

**Extension of Bargaining Council Agreements: International Norms and the Situation
in South Africa**

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SUMMARY

Section 23(5) of the Constitution protects this right to engage in collective bargaining and the Labour Relations Act 66 of 1995 (LRA) promotes collective bargaining, in particular at sectoral level. As part of the promotion of sector level bargaining, parties in a Bargaining Council may request the Minister of Labour to extend their collective agreements to bind non-parties. Sections 32(2) and (3) of the LRA provide for automatic extension where the parties represent a majority of the industry, whereas when there is less than majority representativeness by the parties to the Bargaining Council, then section 32(5) of the LRA permits the Minister of Labour to exercise her discretion whether to grant the extension request or not.

The Free Market Foundation (“FMF”) recently instituted an attack against elements of the extension of bargaining council agreements. They initially that section 32(5) of the LRA is unconstitutional and infringes the majoritarianism principle, however this part of their argument was later abandoned. In my dissertation, I explore the FMF’s abandoned argument to assess whether it has any merit. In order to do this, I also consider the international and foreign positions regarding the extension of collective agreements to non-parties.

CHAPTER 1 INTRODUCTION

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1. Background

The Basic Conditions of Employment Act 75 of 1997 (“BCEA”) sets out certain minimum conditions of employment which apply to all employees in South Africa. These minimum conditions may be varied and in some cases reduced by way of a collective agreement.¹ At present there is no national minimum wage in South Africa. Aside from sectoral determinations,² employers and employees are left to their own devices to negotiate wages and terms and conditions of employment with one another. Collective agreements regulating terms and conditions of employment or other matters of mutual interest may be concluded between trade unions, on the one hand, and on the other hand, employers and/or their employers’ organisations.³

Section 23(5) of the Constitution⁴ enshrines the right to engage in collective bargaining. Unlike the labour relations dispensation prior to 1995, there is no longer a system whereby the law compels parties to bargain and the Labour Relations Act 66 of 1995 (“LRA”) “unashamedly promotes collective bargaining.”⁵ There are different levels at which

¹ S 49 of the BCEA.

² Regulated in chapter 8 of the BCEA. As Van Niekerk *et al* (2015) 109 explain, sectoral determinations are commonly made for sectors where it is difficult for workers to organise. Examples of sectoral determinations are Sectoral Determination 7: Domestic Worker Sector and Sectoral Determination 13: Farm Worker Sector, South Africa. In contrast, bargaining councils are a result of trade unions and employers’ organisations being able to organise and establish a bargaining council (s 27 of the LRA).

³ S 213 of the LRA.

⁴ The Constitution, 1996.

⁵ Explanatory Memorandum (1995) *ILJ* 293. Steenkamp *et al* (2004) *ILJ* 946 note that although there is no doubt that the “promotion of collective bargaining is one of the central themes of the LRA”, surprisingly the LRA does not impose a “duty on private employers to bargain collectively” and rather provides for a framework of organisational rights.

employers and employees may bargain with one another, for example at plant level, sectoral level or at a centralised level.⁶ The LRA has as one of its objects the promotion of collective bargaining at a sectoral level.⁷

One or more trade unions and one or more employers' organisations can establish a bargaining council for their sector or area by adopting a constitution and registering the bargaining council with the Registrar of labour relations.⁸ The parties to the bargaining council may then negotiate with one another under the auspices of the bargaining council and determine terms and conditions of employment and wages (minimum wages or actual wage rates) that will apply to those parties and will, one would hope, take into account the unique circumstances of that particular industry.

Section 32 of the LRA provides for the extension of collective agreements concluded in a bargaining council to non-parties. Where the parties to the bargaining council have as their members and where their members employ the majority of employees in the industry, then the Minister of Labour ("the Minister") *must* extend a collective agreement, upon request, to non-parties.⁹ Where the majority threshold is not met, section 32(5) of the LRA introduces a ministerial discretion. The Minister may extend a collective agreement to non-parties if satisfied that the parties to the bargaining council are *sufficiently representative* within the bargaining council's registered scope¹⁰ and that a failure to extend the collective agreement may undermine collective bargaining at a sectoral level or in the public service as a whole.¹¹

⁶ Plant level bargaining is also commonly referred to as enterprise level bargaining or workplace or company level bargaining. Similarly, sectoral level bargaining is also commonly referred to as industry level bargaining. These terms will be used interchangeably throughout this dissertation.

⁷ S 1(d)(ii) of the LRA. *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA* [1999] 1 BLLR 66 (LC) para 21 illustrates the primacy given to sector level bargaining in South Africa. In this case, the Labour Court found that where there is an industry-wide strike, trade unions need not give notice to each individual employer not affiliated to the bargaining council. It was held that this would "almost defeat the primary object of the Act of seeking to promote collective bargaining at sectoral level" and therefore s 1(d)(ii) simply implies that notice of the strike need only be given to the bargaining council for the purposes of s 64(1)(b) of the LRA. S 199(1) of the LRA also sets out that individual contracts of employment are to give way to more favourable terms in applicable collective agreements.

⁸ S 27 of the LRA.

⁹ S 32(3)(b) & (c) of the LRA.

¹⁰ S 32(5)(a) of the LRA.

¹¹ S 32(5)(b) of the LRA.

The constitutionality of section 32 and the decisions by the Minister to extend collective agreements have come under the spotlight in recent years in South Africa.¹² The Free Market Foundation (“FMF”) instituted an attack against elements of mechanism for extending bargaining council agreements. Initially, the FMF called for the deletion of section 32(5) of the LRA because it alleged that it is subversive of the principle of true majoritarianism¹³ and launched a constitutional challenge against the provisions in section 32 which infringe the majoritarian principle.¹⁴ After the respondents filed their answering papers, the FMF abandoned its constitutional attack.¹⁵ In this dissertation, I seek to examine whether there is merit in the initial allegations of the FMF that section 32(5) of the LRA flouts the principles of majoritarianism and is unconstitutional.

2. Research Questions

In this dissertation, I consider section 32(5) of the LRA in light of the principle of majoritarianism which is advocated by the LRA and determine whether it infringes rights in the Bill of Rights and, if it does, whether such limitation is justifiable. As part of this examination, I must also consider the factors that are relevant in determining whether collective bargaining at a sectoral level will be undermined if an agreement is not extended and whether a challenge to the constitutionality of section 32(5) necessarily implies a challenge to the primary objects of the LRA.

I will argue that section 32(5) of the LRA is in conflict with the majoritarianism principle and limits the rights to fair labour practices, to engage in collective bargaining, to strike and freedom of association. I will find that this limitation is not justifiable because section 32(5) permits the collective interests of the majority of an industry to be overridden by the will of the minority, because sectoral level bargaining is a mere policy choice of the legislature, the Ministerial discretion in the sector is not an adequate safeguard and constitutes unwarranted interference and less restrictive means exist for extensions in the form of a section 32(2) extension. I will ultimately recommend that section 32(5)(a) and (b) of the LRA be deleted.

¹² See *National Employers Association of South Africa v Minister of Labour* (2013) 34 ILJ 1556; *Valueline CC & others v Minister of Labour & others* (2013) 34 ILJ 1404 (KZP); *National Employers Association of South Africa v Minister of Labour* [2014] ZALCJHB 524; & *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 (discussed further below in para 5 chapter 4).

¹³ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 notice of motion para 2.1.

¹⁴ Du Toit (2014) ILJ 2640.

¹⁵ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 para 9.

3. Significance of the Study

The extension of collective agreements to an entire sector has far-reaching consequences for employers and employees in that sector. The policy considerations involved in trying to address both unemployment and inequality, which are being hotly debated in current talks over a national minimum wage, apply equally to an assessment of the extension of collective agreements. As stated however, by Justice Murphy in the FMF case, it is not for the courts to prescribe to the legislature about its preferred, legitimate policy choices.¹⁶ I am not constrained herein in the same manner the courts are, however I seek to keep the discussion limited mostly to legal principles.

Challenges to the Minister's extension decisions are a present and future reality in South Africa. To impose terms and conditions on all employers and employees within an industry, where there is not majority support for those terms and conditions, raises questions about the roles of democracy and voluntarism in our system of collective bargaining. The FMF's abandoned argument over the constitutionality and appropriateness of section 32(5) of the LRA remains unsettled and it will be interesting to see how a court deals with the issue should it be raised at a later stage.

4. Research Methodology

My research methodology and approach is a critical analysis, involving a qualitative analysis of literature and case law. My approach will also be descriptive and comparative insofar as the legal principles, international and foreign law are concerned.

5. Structure

In chapter 2, I start out by explaining the Constitutional values which underpin collective bargaining in South Africa, some of the rights that may be implicated by section 32(5) of the LRA and certain principles which must be followed when assessing the constitutionality of legislation. The term "sufficiently representative" echoes the terminology used in ILO Recommendation 91 of 1951. In assessing section 32(5), guidance must be sought from the ILO standards and supervisory bodies and ought also to be sought from foreign jurisdictions. Therefore in chapter 3, I proceed with a discussion about the ILO standards

¹⁶ *Idem* para 114.

and views of ILO supervisory bodies that deal with the extension of collective agreements. In chapter 4, I briefly discuss the past extension practices in South Africa and then discuss the current relevant legislative framework, as well as the challenges that have already been brought against the extension of collective agreements.

In chapter 5 I analyse the purpose of extensions, why they are so controversial and deal in more detail with the FMF's challenge to section 32(5) of the LRA. The crux of the debate in this dissertation is addressed in chapter 6, where I consider whether section 32(5) is in keeping with the principles of majoritarianism and I then critically examine the constitutionality of section 32(5). Finally in chapter 7, I discuss the approach of extending collective agreements in other countries, with particular focus on recent developments in Portugal and Germany, to see if there is anything which we can learn from foreign jurisdictions.

