises, the dominant feature of the South African system of labour regulations is that Councils are autonomous. In the LRA Section 30 (1) (k), "the constitution of every BC must at least provide for the procedure for exemption from collective agreements". As a result of the autonomous power, a consistent and coherent approach is not possible, due to the fact that even in the same industry, different Councils adopt divergent approaches from one region to another.

Moll (2001:328) suggests that there are also Councils that do not acknowledge a need to develop specific policies and grant exemption to small enterprises, because most employers have always been regarded as small (Horwitz & Franklin, 1996:342). Of even greater significance is that there has been a group of Councils that can best be described as traditionalist and which do not adapt to the changing circumstances, even if there is a significant small business or informal sector activity in their industries.

Du Toit *et al.* (1995:21) maintain that in most cases the clearest indicator of the extent to which Councils are willing to deregulate or not is with regard to *blanket exemption* and *exemption by application*. Blanket exemption implies the automatic exclusion of an entire class or category or type of business, i.e. when a business is exempted from a collective agreement without formally applying for exemption simply because it belongs to a relevant category. This does not necessarily mean that a business is not required to register with the Council (Godfrey *et al.*, 2005:72). Exemption on application includes an absence of clear and consistently applied categorisations of such exemptions (i.e. the provisions from which exemptions are being sought).

The controversy around exemptions relates primarily to small enterprises, although there are other kinds of exemptions that Councils deal with. These different kinds of exemptions raise

altogether different issues. Applications for exemption by small enterprises are largely motivated by affordability because they are economically unable to comply with the minimum standards laid down by the Council.

According to Du Toit *et al.* (1995:22) there are at least two major categories of exemption which Councils routinely deal with and whose primary concern is not the issue of affordability. The first concerns *the application for exemption from membership of one or other benefit fund* which Councils provide for. The second concerns *applications of a more technical nature* where an employer party might want exemptions from a particular provision of the agreement, for example annual leave.

With regard to the application of such exemptions, both parties and non-parties to Councils apply for such exemptions alike, while still complying with the other provisions of the agreements. Robertson (1996:69) reports that councils obviously must and do categorise exemptions in some manner in order to deal with them. However, in most circumstances it appears that with few exceptions they do not do so in a systematic or consistent way. As a result, the absence of clear, consistently applied and generally accepted categorisation of exemptions remains a major obstacle in establishing the facts about exemptions.

2.5.2 Exemption requirements in the LRA

Due to a number of problems that were encountered in the LRA 28 of 1956 with regard to dealing with exemptions, the LRA 66 of 1995 has introduced a number of changes in dealing with exemptions. Godfrey *et al.* (2005:20) highlight the following changes:

- Firstly, in terms of Section 32 (3) (e) the Minister must be satisfied before the BC's agreement can be extended (i.e. making sure that the provision is made in the collective agreement for an independent body to hear appeals against the refusal of exemption applications or if the exemption is withdrawn by the Council). The main aim of this change is to restrict the involvement of the Council itself in the exemption procedure. It is also important to note that the LRA 66 of 1995 does not only require that the Council needs an independent body to hear appeals but it also gives power to the independent body to hear

all its applications with regard to the applications for exemptions. The pressure for this change came from the BCs, primarily because they found the need for an independent body to deal with all the difficult and expensive applications essential.

- Secondly, the other important contribution that has been made in terms of Section 32 (3) (f) is that the BC's collective agreement cannot be extended unless the Minister is satisfied that the criteria provided and applied in the collective agreement are fair and promote the primary objectives of the Act when considering the appeals and applications for exemptions. The main objective of this change was to introduce clarity and certainty regarding the standard of judgement of exemptions by the independent committee. Holtzhausen and Mischke (in Godfrey *et al.*, 2005:20) point out that BCs have played an important role in introducing clarity for exemptions and in some cases a direct process for evaluating applications. The new criteria introduced by Councils now explicitly include the size of the firm and whether it is a new firm or not. However, there still are important questions about the Councils' interpretation of the exemption criteria and the impact of the independent appeals committees.
- Lastly, in terms of Section 30 (1) (k) the BC constitution is required to provide the procedure for exemptions from collective agreements. The significance of this change is that Councils are expected to clarify their procedure in detail.

2.5.3 Exemption procedures as applied in practice

When an application for exemption is made to a Council a letter of motivation, as well as a completed questionnaire which was designed for this purpose has to be submitted. All applications for exemptions are considered by a full Council. Some Councils have set up subcommittees composed of up to four representatives from both employer and trade union parties to the Council. The roles of these subcommittees are either to screen applications and make recommendations or to make a decision which is subject to an appeal to the full Council.

One of the important factors influencing the perception of whether any decision-making process is fair or unfair is whether the parties affected by it are able to present their case in person. This is especially the case where the parties concerned are not able to adequately represent their position in writing. Stapelberg (1999:31) has compiled an analysis of the reasons for either granting or refusing exemption applications.

The analysis of exemptions granted highlights the following reasons for exemptions being granted:

- firms working more outside the area of jurisdiction than inside and having their own benefits in place;
- support by employees to be exempted for a limited period;
- no unfair completion would be created if the exemption was granted;
- the company only does a low percentage of work in a specific industry, and
- individual employee applications with special circumstances, for example short duration work permits.

An analysis of exemptions not granted shows the following reasons:

- no support by employees; and
- very little motivation for application for exemptions.

The reasons mentioned for exemptions being granted or not granted can be criticised for the absence of safeguards against unfairness. Firstly, the exemption procedures are discretionary and informal, with no provision for a hearing where the applicant's case can be stated fairly. Secondly, there is also no provision for employees affected by exemption to state their case.

Du Toit *et al.* (1995:67) highlight that even the most carefully designed regulatory system might not cater for all eventualities, meaning that there are businesses which are genuinely unable to comply with particular requirements of a negotiated schedule. The need for an exemption procedure remains relevant in this case. The major shortcoming of the existing provisions is the lack of clear criteria for exemption and fair procedure. This suggests that the

legislator should at least ensure that the procedure should be fair and that the employer as well as the affected employees should be given a fair opportunity to be heard.

2.6 THE EFFICIENCY OF “ERGO OMNES RULE”

South Africa’s IC has been responsible for setting minimum wages in various industries since the 1920s (Hipkin, 1990:19). Now the BC and sectoral determinations prescribe minimum wages, with the BC wage generally above the levels set in sectoral determinations (Godfrey *et al.*, 2005:4). As the subject of minimum wage levels set by Councils is complex and is not within the perimeter of this study very little attention will be given to that aspect. The focus of this section will rather be on the wage level differentiation that exists in the BCs.

The minimum wage levels set by Councils are probably the most difficult aspect of the BC system for small enterprises. When a BC is formed on a voluntary basis by large unions and some of the large firms, both union and employers are motivated to join because there are economies of scale involved in the negotiation. For instance, proposals would be made for companies that are coming into the system to pay for example 40% of the requirement and productivity linked remuneration system (Budlender, Hendrie, Horner & Young, 1984:4).

While unions are motivated by economic justice to standardise wages within and across businesses, Moll (2001:327) points out that a unique wage called voluntary Industrial Council wage 1, hereafter IC wage1, is set for all. This wage is a compromise between the wage in the largest businesses and the wage in the small enterprises.

Moll (2001:327-328) suggests that companies that do not join the BCs continue to pay the same as before. The non-participant businesses which are small and more labour intensive pay a lower wage than the voluntary IC wage 1. Therefore when a BC appeals to the Minister of Labour for an extension of its agreement to all employers in the industry to pay the same wage level, whether or not they participated in the BC negotiations regarding wages it is called “*compulsory centralisation or ergo omnes rule*”.

After this agreement has been reached, a new voluntary IC wage 2 will be established for all employers, including small and medium-sized enterprises. In reality, it appears that there are some small enterprises that do not comply because the cost of compliance is high. In this case, IC wage 2 is a compromise of IC wage 1. Non-participant small enterprises are driven out of business regardless of the fact that IC wage 2 is less than IC wage 1.

Consequently, because the bargaining table management is deprived of the examples and the nature of uncovered small enterprises, new agreements would be reached to arrange for the increase of wages from IC wage 2 to IC wage 3. It is important to highlight that the minimum wage agreements create an entry barrier for small enterprises. Moll (2001:327) believes that a BC prevents small enterprises in the black townships from graduation, i.e. entry to the formal sector in the cities and central business districts. In the long run this creates fewer owners in the size range of firms and has a negative effect on the economy.

2.7 BARGAINING COUNCILS TODAY: A SYSTEM IN CRISIS

BCs in South Africa form an important component of South African labour relations. However, there is little research on the relevance of BCs for small enterprises, with the particular focus (collecting micro data) on a single BC in a specific industry. Researchers (as stated in chapter 1 section 1.1) have looked more at BCs in totality (collecting macro data) and less at a specific BC. The main reason for this is based on the fact that the number of existing Councils has declined dramatically. Precise data about the number of BCs and the number of workers they cover are inaccurate and difficult to measure (Godfrey *et al.*, 2005:81).

According to Godfrey *et al.* (2005:81) the number of Councils that existed in South Africa between 1983 and 2004 has dramatically decreased. For instance, in 1983 there were 104 Councils, in 1992 87, in 1995 80 and in 2004 only 57 Councils remained of which nine were non-operational. One may argue that the decline in the number of Councils has been counteracted by the establishment of the five Councils in the public sector after the new LRA was declared or by a few other Councils that have been established (e.g. chemical, fishing, wood and paper industry).

It is also important to note that in most cases the new Councils were established with considerable difficulty. The amalgamation of regional and sub-sectoral Councils to form bigger national Councils, e.g. the Clothing and the Textile Councils to a certain extent accounts for the declining number of Councils.

It is also important to note that part of the decline is the result of the Councils ceasing to function and being de-registered. New Councils are not established easily and the merger of Councils is also a very slow and difficult process. For example the amalgamation of regional Councils to form a national Clothing Council took about eight years and the Council is still for all intents and purposes an amalgamation of regional structures rather than a national structure (Butcher & Rouse, 2001:354).

While the slow process of amalgamation and establishment of new Councils is taking place on the one hand, a more rapid process of decline of regional and local Councils is apparent on the other hand. Consequently, questions about the future of the collective bargaining system in South Africa can be raised if the trend towards large national Councils, the demise of smaller Councils and the number of functioning Councils which appear to be in an uncertain position continue. (Godfrey *et al.*, 2005:81-82).

The second contested issue facing BCs today is the extent to which trade unions conduct a second tier of bargaining at an organisational level in generating “recognition agreements”. Moll (2001: 353) states that BCs are mostly concerned with the wages of skilled workers while trade unions at the shop floor level primarily represent unskilled and semiskilled workers. This means that trade union negotiators often focus on increasing the lowest wage and narrowing the wage gap between skilled and unskilled workers.

2.8 SUMMARY

This chapter provides an overview of the structure and functions of BCs in general, with emphasis on the main functions of BCs. It also sets up an approach to a single BC that the

study attempts to explore. The issues of representativity with reference to the Council's parties and non-parties in the informal sector have been looked at specifically with regard to the fact that representativity is one of the criteria for extending agreements negotiated in Councils. The question of exemption is also considered since Councils have been found to adopt different approaches to exemptions that show a lack of clear and consistently applied categorization of exemption,

The following chapter focuses on small enterprises, with the recognition that small enterprises experience certain difficulties with the BC system which do not usually apply to large enterprises. It also highlights the arguments around the requirements and restrictions that threaten the existence of small enterprises in the informal sector.

CHAPTER 3

SMALL ENTERPRISES IN RELATION TO BC

3 INTRODUCTION

In this chapter a review of small enterprises in relation to BC is done. The focus will be on the requirements and restrictions that threaten the existence of small enterprises, especially with regard to the BC system. Since the establishment of the new democratic system in South Africa in 1994 and the labour relations dispensation in 1995 small enterprises have become significantly more important in economic development. The current propositions of small enterprise development in South Africa have acquired the status of first preference (Godfrey & Theron, 2002:31; Theron, 1993:58).

The main reasons for promoting small enterprises are to create employment opportunities and to stimulate economic growth. The advantages of small enterprises outweigh the disadvantages. For example, a small enterprise requires less capital per worker; promotes local development, is more innovative, grows faster than older firms, creates jobs at a faster rate and more importantly, is seen as a vehicle for entrepreneurial development (Vosloo, 1994:166-168).

Du toit *et al.* (1995:70) challenge this argument and maintain that the advantages of small enterprises may have been exaggerated. In some countries such as Japan and Italy they make an important contribution to economic development. However, in South Africa those firms that make any serious contribution to economic growth comprise only a fraction of the total number of existing firms. The role of small enterprises in job creation as a whole is also less impressive than that of large enterprises. Moreover, an important factor that influences job creation negatively is the high failure rate of small enterprises, especially in their early years, and the consequences of this on employment and economic growth. Butcher and Rouse (2001:349) point out that the highly centralised collective bargaining system in South Africa is the major contributor to inflexibility in the South African labour market economy. It

affects small employers in various ways, i.e. it increases business failures, discourages start-ups and contributes to South Africa's extremely high unemployment rate.

In spite of the importance of small enterprises in the South African economy they encounter certain difficulties with the BCs which larger enterprises do not usually have to deal with. Some of these difficulties are the inability to raise capital and the inability to offer professional services because of the high cost. In addition to these problems, Davidov (2004:89) and Du Toit *et al.* (1995:43) point out that owners of small enterprises maintain that they are constrained by regulations which govern their operations. Some even insist that the requirements and restrictions they face are so severe that their existence is threatened.

This explains why the BCs are experiencing problems to enforce collective agreements and obtaining compliance from small enterprises. Owners of small enterprises are of the opinion that it is necessary for BCs to remove restrictions and labour regulations which inhibit small enterprises from promoting their businesses (Theron, 1993:58).

3.1 DEREGULATION VERSUS REGULATION OF LABOUR MARKET SYSTEM

The existence of small enterprises has to be examined against the background of deregulations and tighter regulations of the labour market system. Firstly, the proponents of deregulation argue that in order to promote small enterprises in South Africa, the present form of collective bargaining is inappropriate for small enterprises based on the fact that it is burdensome and places restrictions on their operations (Theron, 1993:58).

Secondly, it is argued that centralised bargaining is inflexible and does not take the different interests of small enterprises into consideration. The argument is that if restrictions on the operations of small enterprises such as minimum wage standard and labour regulations are removed it will increase the potential of business success, encourage start-ups and contribute to South Africa's employment creation (Theron, 1993:58).

The issue of the high unemployment rate in South Africa has been the central domain around the arguments for deregulation of the labour market economy (Adler, 1991:53). The inference is that for employment creation to increase there should be no regulations governing employment relations (Hudson, 2003: [5]). From this point, it has become increasingly clear that the arguments against tighter regulation fail to consider the quality and the nature of jobs created. This is primarily because the employee's position within the contractual relationship between the employer and the employee is not considered. This would mean that if fewer regulations are implemented, they would be in contradiction with the basic core standards of the LRA that are addressed in section 3.3 (Moleme, 2001:30).

The proponents of tighter regulations of the labour market economy argue that the theory that deregulation leads to an increase in job creation is questionable. This is based on the fact that deregulation does not address the fundamental problems experienced by small enterprises in both formal and informal sector. It is argued that the creation of employment is not sufficient enough to improve the quality of life. The ultimate aim should be to improve the quality of life for all rather than just to create job opportunities. The improvement of quality of life is achieved through protecting workers from exploitation in small enterprises that exist in an isolated informal sector. This would require the existence of proper labour relations standards that take into account the well-being of workers in small enterprises (Du Toit in Moleme, 2001:30).

Proper labour standards would be those that allow for the observance of basic requirements governing the employment relationship. All parties involved in the labour market should be satisfied with the set standards. This in turn, requires flexible social institutions that are made up of all parties involved in setting-up labour relations standards. At present the collective bargaining system is the best mechanism for regulation (Moleme, 2001:31). However, the challenges are to make the BC flexible so that appropriate mechanisms for regulations can be established and to determine what should be done to accommodate the interest of small enterprises.

Moleme (2001:31) suggests that the idea of making the BC system flexible can be achieved by allowing the BC to set basic conditions and then to devolve bargaining to the level of small enterprises. This can be done by adopting special schedules for small and medium size enterprises to simplify the administrative process needed for compliance by small enterprises and to ensure the negotiation of appropriate requirements for small enterprises. This will change the perception that the BC system accommodates only the interests of larger firms and organised labour, whilst it neglects the special interest of small enterprises.

In response to the challenges of small enterprises, the Congress of South African Trade Unions (COSATU) has proposed the following special consideration for micro-businesses with tighter regulations for the South African labour market economy (Theron, 1993: 65):

- In support of tighter regulations, small enterprises will have to qualify in terms of the definition and register with the BC;
- the number of the BC inspectorates should be increased, and the quality of work should be improved;
- blanket exemptions from the BC agreements and the LRA should not be allowed, and a new system of applying for exemption should be formalised.

COSATU argues that this system should be effective not only for the BC but also for small enterprises. It requires an enterprise to publish a notice that it is applying for exemption in the Government Gazette to allow for objection. The application would then be considered by the BC or in the absence of a BC by a regional committee which consists of employer and trade union representatives. It points out that the system should also include a right of appeal to a national body. This would prevent the adversarial and interest based type of bargaining which is equivalent to negotiating in bad faith and which only emphasizes job creation and economic growth at the expense of workers.

3.2 PROBLEMS WITH THE EXTENSION OF AGREEMENTS

Extension of agreements made by the Minister of Labour at the request of the parties in the Council has been subject to criticism by small enterprises. Small enterprises are concerned that the system of extending agreements by the Minister does not take into account the differences that exist between small and large enterprises. They argue that applying the same minimum labour standards to the whole industry is detrimental to the success of small employers and it discourages production in small enterprises. While small enterprises are labour intensive in nature, they argue that the BCs are dominated by capital intensive businesses which tend to settle for higher wages that small enterprises cannot afford. As a result, small enterprises are negatively affected and find it difficult to adjust to global cost levels (Moleme, 2001:31).

Van Meelis (1999: 67) points out that as much as BCs adopt different approaches to their collective agreements, the problems faced by small and medium sized enterprises seem to be more or less the same. For instance, in 1997 employers of small enterprises told the trade union that they were considering pulling out of the Gauteng Building Industrial Council. They cited inefficiency and payment of benefits as problems. They criticised the BC for being expensive; too big and not cost effective. In other words, the uniform regulations applicable to all enterprises within the industry, especially the higher wages, have a negative impact on small enterprises. Small enterprises cannot afford these wages and are forced out of business. This Council was deregistered eventually as the employers withdrawn from the Council.

Opponents of the extension of agreements (the non-parties to the Council), argue that the main collective agreement of the BC should only be applicable to parties in the Council because they are the ones who negotiated it. They also maintain that the agreement should not be applicable or binding on non-parties primarily because they did not take part in the negotiation process. This means that the jurisdiction of the BC should be limited to its members only and not to non-parties (Van Meelis, 1999: 67).