CHAPTER 2 THE CONSTITUTION

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1. Introduction

The principle source of labour relations law in South Africa is the Constitution.¹⁷ South Africa became a democracy in 1994. An interim Constitution was adopted in 1994 and, in 1996, the ‘final’ Constitution came into force.¹⁸ The previous system of parliamentary sovereignty changed to one of constitutional supremacy in 1994.¹⁹ Constitutional supremacy entails *inter alia* that the judiciary has the power to enforce the Constitution and may therefore declare any laws or conduct in conflict with the Constitution as invalid.²⁰ In this chapter, I consider the fundamental rights which are relevant to an analysis of the extension of collective agreements, as well as some of the most important applicable constitutional principles. Before focussing, however, on the fundamental rights, it is important to first explore the principle of democracy, which I believe is highly relevant to the functioning of a bargaining council and the extension of collective agreements.

2. Democracy

The principle of democracy is a primary consideration when evaluating section 32 of the LRA because section 32(5) is concerned with how representative the parties in the bargaining council are within the registered scope of the bargaining council. By using the term “representative”, this must surely mean that we are considering how representative the parties of the bargaining council are of the *voice* or the *will* of all those who are

¹⁷ The Constitution, 1996.

¹⁸ Currie & De Waal (2013) 1-2.

¹⁹ *Idem* 2.

²⁰ *Idem* 9, with reference to s 172 of the Constitution, 1996.

affected by the collective agreement and by its extension. There are many different types of democracy, such as a participatory, direct, representative and pluralist democracy, however there is no definition of democracy in the Constitution.²¹ I do not intend to deal with the different forms of democracy to a greater extent than is necessary for purposes of this dissertation. Roux describes democracy as the following:

“Democracy is a noun permanently in search of a qualifying adjective. The core idea – that decisions affecting the members of a political community should be taken by the members themselves, or at least by elected representatives whose power to make those decisions ultimately derives from the members – is more or less settled.”²²

He also continues to explain how, in South African constitutional law, democracy cannot be merely equated with the majority-rule principle, but rather means something deeper which entails the recognition of individual rights.²³ The protection of fundamental rights is a condition necessary for a process to be democratic.²⁴

In *Democratic Alliance & Another v Masondo*,²⁵ although made in the context of democracy at the local government level, Sachs J makes some important remarks which apply when considering the principle of democracy which our Constitution envisages, in general. Sachs J states that fair representation does not require a mathematical form of democracy but rather contemplates a “pluralistic democracy” where there is respect for “the rights of all to be heard and have their view considered.”²⁶ He also makes the following statement about democratic decision making:

“At the same time, the Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding.”²⁷

These are important considerations in both the deliberating of terms of the collective agreement and in establishing who is in favour of the collective agreement being made binding on an entire industry. The rights of all stakeholders must be taken into account, however, at some point deliberation must end and a decision needs to be taken. This

²¹ Currie & De Waal (2013) 14.

²² Roux (2014) 10-1.

²³ *Idem* 10-66.

²⁴ *Ibid.*

²⁵ 2003 (2) SA 413 (CC).

²⁶ *Idem* para 42.

²⁷ *Ibid.*

statement by Sachs J reinforces that decisions should be favoured by the majority of stakeholders. If there is not majority support for the outcome, then it is questionable whether the rights of those who disagree have been taken into account and doubtful whether the limitation of those rights is justifiable in an open and democratic society.

A pluralist democracy allows minorities the power to determine issues specific to those minorities and the majority is prevented from deciding matters of particular importance to the minority.²⁸ The majority still has a general right to govern “on account of the majority obtained at the ballot box”, however minorities are not to be suppressed by the majority and their rights are protected in order that “minority communities can survive and flourish.”²⁹ Where a “constitutional democracy” comes in is by affording protection to the fundamental rights of the minority, which the majority may not impinge.³⁰

Democracy does not only refer to a system of government but also a form of society, a principle or a set of values.³¹ Whilst private persons and institutions are not required by the Constitution to act in a democratic manner,³² according to Roux, the preamble³³ suggests an expectation that “democracy will permeate all social relations” and “inform all South Africans’ dealings with each other.”³⁴ Even if that argument fails, the principle of democracy should in any event be applicable to the extension process because, once a collective agreement is extended to non-parties by the Minister in the manner provided for in section 32, its binding force is derived from the fact that it is a form of delegated legislation.³⁵

²⁸ Malan (2010) *TSAR* 436.

²⁹ *Idem* 438.

³⁰ *Ibid.* In *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC) para 234, the following was said about a constitutional democracy: “[a] vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands. Indeed, public involvement may be of special importance for those whose strongly-held views have to cede to majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy.” I need to stress that while there seems to be some acceptance for the will of the minority giving way to the majority, we see no support for majority will acceding to that of the minority.

³¹ Roux (2014) 10-2.

³² Currie & De Waal (2013) 14.

³³ The preamble to the Constitution provides that the aims of the Constitution are to “establish a society based on democratic values, social justice and fundamental rights” and “lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.”

³⁴ Roux (2014) 10-23.

³⁵ *Fredericks & others v MEC for Education and Training Eastern Cape and Others* [2002] 2 BLLR 119 (CC) para 28. S 239(b)(ii) of the Constitution, 1996, provides a definition for “organ of state” which includes “any other functionary or institution exercising a public power or performing a public function in terms of any legislation.” The lawfulness of

Roux explains how there is a tension between rights and democracy. In certain circumstances, the “vindication of a right at the expense of majoritarian wishes will not be undemocratic.”³⁶ Where a right is infringed by the principle of majoritarianism, an analysis in terms of the general limitations clause will determine if the infringement is justifiable.³⁷ The will of the majority, on its own though will not be sufficient in order to justify the limitation of a right.³⁸ The corollary of this is that, where there is minority-rule, there is a seemingly undemocratic process and it is highly unlikely that such limitation would be justifiable. Below I briefly describe the fundamental rights which appear most affected by section 32(5) of the LRA.

3. Fundamental Rights

3.1. Labour Relations

Section 23(1) of the Bill of Rights provides that “everyone” has the right to fair labour practices.³⁹ The remainder of the provisions in section 23 refer to workers, employers, employers’ organisations and trade unions.⁴⁰ Sections 23(2) and 23(3) of the Constitution entrench workers and employers’ rights to form and join trade unions or employers’ organisations, as the case may be, and participate in the activities and programmes of those organisations. Section 23(2)(c) provides an additional right to workers to strike. The rights of trade unions and employers’ organisations to determine their own administration, programmes and activities, to organise and to form and join a federation are provided for in section 23(4) of the Constitution.

delegated legislation was confirmed again by the Constitutional Court in *AAA Investments (Pty) Ltd v Microfinance Regulatory Council and Another* 2007 (1) SA 343 (CC). In *Confederation of Associations in the Private Employment Sector and others v Motor Industry Bargaining Council and others* (Case 46476/2011) para 32, Fourie J held that it would be difficult not to conclude that a bargaining council falls within the definition in s 239 of the Constitution of “organ of state” and is therefore subject to the ordinary requirements of legal accountability.

³⁶ Roux (2014) 10-33 & 10-34.

³⁷ S 36 of the Constitution, 1996.

³⁸ Roux (2014) 10-36 & 10-37.

³⁹ The Constitutional Court has afforded a wide meaning to “everyone”, finding in *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) that the term includes employers. The Labour Appeal Court held in the matter of *Kylie v Commission for Conciliation Mediation & Arbitration & others* (2010) 31 ILJ 1600 (LAC) that sex workers, who cannot work legally in South Africa and cannot conclude a valid employment contract, are entitled to fair labour practices. In discussing the scope of the word “everyone”, Cheadle (2006) ILJ 672 expresses his view that this right is afforded to all those “involved in the employment and labour relationship, namely employers, employees, trade unions and employer organizations.”

⁴⁰ Van Niekerk *et al* (2015) 38. As stated by Cooper (2014) 53-3, the s 23 rights are all concerned with the “mediation of private relationships” whether on an “individual or a collective basis.”

Section 23(5) of the Constitution entrenches the following right:

“Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that legislation may limit a right in this Chapter, the limitation must comply with section 36(1).”

Section 23(5) of the Constitution is probably most important of these labour relations rights for purposes of this dissertation. The extension of collective agreements to non-parties is brought about by national legislation which has regulated collective bargaining. Extensions affect the right of non-parties to engage in collective bargaining. Finally, section 23(6) of the Constitution provides that national legislation may recognise union security arrangements contained in collective agreements⁴¹ and any limitation must, similarly, be in compliance with section 36(1) of the Constitution.

Section 23 of the Constitution, on the face of it, does not appear to establish a constitutional duty to bargain. There have, however, been mixed views by legal writers and a lack of clarity from the Constitutional Court in this regard.⁴² Although the matter is not settled, the dictum of O’ Regan J in *SANDU v Minister of Defence & others*⁴³ leaves one with the impression that the Constitutional Court would not easily recognise a constitutional duty to bargain:

“were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, courts may be drawn into a range of controversial, industrial-relations issues.”⁴⁴

Interestingly, nothing in section 23 of the Constitution specifies what level collective bargaining must take place at⁴⁵ or contain any express obligation on the state to promote collective bargaining. The promotion of collective bargaining at sectoral level is therefore

⁴¹ For example, a closed shop agreement.

⁴² Currie & De Waal (2013) 486 are of the view that “the drafters’ silence on that point suggests that they favoured a ‘voluntaristic’ approach to collective bargaining.” Vettori (2005) *De Jure* 384-385 & 391 explains how a duty to bargain is more easily enforced where bargaining takes place at plant level and also expresses her opinion that enforcement does not necessarily need to be effected by the courts and can be in the form of economic forces or industrial muscle.” As Cooper (2014) 53-32 mentions, under the Interim Constitution, 1993, workers were granted the right to bargain collectively rather than the right to engage in collective bargaining, which simply adds to the debate.

⁴³ *SA National Defence Union v Minister of Defence & others* [2007] 9 BLLR 785 (CC).

⁴⁴ *Idem* para 55. Cheadle (2005) *LDD* 150-151 supports the decision arrived at in *SANDU v Minister of Defence* (2003) 24 *ILJ* 1495 (T) that there is no constitutional duty to bargain and, in fact, refers to three arguments not relied upon by Van der Westhuizen J’s judgment.

⁴⁵ Du Toit *et al* (2015) 325.

only provided for in the LRA⁴⁶ and is not constitutionally entrenched. Also absent from the Bill of Rights is any provision entrenching the right to work, which would be a virtually impossible right to guarantee in a free market.⁴⁷

The rights within section 23, and the Bill of Rights in general, are not neatly compartmentalised distinctly from one another. In an article by Du Toit⁴⁸ where he considers the argument by the employers' group in the ILO that there is no right to strike at an international level, he refers to a recent decision of the Canadian Supreme Court where it analysed the right to strike:

“Interestingly, a very similar question was recently considered by the Canadian Supreme Court in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 where the constitutionality of provincial legislation limiting the right to strike was at issue ... the majority of the Supreme Court ruled that ‘[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right’ (para 3).”

As stated by Van Niekerk *et al*, a cornerstone of collective bargaining is freedom of association. Freedom of association is “precondition for the realisation of a number of different rights, including the right to organise, to engage in collective bargaining and to strike.”⁴⁹

Where terms and conditions of employment agreed on in a bargaining council and extended to non-parties, it seems likely that this impinges the rights of non-parties to engage in collective bargaining. Similarly where a trade union that is not a party to the collective agreement becomes bound by its terms, if there is a “peace clause”⁵⁰ in the agreement, the trade union on which the agreement is imposed may be prevented from striking, in terms of section 65 of the LRA,⁵¹ over any issue dealt with in the collective agreement. This seems to be a limitation of the right to strike.⁵²

⁴⁶ S 1(d)(ii) of the LRA.

⁴⁷ Devenish (2005) 127.

⁴⁸ Du Toit “‘Collective Bargaining’ or ‘Collective Begging?’” (2015).

⁴⁹ Van Niekerk *et al* (2015) 366.

⁵⁰ A “peace clause” is a clause, inserted in collective agreements generally for the benefit of employers, which typically prohibits employees from embarking on industrial action over any issues contained in the agreement until a certain date (typically the expiry of the term of the collective agreement, when new negotiations take place).

⁵¹ S 65(1)(a) of the LRA provides that “[n]o person may take part in a *strike* or *lock-out* or in any conduct in contemplation or furtherance of a *strike* or *lock-out* if that person is bound by a *collective agreement* that prohibits a *strike* or *lock-out* in respect of the *issue in dispute*.” S 65(3)(a)(i) of the LRA further provides that “[s]ubject to a *collective agreement*, no person may take part in a *strike* or *lock-out* or in any conduct in contemplation or

3.2. Other Fundamental Rights

Everyone has a constitutional right to freedom of association.⁵³ This right is concerned with a group of people joining together for some purpose.⁵⁴ As explained above, this right is closely related to the right of workers and employers' to join trade unions and employers' organisations, respectively, and to participate in the activities and programmes of those organisations. It is also closely tied to trade unions' and employers' organisations' rights to determine their own administration, programmes and activities.⁵⁵ Collective agreements can be extended to parties who are not members of the majority trade union and employers' organisation and the freedom of association of these "non-parties" is possibly affected.⁵⁶ Whether there is a right *not* to associate remains open to debate.⁵⁷

Everyone has the right to freedom of expression.⁵⁸ This right is closely related to the right to freedom of association, as well as a host of other rights in the Bill of Rights, such as the right to dignity and the right to assembly.⁵⁹ I argue that in order to ensure a democratic deliberation process, when deciding if a collective agreement should be extended to apply to an entire industry, all affected stakeholders should be able express their will regarding the extension prior to a final decision being made.

Section 32(5) of the LRA affords the Minister a discretion as to whether a collective agreement may be extended to non-parties. This decision amounts to administrative action

furtherance of a *strike* or *lock-out* if that person is bound by any arbitration award or *collective agreement* that regulates the *issue in dispute*."

⁵² Cheadle (2006) *ILJ* 667 states that, whilst s 23 guarantees workers and unqualified right to strike, the LRA does place certain limitations on this right, for example that a strike can only take place over matters of mutual interest, or that the right of workers in essential services to strike may be curtailed. Cheadle explains that the limitations in the LRA are generally regarded as being justifiable in an open and democratic society and are accepted by the supervisory machinery of the ILO. The argument I will make in this dissertation is that the limitation of the right to strike where a collective agreement regulates the issue in dispute (s 65(1)(a) of the LRA) is not a justifiable limitation where the parties to the bargaining council are not representative of a majority of the industry in question.

⁵³ S 18 of the Constitution, 1996.

⁵⁴ Devenish (2005) 109.

⁵⁵ Currie & De Waal (2013) 397 state that "associations make good the promise of a variety of other, correlative rights." Swepston (2004) 149 also remarks that freedom of association "has special importance for workers, as an essential means to defend their interests, and is vital also to employers."

⁵⁶ Currie & De Waal (2013) 488.

⁵⁷ In the Explanatory Memorandum (1995) *ILJ* 295, it is stated that the Constitution "endorses freedom of association without resolving the vexed question of whether such a right includes the right not to associate." According to Devenish (2005) 111, no person should be compelled to establish or belong to an association.

⁵⁸ S 16 of the Constitution, 1996. According to Devenish (2005) 99, some forms of expression, like voicing political ideas, are central to this right, whereas other forms of expression such as commercial advertising, may be regarded as peripheral.

⁵⁹ *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* (CCT20/95, CCT21/95) [1996] ZACC 7 para 27.

and the decision-making process and its outcome are subject to section 33 of the Constitution which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.⁶⁰ This is not a right alleged to be impinged by section 32(5), however I have referred to it briefly because the Minister's decision can be taken on review.⁶¹

Section 22 of the Constitution enshrines the right of every citizen to choose their trade, occupation or profession freely.⁶² A restriction of commercial activity will, in most cases, fall outside of the scope of this constitutional right and jurisdiction persons are not bearers of this right.⁶³ This right is relevant to the discussion in this dissertation as there is an argument to be made that fixing minimum and entry-level wages may limit the freedom of occupation of certain employees or unemployed persons who are unable to secure work or are retrenched as a result of unaffordable wage levels. These individuals are denied the choice to work for a lower wage in order to remain employed or find work.⁶⁴

Section 9 deals *inter alia* with the right to equality. Briefly, it provides that everyone is equal before the law and has the right to equal protection and benefit of the law, that the state may not discriminate against anyone on certain prohibited grounds and that no person may discriminate against another on those same prohibited grounds. In order for there to be an infringement of the right to equality, it must be established that there has

⁶⁰ S 33(1) of the Constitution, 1996. As required by section 33(3) of the Constitution, the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was promulgated to give effect to this right.

⁶¹ A review application in the Labour Court of the extension decision by the Minister can be brought in terms of s 158(1)(g) which provides that the Labour Court has the power, subject to s 145, to review the performance or purported performance of any action provided for in the LRA, on grounds permissible in law. See *National Employers Association of South Africa v Minister of Labour* [2014] ZALCJHB 524 where the review application was brought in terms of s 158(1)(g) of the LRA and s 6 of PAJA. S 1 of PAJA defines "administrative action" to include "any decision taken, or any failure to take a decision, by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision." It is also conceivable that the decision by a bargaining council to request the Minister to extend a collective agreement may, itself, constitute administrative action and be susceptible to review in terms of PAJA. In *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 para 8 Murphy J states that there is a possibility that bargaining council agreements may be reviewed in terms of PAJA or on rationality grounds.

⁶² Under the interim Constitution, 1993, section 26(1) provided that every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory. According to Currie & De Waal (2013) 459 the scope of this right was narrowed in the final Constitution, which is important to bear in mind when analysing any limitation of section 22 of the Constitution. Occupational freedom is framed as an individual right and is narrower than the concept of freedom of commercial activity (also see Rautenbach & Malherbe (2009) 380).

⁶³ Currie & De Waal (2013) 465.

⁶⁴ Currie & De Waal (2013) 465 state that "an occupation may accordingly be defined as an activity through which people seek to provide for their needs not only in a material sense but also in a more idealistic sense of pursuing their self-development – the sense in which an occupation can be a 'vocation'."

been some type of differentiation and that there is no rational relationship between the differentiation in question and the governmental purposes “which is proffered to validate it.”⁶⁵

Section 10 of the Constitution enshrines the right to dignity by providing that everyone has inherent dignity and the right to have their dignity respected and protected. Juristic persons are not protected by the right to human dignity.⁶⁶ The Constitutional Court has also observed that dignity is a founding value of the Constitution and the foundation of many of the other fundamental rights.⁶⁷ As mentioned above, the extension of collective agreements to non-parties may result in employers not being able to afford to pay their employees the imposed wages, which could in turn result in retrenchments and/or a decision not to employ new recruits. This may limit the right to dignity of job-seekers and employees facing retrenchment.⁶⁸

4. Constitutional Principles

4.1. Direct Reliance on Constitution

When interpreting legislation, and developing the common law, the courts must promote the spirit, purport and object of the Bill of Rights.⁶⁹ If legislation is found to unjustifiably limit a right in the Bill of Rights or unjustifiably conflicts with the Constitution, the Constitutional Court may strike such legislation down. In *SA National Defence Union v Minister of Defence and others*⁷⁰ the Constitutional Court held that legislation which gives effect to a constitutional right may not be bypassed and reliance placed directly on the constitutional right. If the legislation does not sufficiently give effect to the right and is “wanting”, then the constitutionality of that legislation should still be challenged without asserting direct reliance on the right in the constitution.⁷¹

⁶⁵ *Prinsloo v Van der Linde* 1997 (3) SA 1012 paras 23 & 26.