Moleme (2001:20) suggests that there is also a need to look at the significant contributions that the extension of agreements has made. The first contribution that the extension of agreements has made is to remove and prevent unfair competition by non-party firms with regard to low wages. This is done by taking wages out of the competition between firms and ruling out very low wage service provisions. Secondly, extensions of agreements aim to promote uniformity in the sector in terms of providing similar remuneration systems and conditions of work to promote stability in the sector.

The main concern with the extension of agreements is that an extension would promote the notion of “free riding” to the employees and they would feel it is not necessary to join and be part of the trade unions (Theron, 1993:65-66). This has a negative impact on trade unions as it will affect the membership level and scope of negotiations.

Party members to the Council highlight the fact that if an extension of agreements has a negative impact on small enterprises, there are mechanisms to alleviate the effects of such extensions through the provision of exemptions. This provision supports enterprises that cannot afford to pay higher wages and meet other requirements in the main agreement (Van Meelis, 1999:67).

3.3 COMPLIANCE AND ENFORCEMENT OF COLLECTIVE AGREEMENTS

Enforcement of collective agreements refers to the Council’s capacity to implement the main collective agreement for small enterprises, whereas compliance refers to the level of conformity to the Council’s collective agreements by both party and non-party members in the Council (Godfrey *et al.*, 2005:15). According to Theron (1993:66) compliance by small enterprises to the Council’s collective agreement seems to be a challenge. Small enterprises cite non-compliance to the main collective agreement based on the fact that the BC is burdensome to their operations (Van Meelis, 1999:67).

Godfrey *et al.* (2005:15) argue that the LRA has been a primary reason for non-compliance to BC agreements. This is because it made the situation of non-compliance difficult by de-

criminalising non-compliance with agreements and at the same time introducing the new system of dispute resolution procedure that should also have included the mechanisms and powers to enforce the BC's collective agreement.

It clearly states in Section 33A (4) (a) that “the Council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the Council”, but this new dispute resolution system through which councils had to enforce agreements proved slow and burdensome. On the one hand it resulted in challenges that make it difficult for the inspectorates to enforce the collective agreement, and on the other hand, the uncertainty regarding enforcement of Council agreements led to firms deciding to take a chance and ignore agreements (Godfrey *et al.*, 2005:15).

Section 33A (3) also indicates that a collective agreement “...may authorise a designated agent (inspectorate) appointed in terms of Section 33 to issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period”. This also proved to be burdensome and made it extremely difficult for BC inspectorates to bring non-complying employers to book. It becomes increasingly clear that Section 33A has given greater power to designated inspectorates to enter workplaces, gather information and question employees regarding compliance with the BC's agreements. It also includes implicit procedures on how enforcement of BC agreements should be monitored. This new system of compliance followed by arbitration appears to be expeditious and it is associated with the problem of non-compliance of small enterprises.

3.3.1 Problems with compliance

Non-compliance to the Council's collective agreement has been cited as a reason by some small enterprise employers for considering pulling out of the BCs. For instance, in the Building Industry Bargaining Council in Gauteng, the Minister of Labour extended the agreement on wages and benefits reached at the Council to all employers and employees in Gauteng. About 60% of the employers paid less than they should as indicated in the Council's collective

agreement. Van Meelis (1999:68) points out that the reasons for small enterprises not complying with the collective agreement are the following:

- employers of small enterprises point out that companies which do not comply can do the work more cheaply than companies which comply. In other words non-complying companies would get more contracts and make more profit than companies that comply with the Council's agreements;
- De Kock (in Van Meelis, 1999:68) points out that it is too expensive and virtually impossible to ensure full compliance with the Council's collective agreements. Before the establishment of the LRA 66 of 1995, it was a criminal offence not to comply with the BC agreements. Companies or employers who did not comply with the Council's collective agreement could be prosecuted by the state and the non-compliance rate was fairly low; and
- while non-compliance according to Section 33A of the LRA should go the arbitration route, De Kock (in Van Meelis, 1999:68) is of the opinion that this new system is less compelling to employers and small enterprises in general. Other researchers such as Godfrey *et al.* (2005:18) and Stapelberg (in Van Meelis, 1999:68) seem to think that this is a better system, primarily because you can solve labour relations matters that cannot be resolved in a criminal court through arbitration. With arbitration the process is self-managed, dates can be decided on independently and it is quicker than taking the matter to the criminal court.

Moreover Van Meelis (1999:68) argues that non-compliance should not be a reason for employers of small enterprises to pull out of the BC. This is primarily because they are the ones who complain about non-compliance and it is their own members who do not comply with the Council's agreements. Previously, the employers who have been complying with the Council's agreements were some of the independent white contractors. Now there are many emergent black contractors who are non-compliant with any form of legislation and they operate on low wages. Allowing small employers to pull out of BCs will lead to employers lowering wages, decreasing benefits and weakening the unions. It should be noted that it is

only through strong centralised institutions that workers can be protected and parties can jointly address issues concerning industries.

3.3.2 Ineffectiveness of agreement enforcement

At the request of the BC, the Minister may appoint a designated inspectorate to help enforce any collective agreement concluded at the BC (Nel *et al.*, 2008:121) and in terms of Section 33A (3) "... may issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period".

The Act appears to have given considerable latitude to designated inspectorates to enter workplaces and gather information with regard to the enforcement of the Council's agreements. While the Council inspectorates also find it difficult to bring non-complying employers to book, Van Meelis (1999:69) further points out that, inspectorates are viewed as corrupt and ineffective by small enterprise employers. The Councils believe that they play a constructive and facilitating role for both employers and employees, whereas half of small enterprise employers are dissatisfied with the performance of inspectors (Du Toit *et al.*, 1995:22).

It has been proposed that the number of Council inspectorates be reduced to lower costs. Instead, shop stewards should enforce and police agreements. De Castro (in Van Meelis, 1999:69) strongly agrees with this argument by highlighting the fact that inspectorates are useful when they monitor the system of the Council's agreements. When they are not monitoring the system there is no need for them as the shop stewards can take over their role easily. This, in turn, will save money and the process of enforcing collective agreements will be self-managed by shop stewards with the help of trade unions.

Van Meelis (1999:69) supports the idea of shop stewards enforcing and policing the council's agreements if more shop stewards at the firm level can be employed. This will be more effective than the 10 to 12 inspectorates that are employed by the BCs. Effectiveness will further be improved if Councils can publish copies of the agreement in pocket size books and make these available to the party members of the Council. In this way, it will be possible for

all party members of the Council to take ownership of the agreement and ensure its implementation at the firm level.

The proponents of tight regulations of the LRA and the Council's agreement highlight a poor record in this regard, by pointing out that in 1994 there was a reduction of 50% in the number of inspectorates in most Councils. This happened primarily because parties agreed to play an active role in ensuring the implementation of agreements, but unions did not play an active role as was promised. What also has to be taken into account is the training of designated shop stewards. Firstly, negotiations will have to take place between the Councils and the trade unions about the training of shop stewards on agreements. Secondly, it should be noted that at this stage council inspectorates are involved in dispute resolution at the BC level and if the number of inspectorates are reduced, there will be only a few qualified people amongst the employers and unions who can do intensive dispute resolution at the BCs (Van Meelis, 1999:69).

Researchers such as De Kock (in Van Meelis, 1999:69) argue against this proposition by pointing out that the issue of dispute resolution would not be a problem as it could either be done by Independent Mediation Services of South Africa (IMSSA) such as the Commission for Conciliation, Mediation and Arbitration (CCMA) or by trained shop stewards. The underlying fact is that, the LRA states that parties that fall under a BC must go to their Council for dispute resolution if it is accredited to do so. For instance, Section 51 (2) (a) (i) states that "the parties to a Council must attempt to resolve any dispute between themselves in accordance with the constitution of the Council".

Section 51 (2) seems to be problematic for the BCs, since Godfrey *et al.* (2005:19) are of the opinion that recent research indicates that BCs view the dispute resolution function as a very important part of their role within a sector and that there are two ways in which this is done. Some Councils contract their dispute resolution functions out to outside agencies, whilst others train their inspectorate to perform dispute resolution as an in-house function. The problem is that neither one of these routes solves the problems of expense and capacity of

the BC; primarily, because Councils still face the difficult balancing act of taking on the dispute resolution function in terms of Section 33A.

3.4 NON-APPLICATION OF EXEMPTIONS

A BC in terms of Section 30 (1) (k) must at least provide for exemption procedures in their constitution and in terms of Section 32 (3) (e) an independent committee must be established to hear and decide on possible application and appeals for the refusal of exemptions. Although the exemption system and the composition of the exemption board in particular have been subject to criticism, the arguments underpinning this criticism are based on the following facts: firstly, exemption committees have been alleged to be bureaucratic and as a result less effective and less user friendly to small enterprises (Godfrey, 1997:101).

The composition of the exemption board should comprise of representatives of both the trade union and employer association. This has been problematic for non-parties because it is their competitors that take a decision whether exemption should be granted or not. Moleme (2001:23) also highlights similar criticisms against exemptions by pointing out the following:

- the parties who have a vested interest in not granting exemptions decide on exemptions;
- exemptions take a long time to process;
- exemptions are granted on an arbitrary basis;
- representations by applicants are not allowed;
- reasons for refusals are not given, and
- exemption procedures are complex.

From these criticisms it has become increasingly clear that when small enterprises apply for exemptions they consider the process a challenge they have to face up to before they can be exempted for a particular provision. Moreover, this also influences their decision whether it is worthwhile or not to apply for exemption. The complexity of exemption procedures has been the major obstacle in discouraging small enterprises from applying for exemption. Moleme (2001:24) points out that, exemptions do not seem to be the preferred method amongst small

enterprises for solving their problems, as they find it complicated to comply with the Council's exemption system. They lack the resources, time and common purpose to represent their interests effectively in BCs.

3.5 SUMMARY

This chapter has presented a review on small enterprises which focuses on the arguments around the requirements and restrictions that threaten the existence of small enterprises. It recognized that small enterprises face certain difficulties from the BC system and the conclusion that emerged from the literature is that considerable research on BCs in relation to small enterprises still needs to be done before reasonable accurate data can be obtained for the development of policies. This will make it possible for Councils to take account of particular circumstances of small enterprises when developing their own criteria for judging applications for exemption since each sector presents a different set of problems that Councils must adapt to.

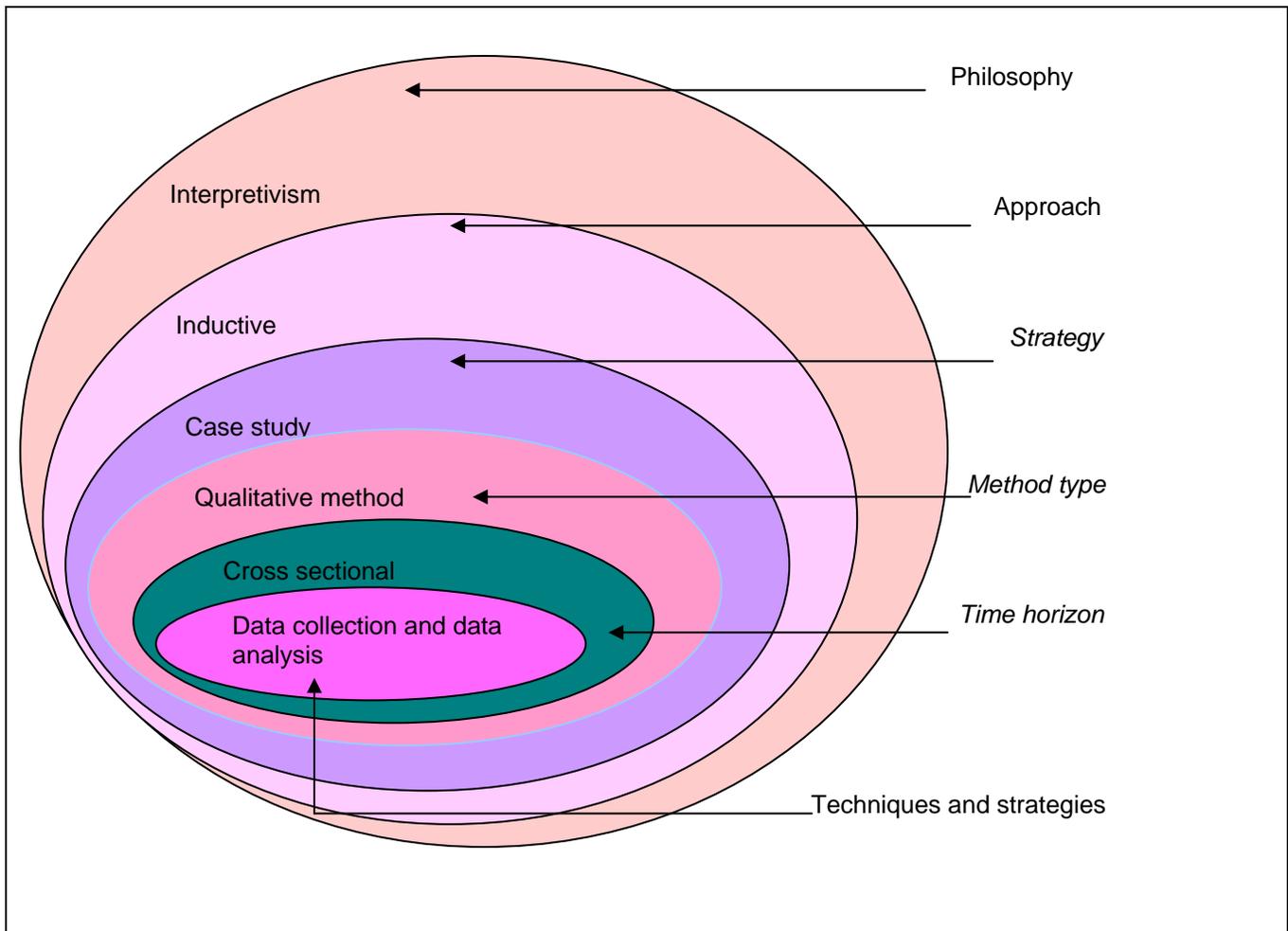
CHAPTER 4

RESEARCH METHODOLOGY

4 INTRODUCTION

This chapter reports on the research design and methods utilized for the research problem: *The relevance of the Bargaining Council on a group of small restaurant enterprises in Pretoria*. Figure 2 below provides a general conceptual framework of the methods that were used in this study:

Figure 2: The conceptual frame work



Source: Adapted from Saunders *et al.* (2007:132)

4.1 THE RESEARCH PARADIGM

Different types of paradigms such as positivism, post-positivism, constructivism-interpretivism and critical-ideological perspectives are incorporated in research in order to conceptualize, guide and classify research (Ponterotto, 2005: 128). According to Plack (2005:224) and Thornhill (2007:100) a paradigm refers to a set of basic beliefs that represents world views. It defines the nature of the world and the individual's place within it. A paradigm is not only a set of basic beliefs, but also a "set of interrelated assumptions about the social world which provides a philosophical and conceptual framework for the organized study of that world" (Filstead in Ponterotto, 2005:127).

In this study, an interpretivist paradigm was used to guide the study and according to Saunders *et al.*, (2007:106), an interpretivist paradigm is an epistemology that makes it possible to understand humans in their role as social actors. Ponterotto (2005:129) further indicates that the distinct characteristic of an interpretivist paradigm is the interaction between the investigator and the object of investigation, through which deeper meanings are constructed and uncovered.

The interpretivist paradigm is used to guide both the philosophical assumptions of the study and the process of selecting the tools, instruments, participants and micro-research methods that are used in the study.

Business and management science, particularly the field of labour relations management, is concerned with the social world in which we live and work (Saunders *et al.*, 2007:107). An interpretivist paradigm is adopted in this study primarily because the BC and small restaurant enterprises are organizations that result in situations which are not only complex, but also unique. They are a function of a particular set of circumstances and individuals, and for this reason it situates the study within the interpretivist paradigm that is used to understand the fundamental meaning attached to organizational life and to discover irrationalities, reasons and obstacles not seen (Saunders *et al.*, 2007:107).

4.2 DESCRIPTION OF OVERALL RESEARCH DESIGN

The qualitative research design was adopted in conducting this study. It was based on meanings expressed through words where results were collected in non-standardized data to ensure congruence between the research question and the components of the method (Robson, 1993:38). According to Leedy and Ormrod (2005:94); and Morse *et al.* (2002:120) qualitative research is used to answer questions about the complex nature of phenomena, often with the purpose of describing and understanding the phenomena from the participant's point of view.

A qualitative research method was used to produce a wealth of detailed data about a smaller number of people or cases, through direct quotation and careful description of situations, events and interactions (Gillham, 2000:11 & Ichharam, 2002:27).

In the process of this research an extensive amount of verbal data was collected from a small number of participants. The data was then organized into a form that gives coherence so that it becomes possible to use verbal description to portray the situation studied. The researcher entered the setting with an open mind, prepared to be immersed in the complexity of the situation and interact with participants (Bryman, 1988:61-63).

The qualitative method used in this study was not used in conjunction with any other method; primarily because the qualitative method on its own enables one to understand the context of the chosen BC in relation to a group of small restaurant enterprises that are part of the study (Hofstee, 2006:133).

O'Neil (n.d:3) supports this approach by pointing out that the qualitative method can be used on its own, specifically if the phenomenon under study is:

- ill-defined or not well understood;
- deeply rooted, i.e. when subject matter is deeply set in the personal knowledge and understanding (their responses to events) of participants

- emotive to individual participants.

4.2.1 Type of qualitative research design

To obtain clarity on the nature of a BC in relation to a group of small restaurant enterprises, a **cross-sectional case study** "that looks at interaction at one point in time instead of a longitudinal case study that allows for observation over an extended time period" (Moguerane, 2005:37) was adopted.

The cross-sectional case study approach was utilized in this study for a number of reasons. Firstly, it was used as a means to obtain detailed information on a particular process within a specific type of BC to determine its function in relation to a group of small restaurant enterprises. Secondly, it was used because it has considerable ability to generate answers to the research question (Beauchamp, 2004: xi).

The case study approach that is demonstrated in the work of Barawoy (2001:24) and Ichharam (2002:31) is an extended case study method which allows the study to draw the broadest conclusions from the smallest detail. The use of a case study in this research was aimed at accomplishing a similar goal, but in a way which modifies generalizations rather than theories.

Saunders *et al.* (2007:139) distinguish between four case study strategies based upon two discrete dimensions:

- single case v. multiple case;
- holistic case v. embedded case.

A **single embedded case** was employed in this study (i.e., one from the first dimension and one from the second dimension). These strategies were adopted in this study in such a way that a BC was used as a single case within which small restaurant enterprises existed as sub-units. The way small restaurant enterprises were selected or treated in relation to a BC; in this study is an embedded case. These strategies were employed primarily because they are a

very worthwhile way of exploring a research problem. They enabled the researcher to challenge existing research findings and also provided a source of new research questions. Silverman (1998:12) further points out that these strategies

- do not seek explicit control or manipulation of variables, and
- study a phenomenon in its natural context.

4.2.2 The core description that reflects the characteristics of the study

The description that best reflects the core characteristics of this study is that of a non-experimental but **exploratory** and **descriptive** study. Hence these seek an ongoing insight, familiarity of the research problem and a considerable ability to generate answers to the question *why*, as well as to, *what* and *how*. An exploratory approach was adopted to seek new insights from the BC and to assess the functions of the BC in relation to small enterprises in a new light. In addition to an exploratory approach a descriptive approach was also adopted as an object of description to portray an accurate relationship between the BC and small enterprises (Saunders *et al.*, 2007:133).

In contrast to the deductive research approach that deduces a hypothesis (a testable proposition about the relationship between two or more concepts or variables) from theory, this study adopted an **inductive approach**, to enable a clear understanding of the way in which BC officials interpret their daily work functions as a direct consequence of their perceptions of their work experiences (Saunders *et al.*, 2007:117).

4.3 SAMPLING

In qualitative research the sample must be appropriate and consist of participants who best represent or have knowledge of the research topic to ensure efficient and effective saturation of categories for data analysis (O'Neil, n.d:10 & Morse *et al.*, 2002:12). That means that, instead of drawing from large representative samples of an entire population, the study should

seek to acquire depth and intimate information from a smaller group (Bless & Higson, 2000:20).

A single BC, i.e. the Bargaining Council for the Food Retail, Restaurant, Catering and Allied Trades Pretoria was chosen. The selection of this Council was on the basis of a BC that covered enterprises, in which a significant number of small restaurant enterprises were known or expected to be present. Hence this created an opportunity to select eight small restaurant enterprises **as sub-units of analysis** for the study.

The secretary of the BC was asked to grant permission for conducting interviews with owners and managers of small restaurant enterprises in the food retail, restaurant and catering trade industry. Small restaurant enterprises were selected in a fairly arbitrary fashion and cannot be considered to be representative.

The selected small restaurant enterprises were made up of both party members and non-party members to the Council. The data on the party employers to the Council is generally confined to the restaurant owners or managers that the Council is aware of. Non-party members to the Council (unregistered owners of small restaurant enterprises) were included in the study based on the following reasons:

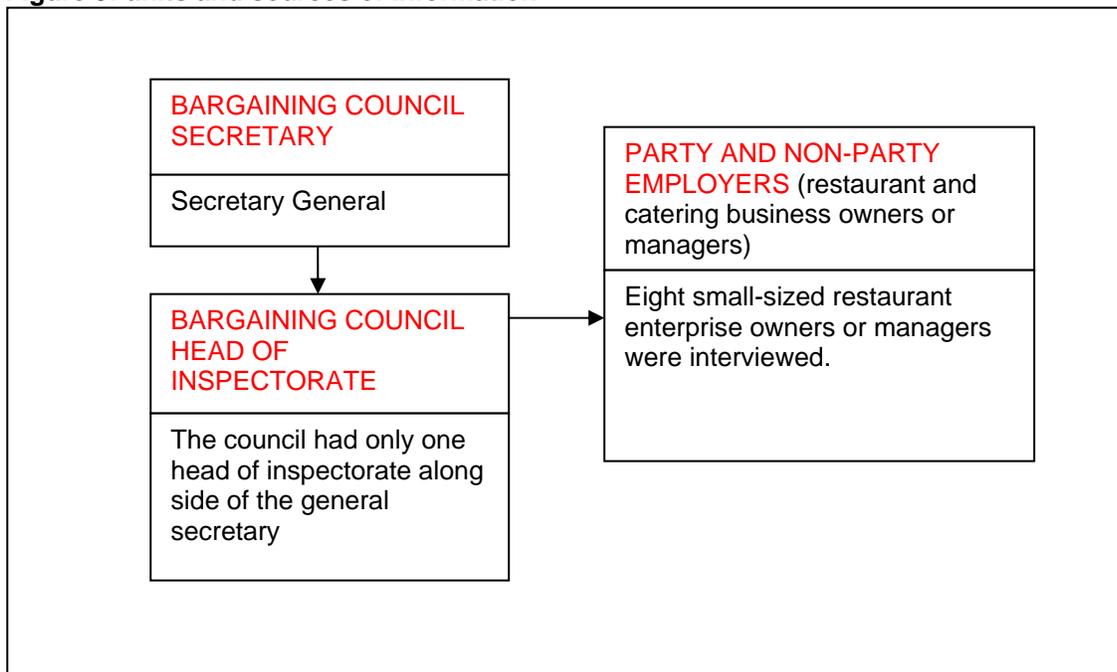
- they added knowledge and a perspective on the representativity and coverage of the Council;
- the existence of non-party employers to the Council highlighted the capacity of the inspectors to enforce their collective agreement to non-parties, and
- the level of non-registered employers gave an indication of whether the exemption system was utilised and whether it was effective or not.

Figure 3 below illustrates the sources of information that took part in this study. Amongst the high ranking officials of the BCFRRCAT in Pretoria, the general secretary of the BC was interviewed as the first candidate to the study. Since the Council has set guidelines for

carrying out inspections and requires regular reports from the inspectors, the head of inspectors was also interviewed as a second source of information.

The head of inspectors formed part of this study primarily because the role that inspectors play in the Council has been viewed differently by different parties in the Council. On the one hand, the Council believes that the inspectors play a constructive and facilitative role towards both employers and employees. On the other hand, half the managers or owners of small restaurant enterprises are, however, dissatisfied with the performance of inspectors. The total number of participants resulted in 10 candidates or sources of information and the way in which these candidates were selected was also based on the fact that they all would represent different perspectives on the research topic.

Figure 3: units and sources of information



The selection of informants that took part in the study was done on the basis of **non-probability sampling** and was drawn from different segments of the research population (Hammersley & Atkinson, 1995:136). The choice of this sample was not only guided by the research problem, but also based on the fact that informants were selected for inclusion in the study according to their status in the BC and small restaurant enterprises were selected based on the criterion of being expected or known to be present within the BCFRRCAT.

4.4 DATA COLLECTION

In qualitative research data collection takes a great deal of time. The potential sources of data are determined by the researcher's open-mindedness and creativity (Leedy & Ormrod, 2005:143). In addition to the use of the LRA, annual reports and official guidelines were consulted to get a wider view of the BC and to understand how the BC operates. The **specific attributes or characteristics** that were investigated differ from one unit of analysis to another. The reason for this was that each unit of analysis selected in the study represented a significant perspective of the topic.

The attributes or characteristics of the BC inspectorates that were investigated considered their functions in the BC. Set guidelines for carrying out inspections and regular reports from inspectors were critically reviewed prior to interviews conducted with the head of inspectorates.

The attributes of small restaurant enterprises that were investigated were similar for all enterprises. The focus was based on the distribution of small restaurant enterprises covered by the Council and the problems they face in their day-to-day operations. This was to relate the question of exemption to a broader debate about deregulation in the context of the development of small restaurant enterprises.

Gaining access from the BCFRRCAT was a crucial part of this research project. Saunders *et al.* (2007:164) point out that gaining access to a particular organization is a process rather than a single event. There are two types of access one has to obtain. Firstly, *physical access* has to be granted by management, as well as informal acceptance from intended participants within the Council. This access was obtained over a considerable period of time that involved numerous telephone calls and emails to the General Secretary of the Council prior to interviews being conducted.

Secondly, *cognitive access* has to be granted by small restaurant enterprises before attempting to answer the research question to meet set objectives. This was obtained through

the process of a detailed informative letter of consent that explained what the study was about and what it aimed to achieve. Furthermore, assurance of confidentiality and anonymity was given to participants in the study.

A major challenge in gaining access to the participants was to arrange interviews and meetings that fit into the busy schedules of the Council officials who could have refused to cooperate. However, this was avoided by being flexible and by planning ahead.

4.4.1 Method used to collect data

An interview is a purposeful discussion between two or more individuals, and it was implemented in this study as a specific method of data collection. According to Robson (1993:228) an interview is like a conversation which is initiated by the interviewer for the specific purpose of obtaining research relevant information. The researcher has to take into account the time, resources available and the cost of different decisions made in the study (Festinger, 1953:176). In contrast to survey research, in qualitative interviews each conversation is unique as the researcher attempts to match the questions to the knowledge of each interviewee as well as his/her willingness to share that knowledge (Rubin & Rubin, 2005:4).

4.4.2 Type of interview method

According to Saunders *et al.* (2007:310) the nature of any interview should be consistent with a research question and objectives. In this study, **semi-structured interviews** were utilized as a specific interview method.

The first set of semi-structured interviews with the BC officials (the General Secretary and the head of inspectorates) was carried out at the beginning of February 2009. After conducting interviews, transcribing and critically analysing the data, it was very important to visit the DOL and collect whatever data they had on the BC regarding a range of issues that would assist in addressing the core research question. A warm welcome and the assistance by the DOL made it possible to do follow-ups telephonically. This was done to obtain clarity on certain

data it supplied and to fill in certain gaps that emerged after the semi-structured interviews had been conducted with the Council officials.

The second batch of semi-structured interviews with small restaurant enterprises was conducted at the end of April 2009. As discussed in section 4.3 and also shown in table 1 below, one needs to bear in mind that small restaurant enterprises were selected in a fairly arbitrary fashion and cannot be considered to be representative. The rationale was that, to obtain more clarity and depth on the nature of small restaurant enterprises, detailed information on a particular and limited number of small restaurant enterprises had to be obtained to determine its functions and get a clear picture of the relationship between the council and small enterprises.

The following table adapted from the work of Moleme (2001:128) shows the number of small restaurant enterprises where semi-structured interviews were conducted, the type of respondent and the size of the company, in terms of the number of employees it employs.

Table1: Details of small restaurant enterprises interviewed

| Company | Respondent | No. of employees |
|---------|------------|------------------|
| A | Manager | 3 |
| B | Owner | 2 |
| C | Owner | 6 |
| D | Manager | 5 |
| E | Owner | 1 |
| F | Manager | 4 |
| G | Manager | 7 |
| H | Manager | 5 |

During the semi-structured interviews, questions which had been prepared in advance were used. However, the researcher was free to modify the order based upon his perception of what seemed most appropriate within the context of the conversation. (A draft of interview guides that were used in this study is included as Appendix A). During interviews the researcher had to carefully plan how to ask his research questions. This involved changing

the way questions were formulated, giving explanations, leaving out particular questions which seemed inappropriate with a particular interviewee and including additional ones when necessary. In this study semi-structured interviews were highly relevant and necessary because according to Saunders *et al.* (2007:313): they

- provide appropriate answers about the research problem;
- are used to gather data that is analyzed qualitatively to reveal and understand the 'what' and the 'how' but also place more emphasis on exploring the 'why' question.

The primary data of the study was collected by only the researcher, and each interviewee was fully briefed and informed before each interview session. A

60 - 90 minute slot was allocated for each interview session. To record the information, a **voice-recorder** was utilized as one of the means and techniques to control bias and to produce reliable data for analysis. Using a voice-recorder made it possible to concentrate more fully and listen attentively to what was said, and to observe the expressions and other non-verbal cues that interviewees were giving.

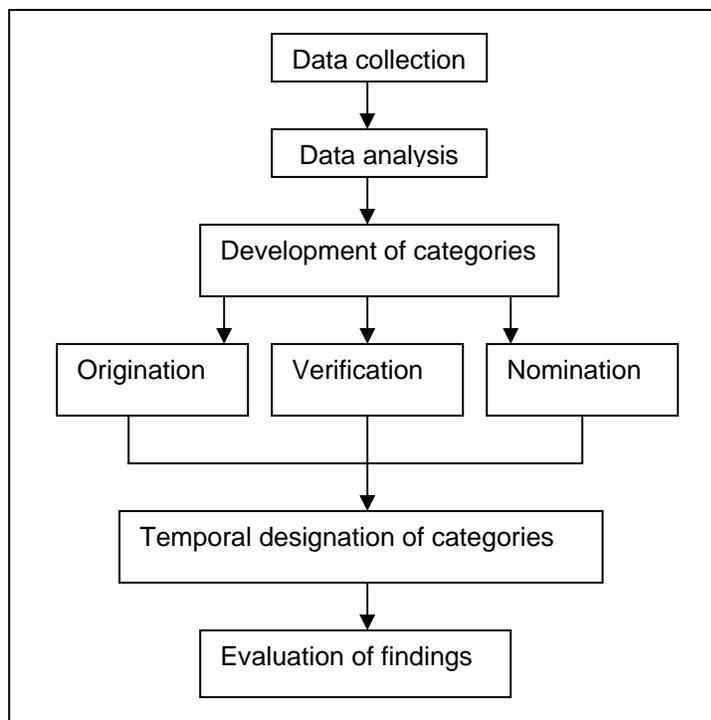
Saunders *et al.* (2007:334) and Ichharam (2002:34) advise that even though a voice-recorder is used, it is also helpful to make brief notes to maintain concentration and focus. A voice-recording can capture the tone of voice and any hesitation but does not record facial expressions and other non-verbal cues. Technical problems can also occur when recordings are made. Note-making had a positive impact on the study. The data collection method utilized in this study was pre-tested on a few master's students that also provided input about the way questions were asked. Hence it was possible to refine the set of themes so that the interviewees would not have problems to answer the questions.

4.5 DATA ANALYSIS

Data analysis involves breaking down or dividing all the complex data into its constituent parts (Spiggle, 1994:492). According to Thorne (2000:68) data collection and data analysis processes should be concurrent with each other in research. This is primarily because the relevance or importance of data obtained from answering the research questions depends on all the analytical processes of the study (Hofstee, 2006:117).

Figure 4 below presents the data analysis processes that were followed to prepare the data for analysis. Through these approaches it was possible to organize, extract meaning, arrive at conclusions and confirm conceptual schemes that describe the data:

Figure 4: The data analysis process



Since qualitative data is never accessible in a unified whole but rather found in isolated form, it is non-standardized and complex in nature (Thorne, 2000:68). The data collected from the participants was divided into categories before it was meaningfully analyzed. This involved the process of attaching relevant parts of data to units such as a number of words or

sentences and a textual paragraph that fit the category of data. The development of categories involved the following process:

4.5.1 Development of categories

Categorization refers to a process of classifying or labelling the data collected into units of data (Spiggle, 1994:493). It involves naming or giving labels to instances of phenomenon found in the data. The text categorization and labelling may be few words or a page long. However, some parts of the text may contain no meaningful information for the analysis and remain uncategorized (Denzin & Lincoln, n.d:783).

There are three different categorization components, i.e. ***origination***, ***verification*** and ***nomination*** that were not only utilized in the course of developing categories in this study but also used to verify and evaluate the accuracy and completeness of the data collected (Constas, 1992: 257). These components were associated with their own particular questions that shed light on the process of categorization as discussed below.

- **Origination**

Origination as a component of categorization identifies the basis of category construction and is associated with the question: “*Where does the responsibility for the creation of categories reside?*” For the purpose of this study, categorization firstly resided with *participants* who were divided into their own categories (see figure 3 in section 4.3 above). Using participants as point of origination meant that the participants were identified as categories. Secondly, a category also emerged from the *participant views* which are referred to as an investigative perspective. Thirdly, a category was also derived from a comparison between interview transcripts and statements or conclusions found in the *literature* of other researchers who investigated a similar topic.

- **Verification**

Verification as a second component of categorization was utilized to detail the strategies used to support the creation and application of categories. The question associated with this component is: “*On what grounds can one justify the creation or existence of a given set of category?*” For the purpose of this study verification required that participants be given an opportunity to review and if possible to modify the results of the study. Since all participants were captured on tape, *verbatim* recordings were used to meet the criteria of participant feedback.

Secondly, a *peer review* which refers to the discussion of the findings with other disinterested people (a number of master’s students) was utilized to verify and substantiate a given set of a category. Their role was to challenge the research to provide solid evidence for any interpretation. Thirdly, the *referential strategy* was also utilized to refer to existing research findings.

- **Nomination**

Nomination is concerned with the naming of categories and the question associated with this component is: “*What is the source of names used to identify a given category?*” The most practical way to organize data was to assign labels or tags to the data that was linked to certain concepts of which the subordinate labels are identical to those used under the origination component, i.e. *participants, participant views, and literature and interview transcripts*.

4.5.2 Temporal designation

Temporal designation is an additional section that was also used to give guidelines when developing categories during the data collection process. According to Conostas (1992:261) it addresses the temporal characteristics of the categorization process and the question associated with this domain or component is: “*At which points during the research process are or were categories specified?*” As illustrated in table 2 below, categories were developed according to three different temporal descriptors at different periods during the research

process. Firstly, categories were developed at a *priori*, meaning that some of the categories were developed before the primary data was collected. Secondly, categories were also created at *posterior*, meaning the creation of categories after the data had been collected. Thirdly, categories were also developed during *iteration*. In iteration they were developed at various points during the research process (Constas, 1992:261-262). Table 2 below, provides a practical summary of the development of categories during the research process:

Table 2: The documentational table for the development of categories

| Component of categorization | Temporal designation | | |
|--|----------------------|-------------|-----------|
| | A prior | A posterior | Iterative |
| Origination | | | |
| Where does the authority for creating categorization reside? | | | |
| Participants | x | x | x |
| Participants views | | x | |
| Literature | x | x | x |
| Interview transcripts | x | x | x |
| Verification | | | |
| On what grounds can one justify a given category? | | | |
| Participants feedback | | x | |
| Peer review | x | x | x |
| Referential strategy | | | x |
| Nomination | | | |
| What is the source of the name used to describe category? | | | |
| Participants | x | x | x |
| Participant views | | x | |
| Literature | x | x | |
| Interview transcripts | | x | |

Category label key:

- Concepts
- Tags
- Textual paragraphs

Data source key

-Interviewing

Source: adopted from Constas (1992:262)

4.6 ASSESSING AND DEMONSTRATING THE QUALITY AND RIGOUR OF THE RESEARCH DESIGN

A semi-structured interview is a specific type of interview method that was employed in this study. However, its lack of standardization may lead to concern about the quality and rigour of the study. This is primarily because of the sources of potential research bias that could have influenced the research findings. The problem here is that the researcher may find what is desired to be found and write up the result of the study. Johnson (1997:283) supports the idea that the problem of research bias is frequently an issue in qualitative research because qualitative research is open-ended, exploratory and less structured than quantitative research.

When qualitative research is conducted, the researcher must play a neutral role to ensure that respondents do not give responses that are generally in agreement with the interviewer's position (Moguerane, 2005:49). Before the researcher started to conduct interviews, there were two potential biases that the researcher was aware of:

The first is **interviewer bias**, whereby the comments, tone or non-verbal behaviour of the interviewer are presented in such a way that they create bias in the interviewee response. Related to this interviewer bias is the **response bias** from the interviewee, which is based on the perception about the interviewer. Often this takes place or results in a situation where the interviewee may choose not to reveal or say more about a certain aspect of the topic that needs to be explored further.

This occurs because the answers may result in probing questions that can lead to subjects or issues that the interviewee does not want to discuss in an interview session. As a result, the interviewee may not provide explicit and complete information about a subject matter (Saunders *et al.*, 2007:318).

4.6.1 Key strategy to reduce research bias

The way in which these research bias issues were reduced was through the use of *reflexivity*, which means that the researcher actively engages in critical self-reflection about his potential biases and predispositions. Through the use of this strategy, it became possible to be aware, monitor, and attempt to control any interviewer bias that might have occurred during the research process.