⁶⁶ *Devenish* (2005) 62 & *Rautenbach & Malherbe* (2009) 365.

⁶⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) para 328.

⁶⁸ In *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2003] 2 BLLR 103 (CC) para 13 it was stated that “[i]n the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees.”

⁶⁹ S 39(2) of the Constitution, 1996.

⁷⁰ *SA National Defence Union v Minister of Defence and others* [2007] 9 BLLR 785 (CC).

⁷¹ *Idem* para 52.

4.2. Limitation Analysis

The rights contained in the Bill of Rights are not absolute and may, under certain circumstances, be justifiably limited by a law of general application.⁷² Section 36 of the Constitution provides for an analysis which must be embarked on by the court when determining if a limitation of a right in the Bill of Rights is justifiable.⁷³ The analysis involves an enquiry into whether the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”⁷⁴ Where a law or conduct is inconsistent with the Constitution, a court must declare such law or conduct invalid to the extent of the inconsistency.⁷⁵

A law of general application could include legislation, the common law and customary law and may also include delegated legislation for purposes of section 36 of the Constitution.⁷⁶ In this dissertation, I am concerned with the constitutionality of section 32(5) of the LRA, which is legislation and therefore is a law of general application.

The requirement in section 36 of the Constitution that the limitation must be “reasonable and justifiable in a democratic society” calls for considerations of proportionality.⁷⁷ The Constitutional Court⁷⁸ has concisely summarised the section 36 test in the following manner:

“In sum, therefore, the court places the purpose, effects and importance of the infringing legislation on one hand side of the scales and the nature and effect of the infringement

⁷² Currie & De Waal (2013) 171.

⁷³ S 36 of the Constitution provides:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

The Constitutional Court stated in *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 para 32 that the s 36(1) factors are not meant to be exhaustive and a mechanical checklist, but are rather key factors to be included in the overall assessment.

⁷⁴ S 36(1) of the Constitution, 1996.

⁷⁵ S 172(1)(a) of the Constitution, 1996.

⁷⁶ Van Niekerk *et al* (2015) 49.

⁷⁷ Currie & De Waal (2013) 162-163.

⁷⁸ *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC).

caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”⁷⁹

The limitation of a right must also be rational, which means that the limitation “must serve a compellingly important purpose.”⁸⁰ Devenish explains the rationality requirement with reference to the case of *South African National Defence Union v Minister of Defence*⁸¹ where the Constitutional Court was not satisfied that permitting the permanent force to join a trade union (which was previously prohibited by the Defence Act 44 of 1957) would undermine the discipline and efficiency of the Defence Force.

4.3. *International and Foreign Jurisprudence*

Section 39(1)(b) and (c) of the Constitution provides that when interpreting the Bill of Rights, the courts *must* consider international law and *may* consider foreign law. For this reason, it is important to consider international norms, such as ILO standards, and also the practices in other countries. South Africa is a member of the ILO and it is required to abide to those conventions of the ILO that it has ratified. It is not mandatory to consider foreign law, however where relevant, it may be incredibly useful to see how courts in other jurisdictions have dealt with similar situations or if better practices are followed in other countries.

5. Conclusion

In this chapter I have discussed our supreme law, the Constitution. It is the principle source of labour law in South Africa and is also the underlying framework for the analysis of those rights that are affected by section 32(5) of the LRA. All laws are required to be consistent with the Constitution and in this dissertation, I am concerned with the question of whether section 32(5) of the LRA is indeed consistent with the Constitution or if it is in conflict with the Constitution. The Bill of Rights may not be relied on directly. Any challenge to the extension of collective agreements concluded in a bargaining council must be an attack based on section 32 of the LRA and section 32 must be analysed to determine if it gives effect to the affected fundamental rights. If there is a conflict and section 32(5) does

⁷⁹ *Idem* para 18.

⁸⁰ Devenish (2005) 181.

⁸¹ 1999 (4) SA 469 (CC) para 35.

limit rights contained in the Bill of Rights, I will then need to examine whether the limitation passes constitutional muster in terms of the limitations analysis.⁸²

One of the vital factors which infiltrates this analysis is the principle of democracy. Section 32(5) of the LRA allows for the will of some to be imposed on others and I am concerned that the rights of those, on whom the collective agreements of others are imposed, are not being adequately respected and protected. Democracy does not necessarily mean majority-rule. When I refer to a democratic process in this dissertation, I am referring to a pluralistic democracy where the rights of all affected parties are taken into account in the process of reaching a final decision and the final decision should *at least* be supported by the majority of those concerned before it is imposed on those who are not in favour of the decision.

When considering section 32 of the LRA and the extension of collective agreements in general, it must be remembered that it is unlikely that our courts would ever confirm that there is a constitutional duty to bargain. Therefore, the collective bargaining framework in South Africa is first and foremost based on voluntarism. No body or organisation can be forced to join a bargaining council and those that advocate for a free market maintain that the employers and employees should be left alone to voluntarily negotiate wages as between themselves. In the analysis later of the LRA extension mechanism, it must also be borne in mind that there is no constitutional obligation to bargain at any particular level.

⁸² S 36 of the Constitution, 1996.

CHAPTER 3

ILO

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1. Introduction

It is imperative to consider what international law obligations South Africa has as a member of the International Labour Organisation (“ILO”) insofar as the extension of collective agreements to non-parties is concerned.⁸³ The most important function of the ILO is standard setting, mostly comprising conventions and recommendations, the purpose of which are to establish and protect fundamental rights at work.⁸⁴ Conventions only become binding once a state has ratified the convention.⁸⁵ Recommendations are non-binding and often give more practical content to conventions. Wisskirchen states the following when describing recommendations:

“After difficulty in reaching agreement on the content of a Convention, lack of time has sometimes led to all remaining outstanding points being lumped together, without thorough examination, in an accompanying Recommendation. Consequently, the content of a good many Recommendations is not exactly consistent or meaningful.”⁸⁶

The two primary “core conventions”⁸⁷ of relevance hereto are the Freedom of Association and Protection of the Right to Organise Convention of 1948⁸⁸ (“Convention 87”) and the

⁸³ S 1(b) of the LRA stipulates that one of the purposes of the LRA is to give effect to South Africa’s obligations incurred as a result of it being a member state of the ILO.

⁸⁴ Van Niekerk *et al* (2015) 22.

⁸⁵ *Idem* 23.

⁸⁶ Wisskirchen (2005) *ILR* 258.

⁸⁷ ILO Declaration on Fundamental Principles and Rights at Work (1998) para 2 sets out those which are core conventions. Even if states have not ratified these conventions, by virtue of their membership of the ILO, there is an obligation on these states to promote and realise these fundamental rights. Creighton (2004) 233-234 remarks that Conventions 87 and 98 have a “degree of acceptance amongst the international community” which renders them “authoritative in relation to freedom of association for trade union purposes” and makes them one of the most respected “international standard-setting instruments in the field of human rights.”

⁸⁸ C87 Freedom of Association and Protection of the Right to Organise Convention, 1948. According to Swepston (2004) 149, Convention 87 has been ratified by 142 ILO member states.

Right to Organise and Collective Bargaining Convention of 1949⁸⁹ (“Convention 98”). South Africa has ratified both of these conventions. Also giving more content to these conventions is the Collective Agreements Recommendation of 1951 (“Recommendation 91”).⁹⁰ Section 32(5) contains a consideration by the Minister as to whether the failure to extend will undermine collective bargaining at sectoral level. It is therefore important to consider what international law prescribes in terms of undermining or promoting collective bargaining at sectoral level. For this reason, it is also necessary to take a look at the provisions of the Collective Bargaining Convention, 1981 and the Collective Bargaining Recommendation of 1981.⁹¹ South Africa has not ratified Convention 154 and therefore this convention is merely a guide and is not an obligation per se. In order to properly interpret the provisions of all of these standards, I will also consider some of the findings by the supervisory bodies of the ILO.

2. ILO Standards

Convention 87 is aimed at giving effect to the part of the preamble of the constitution of the ILO which “declares ‘recognition of the principle of freedom of association’ as a means of improving conditions of labour and of establishing peace.”⁹² This convention provides for a number of protections in order to promote freedom of association and the right to organise, which include the right of employers and workers to join organisations of their own choosing, subject only to the rules of that organisation;⁹³ the right of workers’ and employers’ organisations to draw up their constitutions and rules, elect representatives freely, to organise their administration and activities and formulate their programmes;⁹⁴ and the obligation on members states to take all necessary and appropriate measures to ensure that workers and employers are able to exercise freely the right to organise.⁹⁵

⁸⁹ C98 Right to Organise and Collective Bargaining Convention, 1949. Swepston (2004) 150 mentions that Convention 98 has been ratified by 153 countries.

⁹⁰ R091 Collective Agreements Recommendation, 1951.

⁹¹ R163 Collective Bargaining Recommendation, 1981.

⁹² Preamble to C87 Freedom of Association and Protection of the Right to Organise Convention, 1948.

⁹³ C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 Article 2.

⁹⁴ *Idem* Article 3(1).

⁹⁵ *Idem* Article 11.

The provisions in Convention 98 which are of most relevance to this dissertation are the requirement that machinery appropriate to national conditions should be established to ensure respect for the right to organise⁹⁶ and Article 4 which states:

*“Measures appropriate to national conditions should be taken, where necessary, to promote and encourage the full development and utilisation of machinery for voluntary negotiation between employers and employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”*⁹⁷ (own emphasis)

Article 4 above is most instructive. It provides support for legislation which provides a framework for voluntary collective bargaining. As discussed in the previous chapter, there does not seem to be any duty to bargain in South Africa and we rather have a system of voluntarism.⁹⁸ Article 4 is furthermore important because it obligates member states to promote and encourage collective bargaining in their countries where appropriate.