4.6.2 Criteria and techniques used to ensure reliability and validity

When credibility and rigour in qualitative research are taken into consideration, reliability and validity are not necessarily important criteria in establishing and assessing the quality of research. However, it is important to note that the term validity has originally been attached to and is upheld by the quantitative research tradition (Robson, 1993:66-67). For qualitative researchers the term validity refers to qualitative research that is plausible, credible, trustworthy, and therefore, defensible. It refers to “the extent to which the researcher gains access to participants’ knowledge and experiences and is able to infer a meaning that the participant intended from the language that was used by that person” (Johnson, 1997:284).

There are two types of validity, each with its own techniques that were utilised to ensure quality, credibility and rigour in this study (Johnson, 1997:284):

- **Descriptive validity** was achieved through the factual accuracy in reporting information. It gave an answer to questions such as: “*Did the researchers actually report what they saw and heard?*” and “*Did what was studied by the researcher actually happen?*” To ensure descriptive validity in this study, *data triangulation*, which refers to the use of multiple data sources to verify the findings, was used. This is a technique used to ensure quality, credibility and rigour.
- **Interpretive validity** can be achieved through the accurate portrayal of meaning attached by the participants to what is being studied. What it generally means is that the viewpoints, thoughts, feelings, intentions and experiences of all research participants should be

accurately understood and portrayed in the research. This type of validity was ensured through the use of *verbatim recordings*, which were used to answer the question: “*Did people who participated in the study agree with what was being said about them?*” By using these techniques in the study solid evidence for the findings of the study was provided.

4.7 ETHICAL CONSIDERATIONS

Good qualitative research does not only promote reflexivity, self-awareness and empowerment of the parties involved in a study, it also respects the complexity of the phenomenon under study (Brinkmann & Kvale, 2005:167). This is primarily because ethical concerns emerge during different stages of a study, for example when formulating a research topic, seeking access to an organization or individuals, collecting, processing, storing and analyzing data and writing up research findings (McLeod cited by Grafanaki, 1996:8). Saunders *et al.* (2007:178) define these concerns as research ethics, meaning that it is highly important to ensure that the study is designed not only methodologically sound but also morally defensible to all those who are involved in a study (Appendix B contains an informed consent form that was issued to participants for their voluntary participation in an academic research study and a completed version of the application for ethical clearance required by the Faculty of Economic and Management Sciences Research Ethics Committee).

It is important to note that the methods used in this study neither forced people to participate nor exploited them if they were willing to participate in the study. Consent and permission was required from all possible participants. At the time of first contact with the participants, the interviewer introduced himself to the participants as a master's student, explained his reasons for visiting the participants and also explained clearly to them how they were selected for the study. The research area as well as the method of data collection (use of voice-recorder) was explained to the participants. The anonymity of the recorded interviews as well as its transcription process was also explained. They were all told that the data obtained from them would only be used for academic purposes. It was also explained that only the researcher and the supervisor would have access to the recorded information and only the researcher would

transcribe the information. To participate in the study the participant had to consent to be a participant in the study on a voluntary basis after reading and understanding the information provided in the consent form.

4.8 SUMMARY

This chapter outlines the nature and structure of the research methods used in this research study. The mode of understanding the qualitative research method as an adopted research design has been analyzed on the basis of a practically orientated description around the topic: *The relevance of the Bargaining Council on a group of small restaurant enterprises in Pretoria*. The motivation to carry out this study qualitatively was founded on the following characteristics: its ability to understand the phenomena from the perspective of the people being studied, its ability to provide detailed descriptions of specific settings under investigation and its ability to allow the application and testing of concepts that produced a wealth of detailed data about a small number of people.

CHAPTER 5

COLLECTIVE BARGAINING AT THE BARGAINING COUNCIL

5 INTRODUCTION

In this chapter the foundation for findings in chapter 6 and 7 is done. This is done by providing the scope and content of collective bargaining as the study falls within the theme of collective bargaining functions. The aim is not to trace the history of collective bargaining, as that important task has been undertaken with great success by a variety of researchers such as Butcher & Rouse, 2001; Du Toit *et a.l.*, 1995; Finnemore, 2006; Horwitz, Brosnan, Walsh, 1998; Moll, 2001; Godfrey, & Theron, 2002 and Von Holdt, 1994. Flexibility and adaptability of collective bargaining were repeatedly demonstrated in the past.

5.1 THE SCOPE OF COLLECTIVE BARGAINING

Collective bargaining in South Africa is conducted through the system of BCs, supplemented by firm level bargaining which caters for the needs of unskilled and semi-skilled employees in particular enterprises (Bendix, 2001:242). The LRA 66 of 1995 provides a sphere of influence for collective bargaining through collective agreements as it states in Section 23 (1) (c) that "a collective agreement will bind the members of a registered trade union and the employers who are members of a registered employers organisation that are party to the collective agreement if the collective agreement regulates terms and conditions of employment ;or the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers".

The term collective bargaining is defined by an International Labour Office (ILO) (1981:7) as a process of decision making with an overriding purpose to negotiate an agreed set of rules that governs the substantive and procedural terms of employment relationship, as well as the relationship between the bargaining parties themselves.

Bendix (2001:233) provides a more comprehensive definition of collective bargaining, “as a process, necessitated by a conflict of needs, interests, goals, values, perceptions and ideologies, but resting on a basic commonality of interest, whereby employees/employee collectives and employers/employer collectives, by the conduct of continued negotiation and the application of pressure and counterpressure, attempt to achieve some balance between the fulfilment of the needs goals and interests of management on the one hand and employees on the other - the extent to which either party achieves its objectives depending on the nature of the relationship itself, each party’s source and use of power, the power balance between them, the organisational and strategic effectiveness of each party, as well as the type of bargaining structure and the prevalent economic, socio-political and other conditions”.

The concept “collective bargaining” emanates from the fact that employees join together in trade unions to enhance their power in bargaining with employers over wages and working conditions. In this study the concept “collective bargaining” is extended to a grouping or representative of trade unions and employers at the BC, who themselves come together and combine for the purpose of collective bargaining at a sectoral level of the economy. What is basic to collective bargaining is the capacity of the parties of interest, to develop internal structures suited to the bargaining process for the best interest of employees and employers at the firm level.

5.2 LEVELS OF COLLECTIVE BARGAINING

Since bargaining forums may be established at the highly centralised or decentralised level. These bargaining levels involve a decentralised position where a single trade union and employer in a particular workplace are situated, and a centralised national position where trade union and employer federations are in a centralised bargaining forum are incorporated (Finnemore, 2006:175).

Centralised bargaining refers to the industry-level bargaining that covers a wide range of issues; mainly those that are of interest for the survival of the industry. The idea behind

centralised bargaining is that all employers in that particular industry will pay uniform wages and grant the same conditions of service to their employees. Centralised bargaining is usually the preferred method of bargaining by bigger and better organised unions where the primary forum for centralised collective bargaining is the BC (Grogan, 2007:362).

In contrast to the centralised bargaining in a sectoral bargaining forum at a national or regional level, decentralised bargaining may be referred to as a bargaining forum at the company or enterprise level where trade unions negotiate with the employer, whose ownership may extend to a single workplace or multiple workplaces situated at different sites regionally or nationally (Finnemore, 2006:168).

BCs are significant social institutions in South Africa. They do not only have a significant impact on establishing minimum and uniform standards of employment but also give rise to a number of conventional guidelines in centralised bargaining between the employer organisations and trade unions. According to Theron (1993:58) BCs have become a cornerstone of our labour relations system, and of even greater importance, as the BC system is voluntary it gives minimal power to state involvement in the collective decision making. For the first time the employers and trade unions are able to reach agreements without first getting approval from the state to make it binding for the employers and trade unions.

BCs are predominantly governed by the LRA 66 of 1995, but the Wage Act 5 of 1957 now repealed by the Basic Conditions of Employment Act 75 of 1997 (hereafter BCEA) also has an impact on the BCs. These laws intersect but what is more important according to Butcher and Rouse (2001:350-351) is that when one is involved in setting minimum standards within a particular sector, consideration must be given to both the LRA and the BCEA. In other words, collective agreements founded by the BCs take precedence over minimum standards and where there is no BC in a sector workers are covered by the requirements of the LRA and the BCEA.

5.3 PARTY MEMBERS IN THE BARGAINING COUNCIL

The relative position of employees and employers in their contractual relationship can be significantly affected by the ability of each of the parties (trade union and employers organisation at the BC) to organise for concerted action (International Labour Office, 1981: 17). While the aim of collective bargaining is to arrive at an agreement where both sides of the parties (employers and employees) can work together, the objective of each party's negotiators is to secure the best possible terms for their constituents.

What constitutes the best possible terms for collective bargaining is an abstract question to which there is no practical answer. In practice, negotiators will settle for an agreement which they consider acceptable.

At the BC employer organisations are defined by Barker and Holtzhausen (1996:49), "as organisations that voluntarily link together with any member of employers, often in the particular industry and /or region. One of the primary aims of such an organisation is to regulate relations between employer and employee organisations".

Employer organisations can take the form of chambers of commerce and industry, which are linked to a national federation, and which then represent business and often also lobby government to protect or enhance their interest. Individual employers do not have formal collective representation in the industry. It has therefore become common practice to form organisations that can represent employers in a collective manner concerning all issues that affect them (Nel *et al.*, 2008:41).

There has to be a distinction between *employer organisations /multi-employer bargaining* on the one hand and *single employer bargaining* on the other hand. The simpler case is that of the latter category (single employer bargaining), which is underpinned by the fact that, among the companies with a wide diversity of shareholders, effective responsibility for negotiations almost always lies with the highest level of management. The chief negotiator for the

employer side may have full power to conclude a binding agreement or he or she may be little more than a messenger between the negotiating room and the top management (Nel *et al.*, 2008:41-42).

The former category, i.e. employer organisations tend to grant their negotiators a relatively wide basis of power to conclude agreements. By and large, employer organisations seek to avoid making decisions by means of outright voting. The preferred procedure for deciding about contentious bargaining issues is to seek a consensus. The reason is that a ballot in which each firm has one vote will not reflect the difference in the size of firms and its outcome can easily be contested (Nel *et al.*, 2008:41-42).

The description by the study of International Labour Office (1981: 79) on employer organisations also supports the above practices by pointing out that:

“Whatever method of consultation is employed, the common aim is to obtain a consensus of opinion rather than to take a vote. The policy has to be generally acceptable and simple majority voting can produce a substantial minority in opposition. The process of consultation therefore tends to involve the moulding and modification of views until they are acceptable as widely as possible. Voting by the membership is, however sometimes used to obtain a direct expression of views on important issues”.

Trade unions which are the other party members at the BC may be seen as voluntary organisations of workers. Nel *et al.* (2008:45) further defines them as “a continuing permanent organisation created by the workers to protect themselves at their work, to improve the conditions of their work through collective bargaining, to improve the conditions of their lives and to provide a means of expectation for the workers’ views on matters of society”.

Trade unions are usually grouped according to their nature and character (Webster & Omar, 2003:206). Firstly, there are craft unions which focus on specific occupations. Among the traditional craft unions one can find carpenters, plumbers, painters and bricklayers. Membership is gained by means of a specific occupation; irrespective of the industry (Aidt &

Tzannatos, 2002:27). Secondly, there are industrial trade unions (where the study locates the trade unions for the BCFRRCAT) that define their domain in terms of specific industries. Some of the best known examples of industrial trade unions are those for mineworkers, autoworkers and steelworkers (Jones, 1984: 1-6).

5.4 THE OBJECTIVES OF COLLECTIVE BARGAINING

Apart from the idea that collective bargaining arises from the recognition of collective agreements to protect and promote the interest of employers and employees, Finnemore (2006:174) outlines four main objectives of collective bargaining:

- the provision of institutionalised structures and processes whereby potential conflicts over matters of mutual interest, for example wage and working conditions may be channelled and resolved in a controlled manner thus reducing unnecessary disputes;
- the creation of conformity and predictability through the development of and commitment to collective agreement which establish common substantive conditions and procedural rules;
- the promotion of employee participation in managerial decision-making that concerns the working lives of employees; and
- the enhancement of democracy, labour peace and economic development at national and even international level.

Without this interaction there would not be any bargaining at all. Bargaining emphasizes the inevitable interdependence of the different parties and results in communication which is central to labour relations as the interests of parties can be common or conflicting. Collective bargaining takes place regardless of the nature of the relationship that is prevalent between the parties, i.e. whether it is co-operative or adversarial. According to Finnemore (2006:181-182) the system of collective bargaining is perceived in the light of the following advantages and disadvantages.

5.4.1 Advantages of centralised collective bargaining system

In support of centralised collective bargaining the perceived advantages of collective bargaining are outlined as follows:

- trade unions are of the view that through the extension of collective agreements that are reached by the parties at the Council, they provide protection for non-unionised employees who would be exploited in small enterprises;
- the extension of agreements through the centralised BC system is highly favoured by large employers because uniform wages prevent undercutting of wages by smaller employers, who offer lower wages and worse working conditions and benefits;
- employers must compete on skill management level and not on lowering wages;
- negotiations through the collective bargaining system are conducted by skilled negotiators and this makes it possible for trade unions to train their experts to conduct high level negotiations. It would be difficult to find the range of expertise and the time to negotiate separately with every employer. Small enterprises that do not have skilled personnel in labour relations would be represented by skilled negotiators of their employer organisation;
- more comprehensive training programmes and facilities may be developed on a cost effective basis;
- dispute settlement procedures that are conducted at the BC, offer an opportunity for unbiased hearing of alleged unfair dismissals or unfair labour practices;
- negotiation of a collective agreement for a long time period, e.g. three years results in a decline of strike actions since most of important matters such as wages are dealt with in the collective agreement; and
- less interpersonal tension is experienced at the workplace since negotiations take place at a higher level.

5.4.2 Disadvantages of centralised collective bargaining system

The following criticisms of collective bargaining are frequently put forward at the Council:

- Collective agreements negotiated at the BCs are perceived to be restrictive to the market forces because of the extension of collective agreements covering all the employees and employers in the demarcated area.
- The minimum wage and working conditions become binding whether they are members or not. This is seen to be contrary to the promotion of the free market system and it hinders employers from competing internationally.
- It is suggested that numerous small enterprises have been liquidated due to failure in complying with agreements and payments of the BC in spite of the provision to be exempted from the main collective agreement (Hudson, 2003:[3]).

Taking into account both advantages and disadvantages outlined above, one should note that collective bargaining is not an independent process that is immune to different internal or external environmental influences. Moleme (2001:4) argues that, the nature of collective bargaining “is subject to external influences in the shape of economic and socio-political developments, technological innovation and demographic changes”.

These external influences affect both centralised and decentralised levels of collective bargaining process and in turn, they are also affected by the collective bargaining outcomes. Within the BC, the nature of external influences such as economic and socio-political developments favouring or not favouring any party to the collective bargaining processes may also influence the negotiating power of the parties. For instance, when economic conditions are poor employees are relatively in a weaker bargaining position and this usually affects their demands and their expectations. Under these circumstances employers are normally in a better position to elicit concessions from employees. Improved economic conditions would reverse the position of both employers and employees and improve the expectations of employees and put employers in a weaker bargaining position at the BC (International Labour Office, 1981:76-77).

The state also has a role to play in the collective bargaining process between parties to the Council. This takes place through the process of legislation. The state policies may promote certain kinds of bargaining. This can take place in different ways. One of these ways can be the level at which monetary and fiscal policies are set. Interest rates and inflation rates in particular may shape the expectation of parties to the bargaining process (International Labour Office, 1981:77).

5.5 THE NATURE OF COLLECTIVE BARGAINING IN THE BCFRRCAT IN PRETORIA

Collective bargaining in the BCFRRCAT in Pretoria mirrors the dual collective bargaining system found in most industries in South Africa. The nature of collective bargaining is twofold; it takes place at the sector level as well as at the enterprise level. At the BC level, the bargaining relationship between the employer and employee is regulated by the main collective agreement set by party members in the Council. At the enterprise level employees negotiate with the trade unions and the trade unions negotiate with the employer organisation that represents the employers at the BC. At the Council, administrative functions are headed by a secretary whose function it is to arrange meetings, take minutes, prepare and submit agreements, supervise the accounting function, receive reports from inspectors and deal with any matter which may arise in the day-to-day running of the Council's affairs.

5.5.1 Basic data on the Council and the agreements

Section 54 (1) of the LRA requires the BC to keep records and provide information to register, for instance every Council must keep minutes of its meetings, in an original or reproduced form for a period of three years from the end of the financial year to which they relate.

Section 57 (5), (6), (7) (a) (b) (c) and (8) states that the Council "may resolve to change its name, send the registrar a copy of the resolution and the original of its current certificate of registration, so that the registrar can enter the new name in the registration of the Council and issue a certificate of registration in the new name of the Council; remove the old name from

that register and cancel the earlier certificate of registration; and send the new certificate to the Council, so that the new name takes effect from the date that the registrar enters it in the register of Councils”.

During a visit to the DOL regarding any additional information that it has on the council, it became evident from the records supplied by the DOL that the name of the council changed. Looking at the history of the council and tracing it to 1979, the Council used to be known as “The Bargaining Council for the Tearoom, Restaurant and Catering Trade, Pretoria” (BCTRCT). However, in November 2008 the name of the Council changed from its original name to “The Bargaining Council for the Food Retail, Restaurant, Catering and Allied Trades (BCFRRCAT)”. The name change made it necessary to update the Council’s name in this study. That is why in this study the Council is referred to as BCFRRCAT instead of BCTRCT.

When the Council officials were asked why the name of the Council changed from its original name, the response was that the scope of the Council covered the sale or the supply of meals or refreshments in or from a public restaurant, café or tearoom whether indoors or in the open air and the employer is also the holder of a liquor licence under the liquor Act. Now the Council has broadened its scope to cover the provision of meals and/or sandwiches and/or refreshments from any establishment whether permanent, temporary, indoors or in the open air. These also include activities carried out in public restaurants, fish and chip shops, cafés as well as premises that supply meals and/or alcoholic refreshments.

One should emphasize that after 1979 the data about the Council is limited and the Council has been going through changes with regard to its practices and the employment of officials. During an assessment of the Council’s records supplied by the DOL, it became increasingly clear that the Council does not have substantial historical data except for data on its day-to-day operations. However, it was possible to gather data on the Council for 1979 that can be used and compared to the data collected during the study.

5.5.2 The basic data on the parties to the Council

The scope and terms of the Council's agreement was observed by all employers and employees of the Council. Employer organisations which were party to the Council in 1979 were referred to as the Pretoria and Districts Caterers' Association (PDCA). During this period there was only one trade union that formed part of the Council, known as the Pretoria Catering Trade Employees Union (PCTEU). The union was made up of 359 members in 1980 and it had a mixed racial membership of which the vast majority were whites. In 1983 the union amalgamated with the Pretoria Liquor and Catering Trades Employees' Union (PLCTEU) which was to remain the name of the new union. By 1985 with the inclusion of African workers, its membership had risen to 5550 (Godfrey, 1992:216). However, from 1985 up to now there followed a period for which only undated numbers exist. This leaves a gap which makes it difficult to explain the history of the Council.

However, the significant finding is that the Council had a main agreement that contained no regional or sectoral differentiation and that covered certain magisterial districts in and around Pretoria. There were no major changes to the features of the Council since 1979, although a slight increase in the scope of the Council was introduced in 1982 to cover premises which hold a restaurant liquor licence. There were some changes in the trade union parties and the employer organisations during this period.

5.5.3 Changes to the Council, the parties and agreement

The terms of the Council agreement are now observed by all employers and employees who are members of the employer organisation and the trade union respectively. The main collective agreement is entered into by Pretoria and Districts Caterers' Association (PDCA) (hereafter referred to as the "employer organisation"), the South African Commercial, Catering and Allied Workers' Union (SACCAWU), and the Club, Caterers, Retail and Allied Workers' Union (CCRAWUSA) (hereafter referred to as "trade unions" or the "employee representatives").

The main collective agreement agreed upon by employer organisation and trade unions respectively applies to employers and employees who are members of the employer organisation and trade unions in the Magisterial District of Pretoria, Brits, Bronkhorstspuit, Cullinan, Rustenburg, Warmbaths, Witbank and Wonderboom. Moreover, the collective agreement reached at the Council is extended to non-party members to the Council, i.e. the employers and employees who do not form party to members at the Council.

The food, retail, restaurant, catering and allied trades industry recognises the need to grow and be competitive and this is reflected in their collective agreements. In 1999 the Council reached its first comprehensive agreement with regard to the improvement of efficiency, productivity, skills and quality of working conditions. One such provision of the agreement allowed workers to receive payment for skills acquired, even though they would stay at the same job level. During a period from 1 September 2007 to 29 February 2012, the Council has been and will continue to develop a main collective agreement that is binding for both party and non-party members at the Council.

The system of collective bargaining creates the possibility of survival for industries such as the food, retail, restaurant, catering and allied trades, which do not have a history of trade union activity or collective bargaining and which is experiencing increasing informalisation. Godfrey (2007:3) cautions that not all aspects of such a Council for collective bargaining have worked in facilitating and improving collective bargaining, because the number of Councils has decreased in recent years due to the amalgamation of small Councils into bigger Councils and some Councils are no longer registered. The explanation for this emanates from the following:

- A major challenge is the issue of representativity and the requirements imposed by the LRA for the extension of agreements. This suggests that representativity of parties to Councils has been decreasing. If low numbers of employees and employers join trade unions and employer organisations which are parties to a Council, it becomes difficult for Councils to meet the requirements for representativity set by the LRA and to have an agreement extended to non-parties. If an agreement is not extended, employers who are

bound to the agreement by their membership of the party employer organisation may very likely be undercut by non-party competitors. Consequently, many employers simply leave their employer organisations in order to discontinue their obligations in terms of the agreement. Ultimately, this leads to a collapse of the Council.

- At present the representativity requirement is rigidly interpreted. The Minister must extend an agreement to the majority of employees who are covered members of the party trade union/s and the majority of employees employed by members of the party employer organisations. While the DOL also has discretion to extend an agreement if the Council is sufficiently representative, evidence suggests that the Minister places strict requirements on a Council for it to qualify.
- There is clearly a great need for the DOL to deal with the problem of informal economy and to develop a strategy to assist Councils in centralised bargaining.
- There has been an increasing centralisation of collective bargaining with many agreements prohibiting firm-level bargaining over issues dealt with by the parties in the collective agreement. At the same time, firm-level bargaining within the jurisdiction of Councils seems to have decreased greatly.

5.6 SUMMARY

This chapter has provided a foundation for findings by giving information about the scope of collective bargaining as the study rests within the theme of collective bargaining functions. The approach of this chapter was based on the idea that in order to understand the nature of collective bargaining in the food, retail, restaurant, catering and allied trade in Pretoria, one needs to start by understanding the purpose of collective bargaining and unfold the nature of collective bargaining and the role of party members in the industry.

CHAPTER 6

RESEARCH FINDINGS ON THE BCFRRCAT IN PRETORIA

6 INTRODUCTION

In this chapter the research findings on the BCFRRCAT are presented. The primary source of data was semi-structured interviews conducted with the BC officials, detailed by the Council's records supplied by the DOL and secondary information gathered before field work. The data collected from the DOL provided further insight on representativity and coverage of small restaurant enterprises at the Council.

The approach of this chapter was based on understanding the impact of the BC on small restaurant enterprises. In order to do so, one had to start by examining the representativity position and coverage of the Council. This allows a perspective of the number of employers and employees covered by the Council. This examination included looking at the actual process of extended BC agreements; the enforcement capacity of the Council's inspectorates over collective agreements as well as the nature of the exemption system at the BC. One also had to review the number of exemption applications received, the number of exemptions granted and the number of exemptions refused.

6.1 THE REPRESENTATIVITY AND COVERAGE OF THE BCFRRCAT

This section involves the presentation and examination of the representativity position and coverage of the Council on small restaurant enterprises. Table 3 below presents the coverage according to the number of employers who are members of party employer organisations as opposed to those that are not (the non-parties to the Council), the number of employees of party employers and the number of employees that are members of party trade unions. This

has been done in order to get a picture on how small restaurant employers feature in the negotiation of BC collective agreements.

Table 3: Information on small restaurant enterprises falling within registered scope of the Council

| | |
|---|-------------|
| <i>How many small enterprises:</i> | |
| <i>are within the bargaining Council's registered scope?</i> | <u>630</u> |
| <i>are members of the employer parties to the Council?</i> | <u>306</u> |
| <i>are covered by collective agreements extended in terms of Section 32?</i> | <u>324</u> |
| <i>how many employees are employed by small enterprises within the Council's registered scope ?</i> | <u>4237</u> |
| <i>of those employees, how many are:</i> | |
| • <i>employed by members of the employer parties to the Council?</i> | <u>2412</u> |
| • <i>Party trade union members?</i> | <u>2447</u> |

6.1.1 Bargaining Council measures of representativity and coverage

The table below divides the BC representativity and coverage into five sets of data, i.e. the total number of: employers, employees, party employers, employees at party employers and members of trade unions. The three measures of representativity are, party employers as a proportion of all registered employers, the number of covered employees of party employers as a proportion of all covered employees, and members of party trade unions as a proportion of all covered employees:

Table 4: Bargaining Council measures of representativity and coverage

| Total employers | Party employers | Party employers as % of all employers | Total employees | Employees of party employers | Party employer employees as % of all employees | Party union members | Party union members as % of all employees |
|------------------------|------------------------|--|------------------------|-------------------------------------|---|----------------------------|--|
| 630 | 306 | 49% | 4237 | 2412 | 57% | 2447 | 58% |

Calculations of percentages above

Party employers $\frac{306}{630} \times 100 = 49\%$ (Party employers as % of all employers)
Total employers 630

Employees of party employers: $\frac{2412}{4237} \times 100 = 57\%$ (Party employers' employees as % of all employees)
Total employees 4237

Party union members $\frac{2447}{4237} \times 100 = 58\%$ (Party union members as % of all employees)
Total employees 4237

From the table above, it has become increasingly clear that the Council's representation is only for the latter two measures, i.e. the number of covered employees of party employers as a proportion of all covered employees, and members of party trade unions as a proportion of all covered employees that are included in Section 32 (1) (a) (b) of the LRA regarding representativity and the extension of BC agreements. Party employers employ 57% of all employees covered by the Council and 58% of all employees covered by Council are members of trade unions that are party to the Council. But the system of representativity appears to be less representative when one considers the third measure, i.e. party employers as a proportion of all registered employers. Only 49% of employers are members of party employer organisations. This appears to be the reason that the extension of a collective agreement covers only a very small proportion of small restaurant enterprises. As a result it reduces the representativity position of small restaurant employers at the Council.

6.1.2 The accommodation of small sized employers in the Council

The fact that an extended collective agreement of the Council covers only a very small proportion of small restaurant enterprises is an important finding as far as representativity and coverage is concerned. The data found at the Council and that which was supplied by the DOL regarding representativity and coverage puts the concept of "sufficient representativity" into a reduced perspective. Primarily because when one carefully examines the three categories of the Council measures of representativity and coverage, one finds that all three categories are representative on the two measures, i.e. the number of covered employees of party employers as a proportion of all covered employees, and members of party trade unions

as a proportion of all covered employees and none of the categories is representative on the third measure, i.e. party employers as a proportion of all registered employers.

Therefore the claim made by small restaurant enterprises that BCs are not representative of small restaurant enterprises and that they are dominated by large enterprises does emanate from the third measure, since representation in the Council takes place through employer associations and trade unions. There is a tendency to serve the interests of bigger enterprises at the expense of small enterprises. As the interests and needs of small enterprises are different to those of large enterprises, large enterprises cannot represent their smaller counterparts in the BCs.

The Council indicated that as far as representation of small restaurant enterprises is concerned, the Council tries to ensure that their interests are represented through the employer organisations. Although, when the Council officials were asked whether there was a way in which small enterprises could be effectively represented in the Council they did not seem to know how this representation would be possible. This is based on the fact that the organisation of small enterprises in the industry is not easy and small enterprises themselves are not able to organise and take time to participate in the Council.

When the Council officials were asked, how enterprises that were not members of the employer organisations were represented at the Council, the response was that, “ the employer organisation represents all the registered employers in the Council, and as for those who are not members of the Council a collective agreement is extended to all enterprises in the industry. Usually small enterprises ignore the BC; they do not want to be associated with the Council. The only way to get them is through inspection conducted by the inspectorates or when they have dispute cases with their employees at the Council.” (Council official A)

The Council officials believe that small restaurant enterprise representation is not effective because small enterprises are not able to organise themselves within the employer organisations and do not take time to participate in the Council. If they did organise

themselves within the employer organisations, they would be more effectively represented in the Council both in terms of number and seats allocated at the Council.

Godfrey *et al.* (2005:41) suggest that, small and large enterprises in the BC can be sufficiently represented if the Council, employer organisations and trade unions adopt the following procedures:

- a compulsory minimum of one employer and one employee representative on Councils to represent small enterprises;
- the DOL needs to conduct an annual survey of small businesses to identify their needs and problems regarding the BCs;
- recognition needs to be given to the number of small enterprises represented by employer organisations rather than to focus on how many employees the members employ;
- the thresholds (employee numbers or percentages) for admitting new employer organisations parties should be removed as these are barriers to small enterprise representation;
- the BC's definition of small, medium and micro enterprises should be reviewed annually by the DOL;
- the BC should submit an annual report to the DOL on positive steps taken to include and accommodate small enterprises in their main agreements, and
- the extension of a BC agreement should be dependent on complying with the above to the satisfaction of the Minister.

Since the employer organisation (PDCA) is made up of both small and large enterprise employers, the Council officials were asked what the large enterprises had done to represent and accommodate the interest of small enterprises at the employer organisation. The Council made it clear that there was nothing that large enterprises could do if small enterprises did not want to participate and negotiate with the large enterprises at the employer organisation. It became apparent that small and large enterprises at the Council did not have any relationship apart from being represented by the same employer organisation at the Council.

With regard to employer organisation representation of small restaurant enterprises at the Council without meaningful participation of small restaurant enterprises in the employer organisation, the BC official indicated that “ the Council has introduced some form of special exemption procedures to accommodate the interest of small enterprises. If small enterprises feel there is a provision in the collective agreement that is difficult to implement, such as the clause on minimum wages, the employer can apply for a wage relief exemption (a special exemption for small and struggling enterprises). However, the granting of this exemption will be based on conditional circumstances such as the type of business, conditions of business and an attempt made by the employer to comply with the collective agreement or the willingness to compensate in other working conditions.” (Council official A)

When the data from the DOL was analysed in detail, it showed that the parties to the Council had made an effort to make the exemption process more efficient and to set up a special, simple and expedited wage exemption process for small enterprises based on the employment size and annual turnover of the enterprises. But the question that emerges from this finding is why should an industry association composed of and dominated by a few large employers be allowed to impose such difficulties on many small enterprises? Clearly, this gives an indication that exemptions such as the wage relief does not offer a practical solution to the problem of small restaurant enterprise representation in the Council and what may be implied is that the current framework of determining conditions of work in industries through the BC is not appropriate for the needs for small restaurant enterprises.

6.2 NON-REGISTRATION OF SMALL EMPLOYERS IN THE COUNCIL

The Council officials were asked to give an estimation of the extent of non-registered small employers within the Council’s jurisdiction (the number of small employers within the Council’s jurisdiction that were not registered with the Council). The response to this question was not clear as they simply said that it was difficult to estimate non-registered employers within the Council’s jurisdiction. It appeared that the Council officials could not make an

estimation because if they had known about the existence of such employers then it would have been expected of them to go and register them.

To some extent one may argue that, the difficulty of calculating the number of unregistered employers in the Council creates a reward for the parties in the Council. If they do register small employers, it can possibly reduce their representativity.

A far more practical explanation for large numbers of unregistered employers within the scope of the Council is the lack of capacity of the Council to carry out the tracking and registration of such firms. In other words, if the Council has limited enforcement capacity to organise small employers within the Council, then this simply means that not much effort is put into finding and registering such small employers that exist within the sector.

The Council's collective agreement indicates that the Council further lacks the capacity to attract and register small enterprises. The reason for this is that apart from its traditional role as a collective bargaining center and dispute settlement forum, the Council offers no other essential services that will develop small employers. Small employers also see no need to register with the Council if they cannot afford the provisions such as the minimum wage standard set in the collective agreement.

To attract small enterprises to the Council, the Council needs to introduce better services that will benefit the small employers. When the Council's collective agreement was analysed improvement of benefit funds (pension or provision funds) proved to be the main strategy which the Council could adopt to solve the problem of non-registration and non-compliance of small employers in the Council.

- Firstly, the Council can offer services and benefit funds that will attract the small employer. As benefit funds are relatively and the small employer is liable for sick pay in terms of the BCEA in the absence of a benefit fund it seems like a good option for small employers to register.

- Secondly, benefit funds can also be used as a way of raising the representativity of the parties, i.e. if the parties allow only their members to join the benefit funds it can be a way to increase representativity.
- Thirdly, by offering benefit funds it will not only assist the Council to attract small employers, it will also be useful to reduce the burden on the state with regard to health and retirement provisions.

6.3 EXTENSION OF COLLECTIVE AGREEMENT

“A collective agreement is not really an agreement or a contract between the parties to the council, but a form of permitted domestic legislation which by the will of a statutory body is by a majority vote, imposed on all members of a designated group of employers and employees, irrespective of any actual concurrence by the individuals affected and notwithstanding any positive disapproval by any such individual” (Godfrey, 1992:6).

A collective agreement is intended to apply to the parties that negotiated and subscribed to it. The term “parties” in this context has to include the membership of employer organisations and trade unions. If the parties to the Council are representative of their constituents, their agreement will cover the entire economic sector for which the negotiations are conducted. However, it should be noted that, if the representativity of the parties to the Council is not sufficient, then some employers and employees will not be bound by terms and conditions of the agreement.

A collective agreement negotiated at the Council includes the rights and obligations for all parties involved. More importantly, the employer assumes an obligation to put into effect the economic conditions of employment provided for in the agreement. In turn, an agreement recognises the employer’s right to manage his or her business and to direct the workers. The workers on the other hand acquire a substantial number of rights through collective agreements, including the right to be remunerated as agreed upon (Vauthier, 1998:38).

The Council officials were asked if the collective agreement of the Council was to the benefit or detriment of small employers in the BCFRRCAT industry. The response was that, " collective bargaining by the parties in the sector, is done in such a way that all parties are allowed to bargain on matters of interest with other parties to the Council, and apart from this, the collective agreement benefits small employers by eliminating competition amongst their competitors. Whether the interests of the employees or employers are addressed, that rests within the bargaining power of the representative party employees and party employers who are members within the registered scope of the Council." (Council official B)

The collective agreement was an outcome of the collective bargaining process between the parties to the Council (i.e., PDCA, SACCAWU and CCRAWUSA). The implementation of the agreement is monitored by the Council inspectorates, in order to determine whether there is any contravention of the agreement. When asked how this was done to ensure compliance, the Council official mentioned that " to ensure that the Council's agreement is being observed by the industry within which the Council operates, the inspectorates visit the restaurants of small employers to inspect wage records and to question employees and employers about the management of the business. The purpose is to bring any contravention which can be in the form of assessment of under paid wages and arrear contributions to the Council's fund agreements to the attention of the Council." (Council official B)

Section 32 (1) states that "a BC may ask the Minister in writing to extend a collective agreement concluded in the BC to any non-parties to the collective agreement that are within its registered scope and are identified in the request". This section in the LRA not only gives primacy to sectoral collective bargaining but also makes provisions and regulates the extension of collective agreements to non-parties to the Council. If the representativity of the parties to the Council is less than sufficient, some employers and employees will not be bound by terms and conditions of the agreement. Once the collective agreement has been approved by the Minister and extended to non-parties within the registered scope of the Council, non-party employers such as small employers will be required to comply with the terms and conditions of employment as set out in the Council's collective agreement. If they

have been granted exemption or the application has been set aside by the exemption committee they will not have to comply.

When the extension of collective agreements to non-party employers is considered, the BCFRRCAT approaches the Minister of Labour with a request to extend the sectoral collective agreement to specific non-parties that fall within the BC's registered scope. Since the trade unions that are party to the BC (SACCAWU and CCRAWUSA) constitute the majority membership of employees and the employer organisations that are party to the Council employ the majority of the employees, such an extension of agreement in the sector is granted.

The Council expects the Minister of Labour to extend a sectoral collective agreement to non-parties in terms of Section 32 (2) of the LRA within 60 days from receipt of such a request by a BC. The extension of an agreement will only be done if the parties to the Council are sufficiently representative. The representativity of the parties is based on the three measures of representativity that were discussed in section 6.1.1 (i.e., the number of employees at party firms as a proportion of all employees; the members of party trade unions as a proportion of all employees and the number of party employers as a proportion of all employers).

Extension of collective agreements is done in the sector primarily because non-extension of collective agreements would "...lead to large-scale exploitation of employees. Therefore a compromise is reached in the industry to grant exemptions to those small restaurant enterprises who present a strong case against the extension of an agreement or illustrate evident difficulties of business performance." (Council official A)

The system of extension of collective agreements whereby sectoral collective agreements are extended by the Minister of Labour to non-party employers in a sector has been subject to criticism by small restaurant employers. It is argued that extension of collective agreements to non-parties could lead to the loss of employment in small businesses in the sector. It becomes practical not to belong to an employer organisation because, by belonging,

individual employers are bound by collective agreements concluded by their employer organisations while their competitors are not.

In accordance with this argument, the extension of collective agreements to non-parties is deemed to be controversial. According to Groenewald (2006:41) such controversy “is partly shaped by the failure to craft proper framework agreements at sectoral level and the automatic nature of extension if the parties to the agreement are representative or the semi-automatic nature of extension if the parties to the agreement are only sufficiently representative”.