Section 23 of the Constitution⁹⁹ accords with both conventions 87 and 98.¹⁰⁰ Save for the express promotion in Convention 98 for voluntary collective bargaining, these conventions do not appear to provide for any rights, measures, protections or obligations which are not already contained in the Constitution¹⁰¹ or South Africa’s national legislation. It must be remembered, however, that conventions of the ILO are deliberately general in nature so as to allow for sufficient implementation in as many states as possible, which states may have vastly different legal regimes.¹⁰² It is therefore necessary to consider the Recommendation concerning Collective Agreements (“Recommendation 91”)¹⁰³ to see if it provides more guidance.

⁹⁶ C98 Right to Organise and Collective Bargaining Convention, 1949 Article 3.

⁹⁷ *Idem* Article 4.

⁹⁸ See chapter 2 para 3.

⁹⁹ The Constitution, 1996.

¹⁰⁰ Cheadle (2006) *ILJ* 692 states that these two conventions stress the voluntary nature of collective bargaining.

¹⁰¹ The Constitution, 1996. According to Creighton (2004) 233, Conventions 87 and 98 are not, however, exhaustive of the concept of freedom of association and do not make any express reference to the right to strike and are “entirely silent on issues such as the right *not* to association” (also see discussion in chapter 2 para 3). Cooper (2014) 53-10 & 53-11 takes note that none of the ILO conventions and recommendations “provide specifically for a right to fair labour practices” and is of the view that our domestic law is a “much richer source for determining the meaning of the right.”

¹⁰² Wisskirchen (2005) *ILR* 259 states that because of a diversity of conditions in member states, a “minimum level of flexibility is a sine qua non is standards are to be genuinely universal.” According to Swepston (2004) 144, it is problematic to frame international labour standards because of the “diversity of national economic, social, and political considerations” and that the view persists that “ILO instruments should remain universal in character.”

¹⁰³ R091 Collective Agreements Recommendation, 1951.

Clause 5(1) of Recommendation 91 states that where appropriate and taking into account the practice and conditions of each country, measures should be taken to extend certain parts of collective agreements to all employers and workers in the particular industry or scope of the agreements. This clearly indicates that the ILO endorses the extension of agreements¹⁰⁴ however that this principle is not an inflexible rule, but is rather subject to considerations of what is appropriate in the national context. It is therefore difficult to compare different countries' policies on extensions.

Clause 5(2) of Recommendation 91 provides that laws or regulations in countries can make extensions subject to conditions such as:

- “(a) that the collective agreement already covers a number of the employers and workers concerned which is, *in the opinion of the competent authority, sufficiently representative*;
- (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;
- (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.” (own emphasis)

Clause 5(2)(a) of the recommendation provides for a rather vague precondition for extensions, namely that the collective agreement must cover employers and workers who, in the opinion of the competent authority, are sufficiently representative. The wording in section 32(5) of the LRA seems to have been derived from clause 5(2)(a) of Recommendation 91. This recommendation is unfortunately silent both on criteria to be considered by the “competent authority” and what is meant by “sufficiently representative”. It also does not provide any guidance on when extensions may or may not be appropriate. It is therefore up to member states to expand upon these provisions in national legislation and/or regulations. As the above standards, by themselves, do not provide much direction, it is useful to consider the views expressed by some of the ILO's supervisory bodies, which is discussed further below.

Both Conventions 87 and 98, as well as the Constitution¹⁰⁵ are silent on which level of collective bargaining is most appropriate.¹⁰⁶ Section 1 of the LRA sets out its purpose,

¹⁰⁴ Du Toit *et al* (2015) 326.

¹⁰⁵ The Constitution, 1996.

which includes providing a collective bargaining framework,¹⁰⁷ the promotion of orderly collective bargaining and collective bargaining at sectoral level.¹⁰⁸ Section 32(5)(b) of the LRA requires that the Minister must be satisfied that the failure to extend a collective agreement may undermine collective bargaining at sectoral level. The above ILO standards are not of any particular assistance on how to promote collective bargaining, what may or may not undermine collective bargaining or which level of bargaining should be promoted. I will therefore consider the provisions of the Collective Bargaining Convention (“Convention 154”) and Collective Bargaining Recommendation of 1981 (“Recommendation 163”).

Article 5(1) of Convention 154 requires measures to be implemented, which are suitable to national conditions, to promote collective bargaining¹⁰⁹ and Article 5(2) stipulates what the aims of such measures should be, however in my view, the only aim that provides any guidance is the following:

“(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention.”

The rest of the aims can be summarised as advising the establishment of a framework that supports collective bargaining.¹¹⁰ Article 5(2)(a) in fact seems to advocate against any

¹⁰⁶ With reference to Conventions 87 and 98, Du Toit *et al* (2015) 325 observe that the relevant ILO instruments do not distinguish between bargaining levels and “member states are free to regulate levels of bargaining.”

¹⁰⁷ S 1(c)(i) of the LRA.

¹⁰⁸ S 1(d)(i) and (ii) of the LRA.

¹⁰⁹ Du Toit (2014) *ILJ* 2654 states that this provision accurately captures the diversity of the different collective bargaining models in the world.

¹¹⁰ Article 5(2) provides:

- “(a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
- (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;
- (c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;
- (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;
- (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.”

Article 2 of Convention 154 provides the following:

“For the purpose of this Convention the term *collective bargaining* extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for-

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.”

limitation of the right of non-party employers and workers to engage in collective bargaining. Nothing in the above article prescribes that the extension of collective agreements to cover an entire industry is necessary for the promotion of collective bargaining, nor is there anything which specifies which level bargaining must occur at in order for collective bargaining to be promoted. By providing that a failure to extend may undermine sectoral bargaining and by prescribing that bargaining at sectoral level should be promoted, the LRA has more specific requirements than Convention 154.

Recommendation 163 proposes a series of means to facilitate and promote collective bargaining, in accordance with Article 4 of Convention 98¹¹¹ which, as mentioned above, provides for the promotion and encouragement of collective bargaining. These include facilitating the establishment and growth,¹¹² on a voluntary basis, of free, independent and representative employers' and workers' organisations and measures for the recognition of these organisations, criteria to establish the representative character of these organisations¹¹³ and measures to ensure that collective bargaining can take place at any level.¹¹⁴ From this it is clear that, in order to promote collective bargaining, it is important that organisations are representative and that their representivity can be gauged. The corollary of this is that disregarding questions of representivity would likely undermine collective bargaining. Recommendation 163 confirms that any level of bargaining is acceptable.

3. Findings of Supervisory Bodies

In *NUMSA and Others v Bader Bop (Pty) Ltd and Another*,¹¹⁵ the Constitutional Court stated that there are two key ILO supervisory bodies tasked with ensuring the observation of Convention 87 and Convention 98: the Committee of Experts on the Application of Conventions and Recommendations ("Committee of Experts") and the Committee on Freedom of Association ("CFA").¹¹⁶

¹¹¹ ILO General Survey (2012) para 241.

¹¹² R163 Collective Bargaining Recommendation, 1981 clause 2.

¹¹³ R163 Collective Bargaining Recommendation, 1981 clause 3.

¹¹⁴ R163 Collective Bargaining Recommendation, 1981 clause 4.

¹¹⁵ [2003] 2 BLLR 103 (CC).

¹¹⁶ *Idem* para 29.

The Committee of Experts examines reports furnished by member states and makes non-binding findings which are then submitted to the ILO Conference.¹¹⁷ The CFA, as its name suggests, is a committee which is concerned with questions of freedom of association in member states.¹¹⁸ The CFA makes recommendations to the ILO's Governing Body as to whether a case is worthy of examination by the Governing Body.¹¹⁹

In its General Survey of 1994, the Committee of Experts observed, with reference to Article 4 of Convention 98, that machinery and procedures should facilitate bargaining between the two sides of industry, allowing them the freedom to reach their own settlement.¹²⁰ They also opined that, although public authorities may establish machinery to encourage parties to collective bargaining to take voluntary account of social and economic considerations and the public interest, the discretionary power of authorities to approve collective agreements is in conflict with the principle of voluntary bargaining.¹²¹

That there should be measures which facilitate voluntary negotiations between the bargaining partners is already provided for in Article 4 of Convention 98. It is clear that there is a positive obligation on states to promote collective bargaining, however the findings of the Committee of Experts do not provide more direction than Convention 154 and Recommendation 163 as to how this should be done. What I am able to glean from the General Survey of 1994 is that there should ideally be as little interference as possible by the authorities in the settlement reached by the bargaining partners and that public authorities may place certain obligations on the bargaining partners, such as an obligation to factor in social and economic policy considerations and questions of what serves the public interest. This supports the argument that it is appropriate to require, during the negotiation process and during the stage of requesting an extension to non-parties of a collective agreement, that the principles of democracy are observed.

Importantly, in its General Survey of 2012, the Committee of Experts also commented that:

¹¹⁷ Wisskirchen (2005) *ILR* 271 & 273. Member states of the ILO have certain reporting duties. Those that have ratified conventions are required to submit reports detailing the measures which they have taken to give effect to ratified conventions (also see Van Niekerk *et al* (2015) 25 referring to Article 22 of the constitution of the ILO).

¹¹⁸ Wisskirchen (2005) *ILR* 287.

¹¹⁹ Van Niekerk *et al* (2015) 27.

¹²⁰ ILO General Survey (1994) para 248.

¹²¹ ILO General Survey (1994) para 252.