The parties to the Council that are sufficiently representative would be in the position to argue on compelling policy grounds that the failure to extend an agreement in many instances will undermine collective bargaining. This raises the following question that has to be considered, i.e. what can non-party employers do if the minimum wages and other terms and conditions of employment are too burdensome to comply with?. An answer to this question is that, the concerns of all those employers that are not able to comply with the collective agreements, may be catered for through the exemption procedures as discussed in section 6.5.

6.4 ENFORCEMENT AND COMPLIANCE OF THE COUNCIL’S AGREEMENT

Section 33 (1) of the LRA allows for the appointment of inspectors by a BC. It states that " the Minister may at the request of a BC appoint any person as the designated agent of that BC to promote, monitor and enforce compliance with any collective agreement concluded in that BC." In this section of the LRA inspectors are given considerable powers in terms of the Act to ensure that a Council agreement is adhered to. Such power may be used in a negative and bureaucratic way, or it can be used constructively especially to the benefit of small enterprises.

This section deals with the idea of establishing the role of the inspectorates, specifically with regard to the enforcement and compliance of the Council’s collective agreement by small employers within the BCFRRCAT industry. In this regard, the head of inspectorates was

asked about the criteria for appointing designated inspectors and the role that they play in enforcing the Council's collective agreement. One finds that before an inspector can be appointed, the Council first has to make a request to the Minister in terms of Section 33 (1) of the Act to appoint a person as a designated inspector.

The Council then, appoints one or more specific persons as inspectors to assist in implementing the terms of a collective agreement. Members of the inspectorate will then have the right to enter any establishment and question any employer or employee during the course of such inspections and inspect the records of wages paid, time worked and overtime payments made. It is the duty of every employer or employee who forms part of the industry to permit the inspectorate to institute such enquiries, to examine the records and/or documents and to interrogate any person if it is necessary for the purpose of ascertaining whether the terms of the agreement are being observed.

The designated inspectorate may issue a compliance order requiring any person in the industry to comply with the collective agreement within a specific period. A designated inspector is expected to carry out all instructions given to him or her by the Council which is authorised to collect both current and arrear contributions. The Council can request that all reasonable steps are taken which are necessary to ensure compliance with the agreement. If it discovers through its own investigation or through any other sources that the provision of the collective agreement has been breached, the following procedures can be used to enforce compliance:

- the Council requests that a designated inspectorate investigates the alleged breach;
- the designated inspectorate may endeavour to secure compliance with the agreement through conciliation if a breach of the collective agreement is found;
- the designated inspectorate submits a report about the outcome of the conciliation to the secretary of the Council after the conciliation process has been completed;
- the secretary of the Council may refer the matter to arbitration; or take steps deemed to be reasonable after receiving the report; and

- the secretary of the Council may apply to make the arbitration award an order of the Labour Court.

The head of inspectorates was then asked to state how many inspectors the Council had and whether they were employed full-time or part-time. As shown in Table 5 below, the Council only employs three full-time inspectors. When the head of inspectors was asked why only three inspectors were employed for the whole industry, his response was that, “ the number of inspectors a Council is able to employ depends to an extent on the number of employees within the jurisdiction of the Council for whom contributions are paid.” (Council official B)

Based on the fact that inspectors may be required to not only monitor conditions of employment at firms that are registered with the Council, but to also track down unregistered enterprises and with only three inspectors in the whole industry, it became clear how it is possible for some of the employers to not comply with the Council’s collective agreements.

For proposed control of non compliance cases, the Council’s officials follow these procedures:

- The head of inspectorates will contact the employer telephonically to attempt to resolve the matter within two days. If an in-house inspection has to be done, the head of inspectorates will make an appointment for such an inspection which has to take place within seven days after the telephonic communication.
- A second inspection will be held within seven days after the first one if it is necessary. This will only happen if certain information which is still needed is not available due to delay by the employer or if it is necessary to meet with the two parties to resolve the situation.
- The date of arbitration shall be set and notification will be sent within seven days from issuing of compliance order.
- The period from receipt of compliance order to date set for arbitration is between 28 to 30 days.
- The Council’s inspectors will not go out for a second time if the employer fails to keep the first appointment. The compliance order shall then be issued and the employer will be expected to bring the documents to the Council.

In order to gauge the capacity of the inspectors in the sector and to put the effectiveness of the inspectors into perspective, the number of inspectors employed by in the Council is compared with the total number of employees within the jurisdiction of the Council in table 5 below. An alternative is to compare the number of inspectors with the number of employers within the jurisdiction of the Council as in table 4 section 6.1.1.

As may be expected, given the diversity of the Council, the number of inspectors in the Council appears to be very small in relation to the number of employees in the industry. There are only three inspectors for over 4237 employees in the entire industry. This gives an indication that the responsibility of inspectors to oversee collective agreements which includes ensuring registration of employers and compliance with the terms of agreement is not implemented effectively in the industry. This is primarily because half of the small restaurant enterprises in Pretoria have transgressed the main collective agreement. This will be further discussed in chapter 7. Table 5 presents the data on enforcement of and compliance to the Council's agreement by small restaurant employers within the jurisdiction of the Council.

Table 5: Number of agents, inspections per year, time spent tracing unregistered employers and compliance orders in 2008

| Total employees | No of agents | No of total inspections conducted in 2008 | Proportion of agents' time tracking unregistered employers | No of compliance orders in 2008 |
|-----------------|--------------|---|--|---------------------------------|
| 4237 | 03 | 1083 | 80% | 104 |

6.5 BARGAINING COUNCIL EXEMPTIONS

Section 30 (1) (k) states that " the constitution of every BC must at least provide for the procedure for exemption from collective agreements "; and Section 32 (3) (e), (f) and (g) further states that " a collective agreement may not be extended unless the Minister is satisfied that:

- the provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, any appeal brought against the BC's refusal of a non-party's application for exemption from the provisions of the collective agreement and the withdrawal of such an exemption by the BC;
- the collective agreement contains criteria that must be applied by the independent body when it considers an appeal, and that those criteria are fair and promote the primary objects of this Act, and
- the terms of the collective agreement do not discriminate against non-parties.”

The Council is required to set up a policy that will guide the applications, consideration and granting of exemptions. However, it should be noted that it is not the Council that has to determine the outcome of the exemption. The Council is required to establish or appoint a committee from the LRA that will consider the application for exemption and decide the outcome.

When the Council officials were asked if the Council had an independent exemptions committee for appeals against refusal or granting of exemptions, the response was that " before an application for exemption can get to the Council committee, all applications for exemption should be in writing and addressed to the Secretary of the Council for consideration by the exemption committee." (Council official A)

The committee consists of three parties to the Council (an endeavour to structure the committee on tri-partite lines), i.e. the representative from the employer organisation (PCA), two representatives from trade unions (SACCAWU and CCRAWUSA) and one official from the Council who acts as a neutral party.

The selection of the representatives to the committee is based on specific requirements regarding credentials or qualifications that allow them to be on the committee. An example of such a requirement is the representative's experience of the industry in which the committee operates, i.e. a person with an employer background, a person with a trade union background and an ex-bargaining Council agent). The criteria that are used to consider or refuse

applications for exemptions for large and small employers are more or less the same, although the specific circumstances of the employer are taken into consideration.

The exemption committee for the BCFRRCAT industry is duty bound to consider and determine an application for exemption within 45 days from the date of lodging the application in accordance with the following criteria:

- the applicant has to provide a written and verbal substantiation;
- the employer who will be affected if the exemption is granted has to show the extent of consultation with and the petition for or against the granting of the exemption;
- the infringement of basic conditions of employment rights;
- the fact that a competitive advantage is not created by the exemption;
- the consideration of the exemption from any employee benefit fund or training provision in relation to the alternative comparable bona fide benefit fund or training provision, including the cost of the employee, transferability, administration management and cost growing and stability;
- the extent to which the proposed exemption undermines collective bargaining and labour peace in the BCFRRCAT;
- any existing special economic or other circumstances that warrant the granting of the exemption, and
- the recommendation contained in the Report of the Presidential Commission to investigate Labour Market Policy.

The independent exemption committee of the Council considers the applications for exemptions from non-parties in relation to any of the provisions of their agreement. In their main collective agreement which came into effect on 1 September 2007 and is still effective up to 29 February 2010; all applications for exemption are in writing and addressed to the Secretary of the Council for consideration by the exemption committee which is appointed by the Council. Of even greater importance is that all applications for exemption are substantiated and such substantiation includes the following details:

- the period for which the exemption is required;

- the agreement or clauses or subclauses of the agreement from which exemption is required, and
- proof that the exemption applied for has been discussed with the employer, his employee/s and their respective representatives. The responses from such consultations, either in support of or against the application, shall be included.

The secretary of the Council to whom all applications are addressed in writing has to place the applications for exemption on the agenda of the exemption committee meeting for comment. She then provides the exemption committee with details of all the applications for exemption.

In response to this, the exemption committee considers and decides on all written applications and when requested by the applicant(s) or objector(s), may interview applicant(s) or objector(s) at its following meeting. The exemption committee may defer a decision to the next meeting if additional substantiation, information or verbal representations are considered necessary to decide on the application for exemption.

Once the exemption committee has decided to grant an exemption, it will be expected from the committee to issue a certificate and advise the applicant(s) within 14 days of its decision. When the exemption committee has decided against granting an exemption or part of an exemption requested, it will advise the applicant(s) within 14 days of such a decision and will provide the reason(s) for not granting an exemption.

It should also be noted that the applicant for an exemption should satisfy the exemption committee by presenting previous records stating that he or she is not in arrears with respect to payments of the BC levies or employer or employee contributions and trade union or employer organisation subscriptions and/or levies. If the applicant has any existing outstanding payments to be made to the Council, a payment plan has to be agreed upon with respect to any such outstanding payments. In a situation where the applicant is in arrears with payments of Council levies or contributions and a payment plan is not put into place the

chance for an exemption application to be granted by the exemption committee is highly unlikely.

6.5.1 The procedure for application of exemption

When employers apply to be exempted from a particular provision in the collective agreement the Council utilises a standard form for application of exemptions (Appendix F contains an application form for exemption). However, this does not mean that the Council will not accept any written application. The Council said that before the committee considered or heard such an application, it allowed applicants an opportunity to state their case in person and to object if they so wished.

The time taken by the committee to process an application for exemption also does not seem to be unreasonable. The Council said that depending on the amount of work and the date on which an application had been received this would take two weeks at the most. If the respondents are to be believed, reasons were always given in writing for the refusal of an application. It was of course not possible to consider the adequacy of the reasons given for granting or refusing exemptions since the granting or refusing of exemptions are based on conditional circumstances. The most common reasons for granting and refusing exemptions are based on the following motivations:

- Motivations for the granting of exemption(s) for small restaurant employers:
 - minimum wages and working conditions do not differ substantially from the provisions of the collective agreement;
 - location of the business;
 - attempts made to comply with the provisions of the collective agreements, and
 - compensation through other working conditions.

- Motivations for the refusal of exemption(s) for small employers:
 - type of business;
 - working conditions of the enterprise differ substantially from the provisions of the collective agreement;

- no attempt to compensate with other conditions of the collective agreement, and
- no compliance with other clauses of the collective agreements.

6.5.2 The number of exemptions granted to small employers

Within the BCFRRCAT industry, both party employers and non-party employers apply for exemption from the provisions of a collective agreement in the Council. Party employers tend to be large employers and non-party employers tend to be small employers. When one compares the applications of large employers and applications by small employers one finds that the applications by large employers are almost by definition not perceived as core to the collective agreement.

This is because when the Council officials were asked which provision in the collective agreement appeared most frequently in exemption applications of companies, the response was that "...from all the provisions in the collective agreement, the most core provision that employers apply to be exempted from is the minimum wage..." (Council official A)

In most cases employers who apply for exemptions are non-party employers in the Council. When a small employer provides satisfactory evidence to the Council that a provision of the agreement is restricting entrepreneurial initiative and/or employment opportunities, such an employer or employee may apply to the Council for exemption from the specific provision and the Council may grant such an exemption.

It is necessary to know how a small business is defined in this industry if one wants to find out how many exemptions for small employers were granted and refused by the Council in 2008 and 2009. The Council officials were asked if they had a definition for small and large businesses given that in different industries each Council had its own structures and distribution of business sizes. The BCFRRCAT industry defines a small business as an employer who does not employ more than seven employees at a time and every employer who employs more than seven employees is regarded as large employer.

Subsequently, the Council was asked to provide a breakdown of exemption applications made for small employers in the industry in 2008 and 2009. It should be emphasised that after validating the interviews with the Council's records supplied by the DOL, it became evident that the data regarding exemptions was not up to date. It seemed that the Council did not keep track of all exemptions granted and refused. The Council was not able to provide the complete data for 2008 and 2009. It would have given a better indication of trends over the two year period if it had been the case. The data set out in tables 6 and 7 below is therefore not intended to be representative but is merely indicative of what emerged from the Council. The Council was able to provide some data for exemptions granted and refused in 2008 and 2009. The total number of exemption applications in 2008 was four (4) and in 2009 eight (8).

Table 6: Applications by parties to the Council

| Years | Total applications | Granted | Refused | Under consideration |
|-------|--------------------|---------|---------|---------------------|
| 2008 | 1 | 0 | 1 | 0 |
| 2009 | 3 | 2 | 1 | 0 |

Table 7: Applications by non-parties to the Council

| Years | Total applications | Granted | Refused | Under consideration |
|-------|--------------------|---------|---------|---------------------|
| 2008 | 3 | 1 | 2 | 0 |
| 2009 | 5 | 3 | 2 | 0 |

It is possible to get some insight into how the Council deals with the applications for exemptions from these tables. There was a marked increase in the number of exemption applications for both parties and non-parties in 2009 compared to applications for exemptions in 2008. Two aspects emerge from the tables regarding the exemptions granted in 2008 and 2009. Firstly, the number of applications increased overall and secondly, the high proportion of applications that was approved. However, no significance can be attached to the increase in the number of applications and exemptions granted as this has to be seen against the background of a decline in the number of exemptions.

The importance of Tables 6 and 7 is the comparison between party and non-party applications since the controversy about exemptions has essentially been about non-party applications. What the data tells us is that in 2009 most applications for exemptions were from non-parties, i.e. the number of applications from non-parties has increased. An important finding regarding exemptions in the BCFRRCAT industry is that, most applications for exemptions come about when small employers are “caught out”. In this context being “caught out” refers to an employer who fails to register with the Council or who is in breach of the minimum standards the Council has set in the collective agreement.

6.6 SUMMARY

This chapter explored the functioning of the BCFRRCAT industry in Pretoria, with special reference to their accommodation of small restaurant enterprises in the Council. The approach was based on the fact that, in order to understand how the BC could impact on small restaurant enterprises, one needs to start by examining the representativity position and coverage of the Council. This was established through the examination of three measures of representativity, i.e. the number of covered employees at party employers as a proportion of all covered employees, the members of party trade unions as a proportion of all covered employees and the party employers as a proportion of all registered employers.

The Council has shown to have made an attempt to accommodate small restaurant enterprises in the collective agreement. This has largely been shown in the amendment of the Council’s name that aimed at broadening the scope to cover the provisions of meals and/or sandwiches and/or refreshments from any establishment whether permanent, temporary, indoors or in the open air.

However, the Council was found to be less representative on the third measure, i.e. party employers as a proportion of all registered employers. This appeared to be for the reason that the extension of collective agreements covers only a very small proportion of small restaurant enterprises. A practical explanation for large numbers of unregistered small restaurant employers within the scope of the Council is the lack of enforcement capacity of the Council’s inspectorates to enforce a collective agreement to non-registered employers in terms of

Section 33 (1) of the LRA. As a result, this put the concept of sufficient representativity in a reduced perspective as required by the Minister of Labour for which the Council is seeking registration and operation.

CHAPTER 7

RESEARCH FINDINGS ON SMALL RESTAURANT ENTERPRISES

7 INTRODUCTION

This chapter presents research findings on small restaurant enterprises in relation to the BCFRRCAT. Eight interviews were conducted with small restaurant employers in an attempt to determine their perceptions of the BC and the constraints that they experience in their daily operations.

It is important to acknowledge from the outset the limitations of relying on the perceptions of small restaurant employers to assess the impact of the BC on small restaurant enterprises. Firstly, respondents (small restaurant employers) seemed to ascribe their own weaknesses or failures to problems and features of the external environment. Alternatively, small restaurant employers who are performing better seemed to underestimate the impact of competitive barriers on their less dynamic counterparts.

In spite of these limitations, it is the small restaurant employers that have the most direct experience of the environment in which they operate. While their perceptions of the BC do not constitute verification, they offer a significant starting point for any subsequent studies which may be undertaken within the food, retail, restaurant, catering and allied trade industry.

To identify the problems faced by small restaurant enterprises, two approaches were followed. Firstly, the BC officials were asked which provisions in the collective agreement small restaurant employers applied to be exempted from and what they thought the problems of small restaurant enterprises seemed to be. The BC officials reflected on the following:

- wages that are below the prescribed minimum level;
- lack of cooperation of small restaurant employers with the employer organisations;
- ignorance and being ill-informed about Labour regulations, and

- lack of finances and management skills to sustain their businesses.

Secondly, small restaurant employers were asked about the major problems that impeded their daily operations. The responses varied and were related to the following aspects:

- lack of access to finance;
- regulatory constraints;
- interest rates and taxes;
- lack of management skills; and
- insufficient exposure to potential customers.

7.1 THE PERCEPTIONS OF SMALL RESTAURANT EMPLOYERS ON THE BC

The fact that both party and non-party employers at the Council had little knowledge about Labour legislations and the purpose of the collective agreement at the Council is an important finding.

Those small restaurant employers that are partially knowledgeable about labour regulations at the Council criticised the high cost of labour regulations in the BCFRRCAT industry. The cost of labour legislations is associated with the extent to which workers or conditions of employment can be adjusted to the transforming circumstances in the business. This has a lot to do with specific aspects of work such as working hours, conditions of employment, wage and non-wage labour costs.

Labour legislation is perceived to hinder internal flexibility in the business, as it dictates that only a particular number of hours can be worked by the employees per day. For instance, Section 9 (1) (a) (b) (c) and (2) of the BCEA 75 of 1997 states that " an employer may not require or permit an employee to work more than 45 hours in any week; and nine hours in any day if the employee works for five days or fewer in a week; or eight hours in any day if the employee works on more than five days in a week." Small restaurant employers argue that

based on the BCEA and also supported by the collective agreement of the Council, an employer is only permitted by agreement to extend the employees' ordinary hours of work by up to 15 minutes per day but not by more than 60 minutes in a week. This creates problems for them during peak hours especially as most of them are still in the process of developing their businesses.

Small restaurant employers also complain about the poor enforcement of the collective agreement by the Council's inspectorates, while those who are party to the Council seem to be only partially aware of the labour regulations and procedures followed by the Council. They believe that as the BC is not effectively monitoring firms to ensure that all small restaurant enterprises comply with the minimum standards as set out in the collective agreement this element of non-compliance emerges.

The small restaurant enterprises employers also seemed to be in favour of more flexible regulations that would take into account the needs of small restaurant enterprises. The importance of small restaurant enterprises as part of the Small, Medium and Micro enterprises (SMMEs) of the South African economic growth should be considered specifically with regard to the disproportionate impact that regulations have on them.