“The Committee considers that the extension of collective agreements is not contrary to the principle of voluntary collective bargaining and is not in violation of Convention No. 98. It observes that such measures are envisaged in several countries.”¹²²

In this dissertation, there is no attack on the extension of collective agreements in principle and only concern where the parties to the bargaining council are not representative of a majority in a sector or industry. In the 2012 General Survey, the Committee of Experts again remarked on compliance by countries with Article 4 and stated that:

“Although this provision does not imply a formal obligation to negotiate and to reach agreement, the supervisory bodies consider that the parties must respect the principle in good faith and not resort to unfair or abusive practices in this context (such as, for example, the non-recognition of representative organizations, obstruction the bargaining process, etc). The Committee emphasizes that the overall aim of this Article is, however, the promotion of good-faith collective bargaining with a view to reaching an agreement on terms and conditions of employment.”¹²³

In this statement, the Committee of Experts provides slightly more insight into what the promotion of collective bargaining entails – promotion of good-faith bargaining and the avoidance of unfair or abusive practices. Later on in the General Survey on 2012, the Committee of Experts expressed the opinion that the promotion of collective bargaining requires measures to “address improper practices in collective bargaining, such as proven bad faith, unwarranted delays ... and failure to comply with the agreements concluded.”¹²⁴ Once again, no comment is made to the effect that the extension of collective agreements is a requirement for the promotion of collective bargaining. As mentioned in the previous chapter, in South Africa there is no duty in the Constitution¹²⁵ or legislation that parties must bargain in good faith. If there were, this could be a means to promote collective bargaining.

The two trends which were identified by the Committee of Experts which indicate a lack of respect for the promotion and encouragement of collective bargaining are the precedence afforded to individual rights over collective rights and employers engaging more frequently with non-unionised workers than with those that are represented.¹²⁶ This seems to however be more aimed at enterprise level bargaining. A failure to ensure the general

¹²² ILO General Survey (2012) para 245.

¹²³ *Idem* para 198.

¹²⁴ *Idem* para 243.

¹²⁵ The Constitution, 1996.

¹²⁶ ILO General Survey (2012) para 199.

applicability of collective agreements (at any level) is not mentioned. I have found nothing in the General Surveys which sanctions an extension of a collective agreement to non-parties where the parties to the collective agreement are only marginally representative. I have also not found anything which expands upon the meaning of what is sufficiently representative.

Where the right to strike is concerned, Cooper refers to the Committee of Experts findings in the General Survey of 1994 that indicate an acceptance by them of a limitation of the right to strike during the currency of a collective agreement as a social peace treaty, provided that workers still have recourse to “impartial and rapid arbitration machinery” insofar as the interpretation or application of the collective agreement is concerned.¹²⁷ Whilst she finds that the LRA is in keeping with the stance of the Committee of Experts, Cooper, however, casts doubt that the infringement of the right to strike where, following an extension, non-parties are prohibited from striking due to a peace clause, will pass constitutional muster.¹²⁸

Regarding bargaining levels, the Committee of Experts expressed their view in the General Survey of 1994 that the social partners¹²⁹ should be able to decide for themselves at what level they wish to bargain collectively at,¹³⁰ however they note that it is problematic where legislation makes it compulsory to bargain at levels higher than enterprise level (ie. industry or central level).¹³¹ In the General Survey of 2012, the Committee of Experts opined that the parties themselves are in the best position to determine the most appropriate level of bargaining and that they may adopt a “mixed system of framework agreements” at a higher level which can be supplemented by enterprise level agreements.¹³²

¹²⁷ Cooper (2014) 53-50 with reference to ILO General Survey (1994) para 166.

¹²⁸ *Idem* 53-51.

¹²⁹ Hepple (2005) 230 describes “social dialogue” as “Eurojargon for the participation of representatives of European-level employers’ organisations and trade unions” with these employers’ organisations and trade unions typically being referred to as “social partners”.

¹³⁰ ILO General Survey (1994) paras 195 & 249.

¹³¹ ILO General Survey (1994) para 249.

¹³² ILO General Survey (2012) para 222.

The CFA has reflected its findings in its Digest of decisions and principles.¹³³ The CFA does not view either the imposition or the failure to impose the terms of a collective agreement on non-party workers as a violation of freedom of association.¹³⁴ This gives the impression that it is simply a policy decision of the member state. The CFA observes that, whilst Article 4 encourages voluntary collective bargaining, some regulation by governments is permissible.¹³⁵ This is in accordance with section 23(5) of the Constitution¹³⁶ where it provides that national legislation may be enacted to regulate collective bargaining. The CFA makes an incredibly important point at paragraph 941 of the Digest:

“Collective bargaining implies both a give-and-take process and a reasonable certainty that negotiated commitments will be honoured, at the very least for the duration of the agreement, such agreement being the result of compromises made by both parties on certain issues, and of certain bargaining demands dropped in order to secure other rights which were given more priority by trade unions and their members.”¹³⁷

A collective agreement is the result of bargaining where some gains sought are realised and some concessions are made. Parties compromise. Expecting non-parties to abide by the terms of a collective agreement, which they do not support or have not played any part in negotiating, results in far greater compliance issues.

The CFA also made certain findings relating specifically to cases reviewed by it where the extension of collective agreements was an issue. Most important is the finding that:

“In a case where the public authorities decreed the extension of collective agreements when current collective agreements had been concluded by minority organizations in the face of opposition by an organization which allegedly represented the large majority of workers in the sector, the Committee considered that the Government could have carried out an objective appraisal of representivity of the occupational associations in question since, in the absence of such appraisal, the extension of an agreement could be imposed on an entire sector of activity contrary to the views of the majority organization representing the workers in the category covered by the extended agreement, and thereby limiting the right of free collective bargaining of that majority organization.”¹³⁸

¹³³ ILO Digest (2006). Du Toit *et al* (2015) 78 explain how the reports forming part of the Digest of the CFA are “distilled from over 2 500 cases” and they “form a rich source of international labour law dealing with most aspects of freedom of association and the protection of trade union rights.”

¹³⁴ ILO Digest (2006) para 911.

¹³⁵ *Idem* para 929.

¹³⁶ The Constitution, 1996.

¹³⁷ ILO Digest (2006) para 941.

¹³⁸ *Idem* para 911.

From this, it seems that, despite clause 5 of Recommendation 91, the imposition of a collective agreement concluded by minority organisations on the majority, contrary to the views of the majority, would limit the right to free collective bargaining of the latter. In order to avoid such limitation, the CFA observed that the government in question could have “carried out an objective appraisal of representivity of the occupational associations in question.” What exactly is meant by this is not clear. The CFA does not explain what the representivity appraisal would entail or would need to reveal in order *not* to limit the right to free collective bargaining. What is clear, however, is that the CFA views there to be something objectionable about the minority imposing its will on the majority.¹³⁹

The CFA also remarked that the principles of freedom of association are not contradicted, in principle, by an extension to non-party workers, provided that the most representative trade union(s) have negotiated the agreement and the enterprises are not composed of several establishments. If there are several establishments, those establishments should have a say as to the general application in the workplace of the collective agreement.¹⁴⁰ This, however, seems to be more in the context of the general applicability of a collective agreement in a workplace, as opposed to across an entire sector or industry. Although distinguishable, it does highlight the need to have those affected by the collective agreement involved in the negotiation process and the decision to extend and for support for the agreement by the most representative parties.

Of more relevance to sectoral bargaining, a further observation is made by the CFA which is further confirmation of the concerns of the CFA that, where the will of the minority is imposed on the majority, this amounts to an infringement of free collective bargaining:

“The extension of an agreement to an entire sector of activity contrary to the views of the organization representing most of the workers in a category covered by the extended agreement is liable to limit the right of free collective bargaining of that majority organization. This system makes it possible to extend agreements containing provisions which might result in a worsening of the conditions of employment of the category of workers concerned.”¹⁴¹

¹³⁹ Cooper (2014) 53-39 explains that, in her view, the only instances where the ILO seems to envisage a legally enforceable duty is “where a union is representative of workers in an industry.” This reinforces my argument that, when examining any measures of compulsion, questions of representivity are a paramount consideration.

¹⁴⁰ ILO Digest (2006) para 1052.

¹⁴¹ *Idem* para 1053.

Like the Committee of Experts, the CFA also confirmed in the Digest that the level of bargaining should be left to the discretion of the parties and should not be imposed by legislation or an administrative authority.¹⁴² Finally, the CFA also once again confirmed that extensions should follow only after tripartite analysis of the consequences for the particular sector.¹⁴³ Section 32(5) of the LRA does not require the parties to the collective agreement to analyse the consequences their agreement would have in the sector to which it is to be extended.

4. Conclusion

As we have seen above, the ILO does not have a completely inflexible approach to protecting fundamental rights at work. In other words, collective bargaining rights are not absolute in international law. The fundamental rights enshrined in section 23 of the Constitution¹⁴⁴ and the absence of a constitutional duty to bargain are consistent with Conventions 87 and 98. Recommendation 91 is the only instrument of the ILO that provides any positive direction regarding extensions and it supports extensions of collective agreements to non-parties in an industry, where appropriate and following a decision of a competent authority that the employers and workers already covered are sufficiently representative. I do not interpret Recommendation 91 as sanctioning an extension in all circumstances.

The Committee of Experts do not expand upon Recommendation 91 in any meaningful way. The CFA expressed concerns where minority organisations have extended collective agreements to bind majority organisations, in the face of opposition by the majority organisations. The ILO standards and the findings of the supervisory bodies confirm that the appropriate level of bargaining is up to the bargaining partners to decide. As regards the promotion or undermining of collective bargaining, although providing for a number of general suggestions as to what should be done to promote collective bargaining, there is no finding that a failure to extend a collective agreement to non-parties will, in itself, undermine collective bargaining.

¹⁴² *Idem* para 988. According to Cooper (2014) 53-39, the ILO committees advise that bargaining levels and topics are best left for the parties to decide and should not be imposed by law or by the authorities.