Hudson (2003: [3]) suggests three types of approaches that can be considered for a more flexible form of labour legislation, i.e.

- active assistance to small businesses, in particular to meet the administrative compliance requirements of regulations;
- exemption or modification of the requirements themselves to make them less onerous for SMMEs, and
- the establishment of specific mechanisms to ensure that regulatory design takes better account of the needs and concerns of small enterprises when establishing new compliance burdens.

However, it should be noted that an attempt has been made by the LRA to facilitate a more flexible regulations regarding small restaurant employers. For instance, Section 30 (1) (k)

states that " the constitution of every BC must at least provide for the procedure of exemption from collective agreements." This is a reference to the exemption system which permits applications for exemption from agreements to make it easier for small restaurant employers to participate in the Council through the employer organizations. However, these flexibility mechanisms have not been used by small restaurant employers in the Council because small restaurant employers do not know how to make use of such exemption provisions.

7.2 EFFECTS OF BARGAINING COUNCIL ON SMALL RESTAURANT ENTERPRISES

The BC system is beneficial to those small restaurant employers that are not ignorant or ill-informed about the BC and Labour regulations. However, those who benefit in this regard seem to be a fraction of the total number of existing small restaurant enterprises in the food, retail, restaurant, catering and allied trade industry in Pretoria.

An important benefit of the collective agreement is the set wages and conditions of employment that both Labour and managers have to adhere to. It appears that those small restaurant employers who have shown to make an attempt to comply with the collective agreement set at the Council by compensating with other working conditions benefit by being granted exemptions. Manager C points out that "...in the contemporary world of complex organisations, individual bargaining is not a better option than collective bargaining. Employers do not manage to negotiate with regard to broad enterprise policies such as occupational health and safety, training and technological change."

What supports this statement is that if employers and employees are to be involved in the initiation and administration of policies concerning some of the issues already mentioned above, a collective agreement is needed. This is because it provides the unions and employer organisations with the capacity to negotiate on issues such as safety, training, pension, management and technological change. Oftentimes these issues have a lower priority to union members than money and immediate job security. When union members embark on a

strike it is usually in pursuit of financial and job security issues and not issues such as safety and training and yet these remain important in the long run.

The BC system did not seem to be advantageous to small restaurant enterprises. There were some fundamental benefits such as standardized wages that had been negotiated by the employer organizations and trade unions to eliminate competition amongst small employers, but there was also a cost that emerged from the bargaining process itself. Managers argued that there was no need for a BC because workers at the enterprise level were represented by unions. In the case of small restaurant enterprises especially when the business has less than four employees, the demands made by unions created a problem for development.

The employers viewed the Council as a potential disruptive threat and an infringement on their management rights. Employers did not want the Council to impose their regulations on them, they wanted to maintain their right to manage their enterprises as they saw fit. They were more likely to believe that additional regulations would restrict their ability to respond appropriately and quickly to new conditions since their enterprises depended on their customers to survive.

Manager F pointed out that, "...Joint decision-making for small restaurant enterprises at the Council should not be compulsory, but should be voluntary."

What is referred to here is the principle of voluntarism which is an important feature in the establishment of the BC. The inherent meaning of this principle is that any party member to the Council can withdraw from the Council at any time. It is proposed that the inherent meaning of this principle should also be applicable to new small restaurant enterprises at the Council, so that they can choose to be part of the Council or not through the employer organisations.

However, one should also take note that the principle of voluntarism may have two major drawbacks with regard to collective bargaining. Firstly, voluntarism will result in only a minority of small restaurant employers being involved in collective bargaining. Secondly, voluntarism

will depend on the goodwill of the employer. Employees who depend on the employer may be denied the right to participate in collective bargaining at the Council or trade union if their employer withdraws from the Council.

7.3 APPLICATION OF EXEMPTIONS BY SMALL RESTAURANT ENTERPRISES

The collective agreement is reached at the Council and is made binding for unions, employees and employers who have signed it and those that have not signed (generally known as non-parties to the Council). Manager H pointed out that BC agreements that were reached at the Council between big businesses and trade unions were disadvantageous for small restaurant enterprises. The principal reason for this is that employers of small restaurant enterprises that do not wish to join the Council are bound by the collective agreement against their will.

As discussed in chapter 6 section 6.5 any person including small employers who are bound by the main agreement may apply to the Council for exemption from all or some of the provisions of the main agreement and the BC committee has to consider these applications and grant exemption if the agreement hinders an entrepreneurial initiative.

Of the eight small restaurant employers that took part in the study, only three had an idea of how to apply for exemptions to the BC. Two of them thought about applying for total exemption from the collective agreement but did not do so because they did not have all the information about the application process. They also did not want to attract the attention of the Council as they do not belong to the Council.

The only one that applied directly for exemption to the Council, applied to be exempted from the minimum wage regulations set by party members at the Council. The reason given in this case was that "...the profit made by small restaurant enterprises depends on a number of factors, such as the weather conditions and the place where the restaurant is situated. This restaurant has not been very profitable and the employer is able to remunerate its employee

only the minimum wage that is below the minimum wage level set by the Council.” (Manager C)

The other two small restaurant employers who had thought about applying for exemption at the Council indicated that they wanted to be exempted from the entire collective agreement. One of their reasons was that these restaurant enterprises had only started their operations in 2008 and therefore it would be difficult to adhere to regulations of the Council as indicated in the collective agreement. The other reason for not applying was fear of being subjected to the scrutiny of the Council to which these restaurant enterprises do not belong.

7.3.1 The challenges of applying for exemption by small restaurant enterprises

When small restaurant enterprises apply to be exempted from a particular clause in the collective agreement, it is stated in the collective agreement that all applications should be in writing and addressed to the secretary of the Council. The secretary of the Council includes the applications for exemption on the agenda of the exemption committee meeting. She also provides the exemption committee with details of all the applications for exemption.

The transparency of the process of applying for exemption is one of great concern. This relates to the question whether the procedures are accessible to the applicants. For example, the procedures may be published in a Government Gazette and a Council circular, but these publications may not be available to employers of small restaurant enterprises who are potential party members.

Manager C of a small restaurant enterprise seemed to be aware of this system of exemptions. However, his opinion regarding the system of exemption is that, the application process for exemption is complicated and takes a while to be completed successfully. According to him the system of exemptions does not serve its purpose for small restaurant enterprises.

He suggests that, “ the LRA and the BCEA should not be binding on small restaurant enterprises. The establishment of the system of exemption does not help small restaurant

enterprises, because small restaurant enterprises still need a chance to grow and qualify to be in the main stream of the economy.” (Manager C)

In his opinion small restaurant enterprises should be allowed to negotiate automatic exemption from the collective agreement in its totality instead of having to go through the whole process of applying for exemption from the collective agreement. The applicant should be allowed to compensate with other conditions and be compliant with other clauses based on the state of the business.

Small restaurant employers believe that employer organisations at the Council do not represent their interests because they do not acknowledge the need to develop specific policies with regard to small restaurant enterprises and exemptions in particular.

Manager F mentioned that the underlying principle of the system of exemption was that, “the Council does not see how important growth is to us because most employers in the restaurant industry have always been regarded as small. Large restaurant enterprises that are parties to the Council and that are fairly represented at the Council by the employer organisations shift the focus away from the need to make special provisions for small restaurant enterprises.”

7.3.2 Reasons for non-application for exemptions

The semi-structured interviews which were conducted with small restaurant employers revealed that only one small restaurant enterprise applied for exemption and two small restaurant enterprises made an attempt to apply but did not go through with their applications. The number of applications for exemptions granted and refused to party employers and non-party employers of small restaurant enterprises at the Council (table 6 and table 7 in chapter 6) provides evidence that there are only a few small restaurant enterprises that apply for exemptions.

The reasons for non-application for exemptions by small restaurant employers can be attributed to the following:

- lack of knowledge about the BC and the purpose of Labour legislations;
- a belief that Labour legislations and the collective agreement set at the Council are too costly and are a threat to the survival of their operations;
- complaints of employers of small restaurant enterprises who are party members of the employer organisations about the poor enforcement of the collective agreement by the Council's inspectorates;
- the exemption process and the criteria used to grant exemptions to small restaurant enterprises; and
- the exemption system that is applied by the Council does not constitute a solution to the problems that small restaurant enterprises in the food, retail, restaurant, catering and allied trade industry face.

The immediate research question that surfaces and needs further investigation is to compare the level of applications for exemption and non-application for exemption by small restaurant enterprises in Pretoria with those of small restaurant enterprises that are located outside Pretoria.

7.4 CONSTRAINTS FACING SMALL RESTAURANT ENTERPRISES IN THE BCFRRCAT

The BCFRRCAT is a very heterogeneous industry that represents quite a large number of enterprises. The restaurant enterprises in the industry which are small or very small are characterised by a lack of development due to numerous problems which they experience in their day-to-day operations. Small restaurant employers that took part in the study were asked about the problems they encountered in running their businesses on a day-to-day basis. The most prevailing problems identified from their responses were associated with the lack of access to financing, regulatory constraints, interest rates and taxes, management skills and exposure to potential customers.

7.4.1 Lack of access to finances

Access to finances appeared to be a major problem which small restaurant enterprises face. Theoretically, there are sources and institutions of financing available to SMMEs in South Africa, for example,

- Banks that provide
 - Overdrafts
 - Term-loans
 - Leasing
 - Hire purchase
- Finance from the Small Business Corporation

In addition to these, Khula Enterprise Limited through the Centre for Small Business Promotion (CSBP) of the Department of Trade and Industry (DTI) was mandated to improve access to financing for the country's large SMME sector. Since it was introduced in 1996 a number of loan schemes, such as Business Loan Schemes, Guarantee schemes and Equity funds have been available to increase access to financing for SMMEs through Retail Financial Institutions (RFIs) which are SMME departments for commercial banks. Accredited Non-Governmental Organisations (NGOs) with their own minimum lending criteria to small enterprises were also introduced (Chalera, 2007:94).

Despite the existence of these sources of financial aid to small enterprises it became evident in the BCFRRCAT that the options for small enterprises are still very limited. Small restaurant employers in the BCFRRCAT appeared to have very little information about the support of these financial institutions and sources. The lack of knowledge in this instance is an indication of how small restaurant employers organize themselves with the employer organisations in the sector. According to these employers access to financing is a major problem that prevents expansion.

In most cases in South Africa banks which are owned by the country's major business groups adjust their policies to favour large enterprises and neglect small restaurant enterprises. A

loan request from a small restaurant enterprise is evaluated in terms of the risk and transaction costs for the bank in relation to the number of years experience and the financial status of the enterprise. (Chalera, 2007:94)

7.4.2 Regulatory constraints

Some of the other problems that small restaurant enterprises face in the BCFRRCAT industry are the restrictive regulatory constraints of procedures and practices. Most of the small restaurant enterprises that took part in the study generate a small profit and appear to be fragile and unstable. These regulatory constraints are applied to them even though they have shown to be quite effective and viable.

Some have shown considerable growth potential and these do not appear to be affected to the same extent by the regulatory constraints. Most employers pointed out that the constraints with regard to regulations that have an effect on entry into formal business impacted them the most. These are:

- The Companies Act 61 of 1973

This piece of legislation has been amended several times over the years, particularly in response to situations that large enterprises encounter.

Manager E pointed out that “ the present form of this legislation is unsuitable for the needs of small restaurant enterprises that are still seeking growth.”

In terms of Section 24 of the Act " the company must keep records in writing or electronic form at its registered office or another South African location." If records are not kept at the registered office, a notice of the location of records must be filed.

The reason for a plea to abolish this legislation for small restaurant enterprises is because the legislation restricts small restaurant enterprises (SMMEs) to a complex system of application, auditing and controls, as well as to the system of statutorily determined costs such as

unemployment funds and wage determinations. As a result, some small restaurant enterprises do not register which is technically illegal.

Although this illegal act does not seem to create an immediate problem for small restaurant employers, provided they are not being inspected, in the long run it does create problems and challenges for small restaurant enterprises that want to expand in terms of assets.

- Licensing and the Rental Housing Act 50 of 1999

According to the Concise Oxford English Dictionary (2006:822) licensing refers to a permit from an authority to own, use premises or carry on a trade. The procedures for licensing a business in South Africa represent a serious obstacle for the establishment of small restaurant enterprises, especially where the sale of alcoholic drinks is involved.

Manager H said the following: “The procedure for obtaining a licence is a burdensome and time-consuming one, an application for a licence is referred to a variety of officials, departments and agencies at different levels of government. The procedure to get one may take 5 months or more depending on the number of people who want licences and the types of trades in the business.”

These delays and difficulties have a severe effect on the development of small restaurant enterprises. The motivation and enthusiasm of potential entrepreneurs diminish and the starting capital decreases rapidly.

The rules relating to leased premises are perceived as restrictive for small restaurant enterprises. If tenants have to adhere strictly to building regulations, it will be impossible for small restaurant enterprises to develop and grow.

7.4.3 Interest rates and taxes

Three out of eight employers of small restaurant enterprises said that high interest rates and taxes proved to be a problem in the environment in which they operated. A high interest rate

had an influence on their decision about applying for financial assistance from a bank or not. These employers were not happy with the economic environment in which they operated.

Since interest rates do not only affect small enterprises but also large restaurant enterprises, Manager F pointed out that “ as small and large restaurant enterprises are now taxed the same; it is highly unlikely that the tax structure encourages the creation of small restaurant enterprises.” Small restaurant managers should be charged lower interest rates and they believe that their needs can be best met if the form of taxation is indirect rather than direct.

The general finding among small restaurant enterprises is that interest rate levels are too high and the interest rate for small restaurant enterprises is equal to those of large business enterprises. This has a negative impact on their borrowing capacity.

Moleme (2001:84) also supports the view that the taxation laws have always been perceived to be a problem for small businesses in South Africa. The problem has been associated with the compliance burden that arises out of the resource base available to small businesses. The rationale behind this argument is that “...due to their size, they do not have the necessary resources, including human resources, to be able to comply with their entire tax obligation.” The taxes that small enterprises have to pay have a negative impact on their profit which leads to non-compliance. However, the non-compliance level of paying tax by small enterprises is not only the result of the significant impact that it has on the profit margin, but also occurs due to a lack of understanding of the tax system and their obligations.

7.4.4 Management skills and exposure to potential customers

The other serious problem that the employers of small restaurant enterprises face in their daily operations is the lack of management skills. This leads to problems with book-keeping and keeping of records which in turn affect costing and long-term business planning.

Under the National Strategy, agencies such as Ntsika Enterprise Promotion Agency are doing an exceptional job initiating basic training courses. These agencies have been given the mandate to promote a wide range of non-financial services to local service delivery groups

and delivery of resources to local providers that work directly with small enterprises. Their services include training programmes for entrepreneurs, mentoring of individual firms, marketing and procurement advice and technology assistance (Chalera, 2007:90).

In spite of this there is still a lack of sustained back-up from experienced business people who can give the small restaurant managers/owners in the BCFRRCAT industry advice on problem-solving.

Small restaurant employers have also emphasized their inability to gain exposure to their potential market. Owing to limited finances they are unable to advertise widely and oftentimes their potential customers are simply unaware of their existence. Although these restaurants are inwardly-oriented enterprises that provide a service to the areas in which they are located, they also need exposure to potential customers outside their location.

7.5 ADDITIONAL PROBLEMS RAISED BY SMALL RESTAURANT EMPLOYERS

Employers of small restaurant enterprises in the BCFRRCAT industry, continue to invest in improving working conditions. The BCEA also encourages increased attention to hygiene, environmental fire safety and economic use of energy as it will lead to an improvement in work organization and the working conditions of the restaurants. However, managers of small restaurant enterprises also raised the following problems:

- a lack of available space in the areas where the restaurants are situated prevents employers from expanding their working space and environment in an optimal way.
- the unpredictable character of the industry which is determined by factors such as customers and weather conditions. Manager H said: “During rainy weather, especially during summertime in Pretoria, there is a considerable decrease of income for small restaurant enterprises. As a manager of a restaurant you need to react effectively and immediately to weather conditions that can change very quickly. That is why restaurant

enterprises ask for greater flexibility when it comes to working hours and employment of staff.”

The BC only permits limited flexibility when it comes to small restaurant enterprises. Despite the existence of specific industry approaches to flexibility via collective bargaining agreements, small restaurant enterprises in this industry would like to be allowed more flexibility.

- Another problem for managers of small restaurant enterprises is the fixed wages and working hours for their employees as set in the collective agreement. Manager C remarked that “ in response to the needs of occasional workers, the BC insists on providing a daily standard remuneration for a limited number of days. Since this is not always possible, we often use students to cope with the occasional increase in work during peak periods.” It becomes very difficult for managers to fill in the total number of working hours in the employment contracts of their employees. The fact that they depend to a great extent on casual workers to maintain productivity accounts for this difficulty.

7.6 SUMMARY

This chapter has sought to present the research findings on small restaurant enterprises in relation to the BCFRRCAT, with the aim to determine possible problems faced by small restaurant employers and to reach an understanding as to whether small restaurant enterprises have come to terms with the BC’s collective agreement.

It has become difficult to believe that the Council has made enough attempts to accommodate the needs and interests of small restaurant enterprises if you look at the conditions experienced by small restaurant enterprises in the industry. The rationale that by amending the name of the Council to broaden the scope of the Council so that it covers the provision of meals and/or sandwiches and/or refreshments from any establishment whether permanent,

temporary, indoors or in the open air, does not necessarily mean that the Council has really come to understand the situation of small restaurant enterprises.

Small restaurant enterprises also seem not to be able come to terms with the BC's collective agreement. This is primarily because the Council's administrative functions are not common knowledge amongst small restaurant employers. There is a difference in perceptions between the Council and small restaurant enterprises. This has led to the problem of non-compliance of small restaurant enterprises to the BC's collective agreement, a problem that the Council has not even begun to be address.

The relationship between the Council and small restaurant enterprises is not very accommodating. On the one hand, the Council believes that small restaurant enterprises are failing to organise themselves through the employer organisations at the Council and on the other hand, small restaurant enterprises do not see the benefit of joining party members at the Council as they associate the Council with Labour legislation costs and set collective agreements that interfere with the optimal development of their businesses

It is apparent that the Council and small restaurant enterprises have presented their own sets of functions and challenges that other Councils can use to improve their efficiency. The findings and ideas outlined in this chapter do not contain solutions to the problems raised by small restaurant enterprises. However, they offer a significant starting point for any subsequent studies which may be undertaken within the BCFRRCAT.

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS

8 INTRODUCTION

In this final chapter, the discussion focuses on the conclusion reached, limitations and problems encountered, and recommendations of the investigation.

8.1 CONCLUSION REACHED

The aim of the study was to carry out an investigation into the functioning of the BCFRRCAT in Pretoria, with special reference to the accommodation of small restaurant enterprises in the Council. It is very important not to consider the findings of this study as applicable to other BCs. The study did not in any circumstances attempt to make generalisations about findings that are applicable to other Councils and small enterprises. Throughout the study the focus has been to consider a single Council in order to get a better understanding of the BC system, particularly with reference to the accommodation of small restaurant enterprises in the Council.