¹⁴³ ILO Digest (2006) para 1051

¹⁴⁴ The Constitution, 1996.

CHAPTER 4

LEGISLATIVE FRAMEWORK

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1. Introduction

The extension of collective agreements in South Africa is regulated by way of legislation. This is not unique to the LRA of 1995 and labour legislation in South Africa has made provision for the extension of collective agreements since as far back as 1924. Before looking at the current legislative framework, it is helpful to first consider the historical context of the extension of collective agreements in South Africa. I therefore embark hereunder on a brief explanation of how collective agreements could be extended under the previous legislative dispensation and then set out the framework for extensions as provided for in the LRA of 1995. Following that, I will discuss some of the challenges that have been brought in our courts against the principle of extensions.

2. Previous Dispensation

The Industrial Conciliation Act 11 of 1924 provided for the establishment of industrial councils,¹⁴⁵ which were the equivalent of modern day bargaining councils. From 1924 and the fifty years that followed thereafter, industrial councils played an integral part in collective bargaining in South Africa and mainstream collective bargaining took place at a centralised level.¹⁴⁶ Upon request, the Minister could extend an agreement if he or she deemed it expedient to do so and if satisfied that the applicants were sufficiently representative in the undertaking, industry, trade or occupation concerned.¹⁴⁷ The Minister therefore had a discretion and there was no mandatory provision for the extension of an

¹⁴⁵ S 2(3) of the Industrial Conciliation Act of 1924 provided that to be registered, the Minister had to be satisfied that the council was sufficiently representative in the industry, undertaking, trade or occupation.

¹⁴⁶ Bendix (2010) 62 & 72.

¹⁴⁷ S 9(1) of the Industrial Conciliation Act of 1924.

agreement concluded in an industrial council.¹⁴⁸ The mainstream statutory system provided for centralised bargaining.¹⁴⁹ The 1924 Act was not altered in any major way by either the Industrial Conciliation Act 36 of 1937 or the Labour Relations Act 28 of 1956 insofar as the regulation of collective bargaining and extension of industrial council agreements was concerned.

The Wiehahn Commission was appointed in 1977 to review labour legislation¹⁵⁰ and recommended a host of changes to the labour relations environment.¹⁵¹ Under the previous legislative dispensation, there was no duty *per se* for bargaining partners to bargain with one another, however, an employer's refusal to bargain could be found to be an unfair labour practice in terms of the Labour Relations Act of 1979.¹⁵² The Industrial Court refrained from prescribing at which level bargaining should take place, however it did enforce a duty of bargaining partners to bargain in good faith with one another.¹⁵³

3. Current Dispensation

The LRA of 1995 does not include any provision which imposes a duty to bargain.¹⁵⁴ The Explanatory Memorandum to the Draft Labour Relations Bill unconditionally states that "a notable feature of the draft Bill is the absence of a statutory duty to bargain" and "allows parties, through the exercise of power, to determine their own arrangements."¹⁵⁵ Although

¹⁴⁸ In terms of s 9(3) of the Industrial Conciliation Act of 1924, a failure by an employer to comply with an extended agreement constituted an offence

¹⁴⁹ Pass bearing Africans were excluded from the Industrial Conciliation Act of 1924 and trade unions representing black employees could not be registered. As a result, collective bargaining by trade unions representing black employees typically took place at plant level (see Godfrey *et al* (2012) 44 & Bendix (2010) 62 & 73).

¹⁵⁰ This appointment followed as a result of the industrial unrest which plagued the country in the mid-1970s (see Nel *et al* (1997) 57 & Godfrey *et al* (2012) 56).

¹⁵¹ According to Bendix (2010) 78 & 80, recommendations by the Wiehahn Commission to incorporate black trade unions into mainstream system were adopted by the legislature in 1979. Du Toit *et al* (2015) 12 & 21 state that, initially trade unions representing Africans were sceptical of being included within the industrial council system and preferred plant level bargaining, however the Congress of South African Trade Unions ("COSATU") was formed in 1985 and was a primary driver of sectoral level bargaining. Employers, in particular small employers, were also reluctant about an industrial council system which provided for centralised collective bargaining, in particular when such a system was being promoted by Cosatu. There were concerns about the way this would affect growth and job creation.

¹⁵² Bendix (2010) 307. Du Toit *et al* (2015) 10 describe another important proposal by Wiehahn Commission which was the replacement of industrial tribunals with an Industrial Court. Nel *et al* (1997) 60 explain how the Industrial Court had a wide discretion to pronounce upon unfair labour practices, another concept put forward by the Wiehahn Commission. An unfair labour practice at that time was defined as "any labour practice which in the opinion of the Industrial Court is an unfair labour practice". This definition was later amended, although it still remained very wide (see Du Toit *et al* (2015) 10).

¹⁵³ Du Toit *et al* (2015) 13 & 21.

¹⁵⁴ Du Toit (2007) *ILJ* 1418.

¹⁵⁵ Explanatory Memorandum (1995) *ILJ* 292.

there is no longer a system whereby the law compels parties to bargain, the LRA of 1995 “unashamedly promotes collective bargaining.”¹⁵⁶

The purpose of the LRA is to “advance economic development, social justice, labour peace and democratisation of the workplace.”¹⁵⁷ One of the primary objects of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.¹⁵⁸ The LRA of 1995 promotes collective bargaining at a sectoral level,¹⁵⁹ but does not enforce it.¹⁶⁰ Another primary object of the LRA is to promote orderly collective bargaining.¹⁶¹

Section 32 of the LRA regulates the extension of collective agreements to non-parties on an industry-wide basis. Section 32(1) regulates the vote in the bargaining council to request the Minister to extend their collective agreement to non-parties. In order for the request to be made to the Minister, the request must be supported by trade unions that represent a majority of the members of trade union parties to the council and by employers’ organisations whose members employ a majority of the employees employed by all the members of employers’ organisations that are party to the council.¹⁶²

In terms of section 32(2) the Minister *must* extend the collective agreement to non-parties, within 60 days, if the majority of employees who will fall within the scope of the extended

¹⁵⁶ *Idem* 293.

¹⁵⁷ S 1 of the LRA. Du Toit *et al* (2015) 5 describe the LRA’s role in South Africa’s new constitutional democracy as having “marked a major change in South Africa’s statutory industrial relations system” and that “the LRA encapsulated the new government’s aims to reconstruct and democratise the economy and society as applied in the labour relations arena.”

¹⁵⁸ S 1(a) of the LRA. The LRA is the legislative expression of s 23 of the Constitution.

¹⁵⁹ S 1(d)(ii) of the LRA.

¹⁶⁰ Bendix (2010) 297.

¹⁶¹ S 1(d)(i) of the LRA. In *Chirwa v Transnet Limited & others* (2008) 29 ILJ 73 (CC) para 110 the Constitutional Court commented that “[t]he objects of the LRA are not just textual aids to be employed where the language is ambiguous ... the primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects.”

¹⁶² “S 32(1) A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within the registered scope and are identified in the request, if at a meeting of the bargaining council –

- (a) one or more registered trade unions whose members constitute the majority of the members of the trade unions that are party to the bargaining council vote in favour of the extension; and
- (b) 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 bargaining council, vote in favour of the extension.”

agreement are members of trade unions that are parties to the bargaining council¹⁶³ and the members of employer organisations that are party to the bargaining council will, upon extension of the agreement, employ the majority of the employees in the scope of the agreement.¹⁶⁴ Certain other criteria listed in section 32(3) must also be present, such as an exemptions procedure and a requirement that the collective agreement may not discriminate against non-parties.¹⁶⁵ Essentially where there is majority representation within the industry by the parties to the bargaining council, the Minister has no discretion and must extend the agreement as requested.¹⁶⁶

The section 32 extension mechanism is a type of “legislation by accord”.¹⁶⁷ The principles of majoritarianism are evident in the ease with which majority trade unions and majority employers’ organisations can have their collective agreements extended by the Minister

¹⁶³ S 32(3)(b) of the LRA. In 1988, in the wake of proposed amendments to the Labour Relations Act of 1956, COSATU lodged a complaint with the ILO that the proposed amendments infringed the principles of freedom of association (Saley & Benjamin (1992) *ILJ* 731). Included in the complaint was the allegation that the Minister’s exercise of his discretion to refuse agreements on the basis of them being “politically unacceptable” was unjustifiable under ILO principles (FFCC (1992) *ILJ* para 708). The FFCC (1992) *ILJ* para 710 took the view that there must be respect for the principle of non-interference in freely concluded agreements and the Minister’s role should remain a technical one where questions of form and compliance should simply be verified. The introduction of the term “must” therefore seems to have been very deliberate in order to limit Ministerial interference. Also see chapter 3 para 3 where the view of the Committee of Experts, that there should be as little interference by the authorities as possible, is discussed.

¹⁶⁴ S 32(3)(c) of the LRA. It is noteworthy that the number of firms belonging to an employers’ organisation are not taken into account, but rather only the number of employees employed by the firms. This favours large firms.

¹⁶⁵ “S 32(3) A *collective agreement* may not be extended in terms of subsection (2) unless the *Minister* is satisfied that-

- (a) the decision by the *bargaining council* to request the extension of the *collective agreement* complies with the provisions of subsection (1);
- (b) the majority of all the *employees* who, upon extension of the *collective agreement*, will fall within the scope of the agreement, are members of the *trade unions* that are parties to the *bargaining council*;
- (c) the members of the *employers’ organisations* that are parties to the *bargaining council* will, upon extension of the *collective agreement*, be found to employ the majority of all the *employees* who fall within the scope of the *collective agreement*;
- (d) the non-parties specified in the request fall within the *bargaining council’s registered scope*;
- (dA) the bargaining council has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the collective agreement and is able to decide an application for an exemption within 30 days;
- (e) provision is made in the *collective agreement* for an independent body to hear and decide, as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against –
 - (i) the *bargaining council’s* refusal of a non-party’s application for exemption from the provisions of the *collective agreement*;
 - (ii) the withdrawal of such an exemption by the *bargaining council*;
- (f) 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
- (g) the terms of the *collective agreement* do not discriminate against non-parties.”