The immediate conclusion that emerged from the study is that, in theory, the Council has shown a significant improvement in terms of provisions in the main collective agreement which became effective on 1 September 2007 and will remain effective up to 29 February 2012. This has largely been shown in the amendment of the Council's name that aimed at broadening the scope to cover the provision of meals and/or sandwiches and/or refreshments from any establishment whether permanent, temporary, indoors or in the open air.

However, from a practical perspective the Council was found to be less representative of small restaurant employers as a proportion of all registered employers. Small restaurant employers have pointed out significant constraints that the Council have not even begun to

address. These constraints appeared to be multifarious; although the most prevailing constraints that have a significant impact on small restaurant enterprises appeared to be related with the following:

- A lack of access to financing.
- A lack of knowledge about the assistance of financial institutions which can help them to develop their businesses. The lack of knowledge in this regard signifies the need for the Council to make certain provisions in their collective agreement to provide such information in their collective agreement.
- High interest rate levels have a negative effect on the decision of small restaurant employers to apply for financial assistance.
- Restrictive regulatory constraints relating to procedures, practices and formal business entry constituted some of the other problems experienced by small restaurant enterprises.

In reaction to the problems faced by small restaurant enterprises, the Council seemed to use the exemption system as a weapon rather than to take some accountability for the circumstances of small restaurant enterprises. They did not take into account the fact that the feasibility of small restaurant enterprises could be threatened if they suddenly had to comply with the terms of the collective agreement.

Small restaurant employers do not see the need to comply with the provisions of the main collective agreement of the Council. Of even greater importance is the fact that the system of exemptions has not necessarily proven to be effective. Small restaurant employers are affected by a lack of understanding and clarity about the exemption procedures. There seems to be no evidence that the procedures of the exemption system are functioning adequately. This leads to the non-registration of small restaurant enterprises with the Council and the risk of operating illegally rather than relying on the system of exemption at the Council.

8.2 LIMITATIONS AND PROBLEMS ENCOUNTERED

Even though the study covers both party and non-party employers of small restaurant enterprises bound by the main collective agreement in the Council, there is a limitation on the side of small restaurant enterprises who are party members to the Council. It is a limitation as only three small restaurant employers on the list of party employers received from the DOL were willing to participate. This was because many of them were no longer party members to the Council as they have automatically exempted themselves from participating in the Council. This resulted in fractional views of small restaurant enterprises who are party members to the Council. This also placed a limitation on the generalisation for party employers of small restaurant enterprises in the Council.

During the data collection process there were a number of cases where small restaurant enterprise employers refused to participate due to their busy schedules. This led to difficulties arranging for meetings. Some of them would not allow voice recordings to be made during the interviews. To overcome this problem, the note-taking strategy had to be adopted to make the employers feel at ease. There were also instances where the Council officials refused to give certain information that was regarded as highly confidential by the general secretary of the Council until she had been assured that the information was required for research purposes only.

During a visit to the DOL for the purpose of finding specific information that reflects on various matters of the Council, it was discovered that there was a lack of records of solid historical data about the BC.

It should also be noted that not all employers or managers of small restaurant enterprises that took part in the study were able to answer all the questions asked due to a lack of extensive knowledge about the BC. Some admitted that they were not knowledgeable enough about the Council and therefore did not want to answer certain questions.

Despite all the limitations and problems which the researcher encountered during the study, he approached the research setting with an open mind, prepared to be immersed in the complexity of the situations and to interact with participants in order to draw conclusions from the smallest detail. Consequently it became possible to cover the ground that the study set out to cover in a reasonably effective way.

8.3 RESEARCH RECOMMENDATIONS

The proposal arising out of this study to address the imbalance between the BC and small restaurant enterprises is that there is a need for research and information gathering by the Council and the DOL on the nature and conditions of small restaurant enterprises within the jurisdiction of the Council. This will assist the Council to:

- encourage participation of small restaurant enterprises in the Council;
- improve the representativity position and coverage of the Council;
- improve the nature of the exemption system, and
- improve the enforcement capacity of the Council's inspectorates over collective agreements.

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APPENDIX A

Personal interview guide

This is merely a planning guide that was used as a question guide during the interviews.

Duration: 60 - 90 minutes

PART A: INTERVIEW GUIDE FOR THE BCFRRCAT SECRETARY

Part A of this interview guide was only directed to the secretary of the Bargaining Council for the Food, Retail, Restaurant, Catering and Allied Trades (BCFRRCAT).

OPENING STATEMENT

The main aim of this study is to carry out an investigation into the functioning of the BCFRRCAT in Pretoria, with special reference to their accommodation of small restaurant enterprises. It was done to determine if the Council has come to understand the nature and conditions of small restaurant enterprises, and whether small restaurant enterprises have come to terms with the provisions of the collective agreement reached at the Council.

1 THE REPRESENTATIVITY AND COVERAGE OF THE BARGAINING COUNCIL (BC)

- Who are the members of the BC?
 - Employer Organisations (EO)
 - Trade Unions (TU)
- Do you know how many members the EO have?
- Do members of the EO have a voice at the BC through the EO?
- How many restaurant enterprises are under the jurisdiction of the BC?
- How many of the restaurant enterprises are registered with the BC?

- How many of the restaurant enterprises that are registered with the BC can be classified as:
 - Large enterprises?
 - Small enterprises?
- Is it compulsory for small restaurant enterprises to be members of the EO?
- How are small restaurant enterprises that are not members of the EO represented at the BC?
- How many inspectors/agents are employed by the BC on a full-time and/or part-time basis?

2 EXTENSION OF AGREEMENT

- Do you think BC agreements are to the benefit or detriment of small restaurant enterprises?
 - Please motivate your answer.
- How does the BC main agreement accommodate the needs of small restaurant enterprises?
- Who represents the needs of small restaurant enterprises at the Council?
- What type of the BC agreements were extended to small restaurant enterprises under the jurisdiction of the BC in 2008?
- What types of provisions in the collective agreement are extended to small restaurant enterprises?

3 ENFORCEMENT AND COMPLIANCE OF THE COUNCIL'S AGREEMENT

- What is the degree of compliance with the main agreement?
- Are small restaurant enterprises complying in general?
- Is compliance generally related to membership to the Council in any way?
- How many full-time and part-time inspectors are employed within the scope of the Council to enforce agreements?

- How many inspections are done on average (in 2008 and 2009) of small restaurant enterprises?
- What proportion of an inspector's time is spent on average tracking down unregistered firms?
- How many compliance orders were issued by the BC in 2008 and 2009 to small restaurant enterprises in your estimation?
- How many compliance orders resulted in compliance on the part of small restaurant employers?
- What are the criteria that are applicable to enforce agreements?

4 BARGAINING COUNCIL EXEMPTIONS

- Does the Council have an independent exemption committee for appeals? If yes, who are the members of the committee and what are their credentials or qualifications?
- Is the Council's committee a sub-committee of the Council?
- What are the procedures and structures that determine the applications for exemption?
- Which exemptions do small restaurant enterprises apply for?
- Do you think exemptions serve a purpose? If yes, what is the purpose?
- What are the criteria that are used for granting or refusing applications for exemptions, and are these published in the Government Gazette?
- How long does it usually take to process applications for exemptions?
- Are there any exemptions that are granted based on conditional circumstances? If yes, which conditions are considered in these exemptions?
- How many exemptions were granted for small restaurant enterprises in the period 2008 to 2009?
- How do blanket exemptions or exemptions by application accommodate small restaurant enterprises?

PART B: INTERVIEW GUIDE FOR THE BCFRRCAT HEAD OF INSPECTORATES

Part B of this interview guide was only directed to the head of inspectorates in the BC. The aim was to determine the enforcement capacity of the main collective agreement by designated inspectors/agents and the compliance level of small restaurant enterprises to the BC's main collective agreement.

1 ENFORCEMENT AND COMPLIANCE OF THE COUNCIL'S AGREEMENT

- What are the functions of the BC's inspectorate?
- How many inspections did you do on average in the year 2008 to 2009?
- What is the proportion of time spent on average tracking down unregistered firms?
- In your estimation how many compliance orders were issued by the Council in 2008 to 2009?
 - How many compliance orders resulted in compliance on the part of small restaurant employers?
- What are the criteria that are applicable to enforce agreements?
- Is the Council aware of small restaurant employers in the sector that are not parties to the Council? If there are such employers why do they not join the Council?
- How many compliance orders were issued in 2008-2009 to small restaurant enterprises?
- How many exemptions were generated by the Council's inspectorate for previously unregistered restaurant enterprises when they were compelled to register?

PART C: INTERVIEW GUIDE FOR SMALL RESTAURANT EMPLOYERS

This part of an interview guide was directed only to employers/managers of small restaurant enterprises in Pretoria that agreed to be interviewed about their general operations of the business, constraints and their exemption status, i.e. whether they applied for exemptions or not.

1 ABOUT THE RESTAURANT ENTERPRISE

- What is the name of your restaurant enterprise?
- When did your enterprise start operating?
- How many people do you currently employ in your business?
- What are the problems that you encounter in running your business in general and on a day-to-day basis?

2 ABOUT THE BARGAINING COUNCIL

- Do you know about the BCFRRCAT
- Are there any benefits you get from the main collective agreement at the BC? If yes, what are these benefits?
- Do you think that small restaurant enterprises are fairly represented at the BC?
- It is in the BC where issues such as wages, working conditions and benefits are centrally negotiated and extended. In your view, what impact does this have on small restaurant enterprises?
- Have you ever experienced any problem with the BC before?
- Is there any way in which small restaurant enterprises can be represented more effectively at the BC?
- Do you think big businesses represent the interests of small restaurant enterprises at the BC?
- How can big businesses improve the representation of the interests of small enterprises at the Council?

3 ABOUT EXEMPTIONS

- Have you ever applied for exemption to the BC? If yes, what did you apply for and how long did it take before your application was processed?
- Did you know of the categories of exemptions and criteria that the BC stipulated?
- How did you go about applying for exemption?



- Were you granted any exemption that you had applied for before? And how were you notified?
- If exemption were granted how would you implement it? If it were not granted what would you do?
- What is your general opinion of the BC?

APPENDIX B: Informed consent form



Faculty of Economic and Management Sciences
Department of Human Resources Management

**Informed consent for participation in an academic research study
Dept. of Human Resources Management**

THE RELEVANCE OF THE BARGAINING COUNCIL ON A GROUP OF SMALL RESTAURANT ENTERPRISES IN PRETORIA

Research conducted by:
Mr. V.J. Mnguni (24172686)
Cell: 083 969 2379

You are invited to participate in an academic research study conducted by Vusi Joni Mnguni, a Masters student from the Department of Human Resources Management at the University of Pretoria.

The purpose of the study is to carry out an investigation into the functioning of the bargaining council for the food, retail, restaurant, catering and allied trade in Pretoria, with special reference to their accommodation of small restaurant enterprises. To determine if the bargaining council has come to understand the nature and conditions of small restaurant enterprises and whether small restaurant enterprises have come to terms with the provisions of the collective agreement reached at the bargaining council.

Please note the following:

- This study involves an anonymous semi-structured interviews and I wish to assure you that all the information I receive will remain confidential and will be treated in a professional manner. No names will be attached to any data.
- Your participation in this study is very important to us. You may, however, choose not to participate and you may also stop participating at any time without any negative consequences.
- No risk or discomfort is associated with taking part in this interview. I need approximately 60 minutes of your time and would like you to answer my questions as honestly as possible.
- The results of the study will be used for academic purposes only and may be published in an academic journal. We will provide you with a summary of our findings on request.
- Please contact my supervisor, Dr. P. Smit at 082 568 0047 email address Paul.Smit@up.ac.za if you have any questions or comments regarding the study.

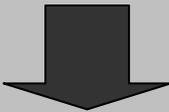
Please sign the form to indicate that:

- You have read and understand the information provided above.
- You give your consent to participate in the study on a voluntary basis.

Respondent's signature

Date



| | |
|--|--|
| <p>APPENDIX C: LRA Form 3.3 Section 29(1) Labour Relations Act, 1995</p> | <p>APPLICATION FOR REGISTRATION OF A BARGAINING COUNCIL</p>  |
| <p>READ THIS FIRST</p>  <p>WHAT IS THE PURPOSE OF THIS FORM?</p> <p>This form is an application for registration of a Bargaining Council.</p> <p>WHO FILLS IN THIS FORM?</p> <p>The trade unions and employers' organisations who have jointly agreed to form a Council.</p> <p>WHERE DOES THIS FORM GO?</p> <p>The Registrar of Labour Relations c/o the Director General, Department of Labour, Private Bag X117, Pretoria 0001. Fax 012-309 4156</p> <p>OTHER INSTRUCTIONS</p> <ul style="list-style-type: none"> ▪ Two completed copies of this form must be sent to the Registrar of Labour Relations. ▪ Each employers' organisation which is a party to the Bargaining Council must fill in page 2 of 5. ▪ Each trade union which is a party to the Bargaining Council must fill in page 2. ▪ Three copies of the constitution of the Bargaining Council must be attached to this form. ▪ An authorised representative of each party must sign this form. ▪ If there is insufficient space on the form use a separate piece of paper. | <p>1) NAME OF BARGAINING COUNCIL</p> <p>.....</p> <p>.....</p> <p>2) ADDRESS</p> <p>.....</p> <p>.....</p> <p>3) PARTIES</p> <p>Employers' organisations</p> <p>.....</p> <p>.....</p> <p>Trade unions</p> <p>.....</p> <p>.....</p> <p>4) PROPOSED SCOPE Describe the character of the sector</p> <p>.....</p> <p>.....</p> <p>Area</p> <p>.....</p> <p>.....</p> |



CHECK!

- Have you attached a copy of the constitution of the Bargaining Council?
- Have all the employers' organisations filled in page 2 of 5?
- Have all the trade unions filled in page 3 of 5?

5) REPRESENTATIVENESS OF THE BARGAINING COUNCIL

_____ Total number of employees falling within the proposed scope of the Bargaining Council and who belong to the trade unions which are party to the Council

_____ Total number of employers falling within the proposed scope of the Bargaining Council and who belong to the employers' organisations which are party to the Council

_____ Total number of employees employed within the proposed scope of the Bargaining Council by the employers that belong to the employers' organisations which are party to the Council

_____ Total number of employers within the proposed scope of the Council

_____ Total number of employees employed within the proposed scope of the Council

6) SIGNATORIES

| | Employers' organisation | Trade union |
|-----------|-------------------------|-------------|
| Name | | |
| Position | | |
| Signature | | |
| Date | | |
| Tel. | | |
| Fax | | |



APPENDIX D:

LRA Form 3.5

Section 32(1)

Labour Relations Act, 1995

BARGAINING COUNCIL REQUESTS EXTENSION OF COLLECTIVE AGREEMENT TO NON-PARTIES



READ THIS



WHAT IS THE PURPOSE OF THIS FORM?

This form requests the Minister of Labour to extend a collective agreement to non-parties.

WHO FILLS IN THIS FORM?

The Secretary of the Bargaining Council.

WHERE DOES THIS FORM GO?

The Minister of Labour, c/o the Director General, Department of Labour, Private Bag X117,

1) BARGAINING COUNCIL DETAILS

Name:

Address:

.....

.....

Tel: Fax:

2) EXTENSION OF COLLECTIVE AGREEMENT TO NON-PARTIES

We enclose three copies of a collective agreement dated

The parties to the collective agreement are:

.....

.....

.....



Pretoria 0001.

Fax 012-309 4156.

OTHER INSTRUCTIONS

Two completed copies of this form must be sent to the Minister of Labour.

Three signed copies of the collective agreement and a copy of the Certificate of Representativeness of parties to the agreement or of the Council, must accompany this form.

... please turn over →

.....

(names)

The Bargaining Council requests that all the provisions of the collective agreement except clauses

(clause numbers)

become binding on the other employers and employees in the

.....

.....

.....

(sector or sub-sectors)



| | |
|--|---|
| | <p>5) REPRESENTATIVENESS OF THE BARGAINING COUNCIL</p> <p>_____ Total number of employees falling within the scope of the collective agreement and who belong to the trade unions that are party to the collective agreement.</p> <p>_____ Total number of employers falling within the scope of the collective agreement and who belong to the employers' organisations that are party to the collective agreement.</p> <p>_____ Total number of employees employed within the scope of the collective agreement by the employers who belong to the employers' organisations that are party to the collective agreement.</p> <p>_____ Total number of employers within the scope of the collective agreement.</p> <p>_____ Total number of employees employed within the scope of the collective agreement.</p> <p>Signature of Secretary of Council</p> <p>Name</p> <p>Date</p> |
|--|---|

DEPARTMENT OF LABOUR DETAILS

I,, duly authorised thereto in terms of Regulation 7(2), have
 (name of official)

checked the information and certify that it is substantially correct.

Signature:

Date:

Place:



APPENDIX E

COUNCIL SUBMITS PARTICULARS OF REPRESENTATIVENESS OF ITS REGISTERED SCOPE



**PARTICULARS OF REPRESENTATIVENESS OF COUNCIL TO BE
SUBMITTED TO REGISTRAR FOR PURPOSE OF CONDUCTING ANNUAL
REVIEW OF REPRESENTATIVENESS IN TERMS OF SECTION 49(3)**

1) COUNCIL DETAILS

Name and address:

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

Tel: Fax:

2) REPRESENTATIVENESS

Total number of employees falling within the registered scope of the council and who belong to the trade unions which are parties to that council:

.....

Total number of employers falling within the registered scope of the council and who belong to the employers' organisations which are party to that council:

.....

Total number of employees employed within the registered scope of the council by members of the employers' organisations that are party to that council:

.....

Total number of employees employed within the registered scope of the council:

.....

Total number of employers operating within the registered scope of the council:

.....



Signature of Secretary:

Name:

Date:

DEPARTMENT OF LABOUR DETAILS

**I,, duly authorised thereto in terms of Regulation 7(2),
have**
(name of official)

checked the information and am satisfied that the information was substantially correct as at

.....

(date of council details)

Signature:

Today's date:

Place:



(Official stamp)

APPENDIX F

APPLICATION FORM FOR EXEMPTION

Name of business:.....

Address of business:.....

.....

.....

Name of Responsible Person :.....

Tel No:..... Fax No.....

Date of application:.....

Please complete as fully as possible:

- 1) Which clause or sub-clauses do you need exemption from?
.....
- 2) The period for which the exemption is required?
.....
- 3) Was the exemption application discussed with your employees?
.....
- 4) If the answer to 3 is "yes":-
 - (a) Do the employees understand the implications if the exemption should be granted?
.....
 - (b) Proof that the exemption applied for has been discussed with the employer, his employees(s) and their respective representatives. The responses resulting from such consultation, either in support of or against the application, to be attached to the application.
.....
 - (c) Can a Council representative meet with you and your employees to discuss the exemption application?
.....
- 5) Attach a list of all your employees indicating names, identity numbers and rate of pay where available.
- 6) Fully motivate the reason for the exemption and include affidavits if possible.
- 7) Attach any other relevant documents to substantiate the application.

.....
Signature of responsible person

.....
Date