¹⁶⁶ Cheadle (2006) *ILJ* 697 attributes the mandatory or rather “automatic or semi-automatic extension mechanism” in the LRA to the abuses of the ministerial discretion under the 1956 Act. However, in his view, there was no need for a mandatory system as the constitutional right to fair administrative action provides adequate protection against ministerial discretion.

¹⁶⁷ Hamburger (1939) *ILR* 194.

under section 32(3). Where the parties to the bargaining council do not represent a majority in the industry, section 32(5) of the LRA introduces a discretion for the Minister to decide whether or not to grant the extension:

“Despite subsection 3(b) and (c), the *Minister* may extend a *collective agreement* in terms of subsection (2) if –

- (a) the parties to the *bargaining council* are sufficiently representative within the *registered scope* of the *bargaining council*; and
- (b) the *Minister* is satisfied that failure to extend the agreement may undermine collective bargaining at *sectoral* level or in the *public service* as a whole;
- (c) the *Minister* has published a notice in the *Government Gazette* stating that an application for an extension in terms of this subsection has been received, stating where a copy may be inspected or obtained, and inviting comment within a period of not less than 21 days from the date of publication of the notice; and
- (d) the *Minister* has considered all comments received during the period referred to in paragraph (c).”

Section 32(5) is not drastically different from the previous legislative dispensation concerning extensions. Subsections (c) and (d) were added by the LRAA of 2014.¹⁶⁸ These two subsections should inform the Minister’s decision as to whether the parties are sufficiently representative and whether the failure to extend will undermine bargaining at sectoral level or in the public service.¹⁶⁹

As already mentioned, section 32(5) is my primary focus. My concern is whether this section unjustifiably limits certain constitutional rights of non-parties and derogates from the majoritarianism theme which runs throughout the LRA. In *Kem-Lin Fashions CC v Brunton & another*,¹⁷⁰ Zondo JP (as he was then) described majoritarianism as being the policy choice of the legislature and which promotes orderly collective bargaining and “the democratization of the workplace and sectors.”¹⁷¹

¹⁶⁸ This amendment brings s 32(5) of the LRA in line with clause 5(2)(c) of Recommendation 91.

¹⁶⁹ For purposes of this dissertation, I am only concerned with the private sector. A discussion of s 32(5A) of the LRA is also beyond the scope of this dissertation.

¹⁷⁰ (2001) 22 *ILJ* 109 (LAC).

¹⁷¹ *Kem-Lin Fashions CC v Brunton & another* (2001) 22 *ILJ* 109 (LAC) para 19. To support his statement that the LRA endorses the principle of majoritarianism, Zondo JP points to the following sections: s 14(1) and s 16(1) provide for organisational rights of electing shopstewards and the disclosure of information to trade unions which represent a majority of the workforce in an entity; s 18(1) stipulates that a trade union representing a majority of the workforce may conclude an agreement with the employer where thresholds of representativeness are set for any trade union in that workplace to obtain the organisational rights in s 12, s 13 and s 15 of the LRA; s 25 and s 26 make provision for the conclusion of an agency shop agreement or a closed shop agreement, respectively, where a trade union is representative of the majority of the workforce; s 78(b), again, a trade union representing a majority of the workforce may establish a company workplace forum.

4. Previous Challenges

4.1. Challenges to Section 32

Godfrey *et al* make reference¹⁷² to a number of cases where legal challenges were instituted against extensions, however it does not seem as if any of these cases ever proceeded. In the matter of *Bargaining Council for the Contract Cleaning Industry and Gedeza Clothing*,¹⁷³ a point *in limine* was raised that the extension of the bargaining council agreement to non-parties in terms of section 32 of the LRA was unconstitutional and infringed the constitutional guarantee of free economic activity. The arbitrator found that the argument was unsubstantiated and ill-conceived and, furthermore, that this was an issue for determination by the High Court and Constitutional Court. It does not appear that the matter was taken further in any of these courts.¹⁷⁴

In *Confederation of Associations in the Private Employment Sector & others v Motor Industry Bargaining Council & others*¹⁷⁵ (“the CAPES case”) the High Court was called upon to determine if section 32 of the LRA limits non-parties’ rights in an unconstitutional manner. The applicants took the point that the section is unconstitutional because unrestrained governmental power is delegated to private actors (bargaining councils). Although this is not the basis on which I am concerned with the constitutionality of section 32(5), it is interesting nonetheless to briefly discuss the High Court’s findings.

Fourie J held that it would be difficult not to conclude that a bargaining council falls within the definition in section 239 of the Constitution of “organ of state” and is therefore subject to the ordinary requirements of legal accountability.¹⁷⁶ The court found that section 32 is not unconstitutional because, firstly, the objectives and functions of extending collective agreements are not decided by parties to the bargaining council but are rather determined and constrained by the Constitution, the LRA and the Minister’s powers in terms of section 32;¹⁷⁷ secondly, the role collective bargaining plays in advancing the interests of

¹⁷² Godfrey *et al* “The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining” (2007) 18.

¹⁷³ (2003) 24 *ILJ* 2019 (BCA).

¹⁷⁴ Du Toit *et al* (2015) 325.

¹⁷⁵ Case no 46476/2011.

¹⁷⁶ *Idem* paras 33 & 34.

¹⁷⁷ *Idem* para 34.

employees and industrial peace;¹⁷⁸ thirdly, non-parties are free to join and participate in bargaining councils;¹⁷⁹ and fourthly, the exemption mechanisms provided for in the LRA.¹⁸⁰

Fourie J also stated that “an unjustified failure to extend would result in the undermining of collective bargaining” and “it would undermine the constitutional right to engage in collective bargaining and to conclude collective agreements.”¹⁸¹ In my view, a *justifiable* failure would be the case where there is not majority support in the industry for the terms of the collective agreement. Similarly, the failure to extend would not undermine the right to engage in collective bargaining in cases where majority support is lacking.

The difficulty I have with the emphasis placed on the decision of the bargaining council constituting an act by an “organ of state” and therefore being reviewable, is the same difficulty I have with the reliance placed on the exemptions provisions. Non-parties should not have to incur the time, expense and uncertainty of instituting review proceedings or the hassle and, again uncertainty, of an exemption application, where the agreement does not enjoy majority support in the first place. I acknowledge however that, given the nature of the constitutional challenge in the *CAPES* case, the reasons provided by the High Court were perhaps a more apt response than in the context of the challenge evaluated in this dissertation.

In *Chamber of Mines of South Africa v AMCU & others*,¹⁸² AMCU challenged the constitutionality of section 23(1)(d) of the LRA, whereby a collective agreement may bind on-unionised employees.¹⁸³ This is a similar extension mechanism to that in section 32, however it is based at enterprise level and is only possible where the trade union(s) have as members a majority of the employees in the workplace. Because the agreement is concluded by majority trade unions, because the principle of majoritarianism promotes

¹⁷⁸ *Idem* para 35.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Idem* para 36.

¹⁸¹ *Idem* para 34.

¹⁸² [2014] 3 BLLR 258 (LC).

¹⁸³ “S 23(1)(d) A *collective agreement* binds employees who are not members of the registered *trade union* or *trade unions* party to the agreement if -
(i) the employees are identified in the agreement;
(ii) the agreement expressly binds the employees; and
(iii) that *trade union* or those *trade unions* have as their members the majority of *employees* employed by the employer in the *workplace*.”

orderly collective bargaining and because the court found the section to be narrowly tailored, the court held that the limitation of the right to strike was justified.¹⁸⁴

4.2. Review Applications

In *National Employers Association of South Africa v Minister of Labour*,¹⁸⁵ the court held that the Minister should not have relied on the section 49(4) certificate of representativeness for purposes of sections 32(3)(b) and (c) and furthermore, there were no reasonable grounds on which the Minister could have been satisfied that the conditions in section 32(3)(a)-(g) of the LRA had been met. The decision was reviewed and set aside.

Again in *Valueline CC & others v Minister of Labour & others*,¹⁸⁶ the court found that the Minister's reliance on the registrar's certificate of representativeness was misplaced. Koen J held that there had not been proper application of the Minister's mind to the requirements of section 32(3)(c) and the decision to extend was therefore set aside.

The above review applications concerned extensions which took place in terms of section 32(2) of the LRA. In a different review application, *National Employers Association of South Africa v Minister of Labour*¹⁸⁷ involved a decision by the Minister to extend in terms of section 32(5). Watt-Pringle AJ found that the request by the bargaining council did not comply with section 32(1) because no collective agreement was ever concluded under the auspices of the bargaining council and there was no valid request for extension. The Minister's actions were held to be *ultra vires* and therefore fell to be set aside on that ground alone. A noteworthy comment is made by Watt-Pringle AJ where he states that:

“the Bargaining Council and the Minister have been given two opportunities to get their proverbial house in order and have failed to do so in ways that are both obvious and fundamental ... the Court ought not to lend its imprimatur to such unauthorised infringement of the rights of affected parties.”¹⁸⁸

¹⁸⁴ AMCU also raised the argument that s 23(1)(d) infringed the rights to dignity, freedom of association, freedom of trade, occupation and profession, the right to fair labour practices and the right to administrative justice. The Labour Court's decision was confirmed on appeal in *Association of Mineworkers and Construction Union & others v Chamber of Mines of South Africa & others* [2016] ZALAC 11.

¹⁸⁵ (2013) 34 ILJ 1556.

¹⁸⁶ (2013) 34 ILJ 1404 (KZP).

¹⁸⁷ [2014] ZALCJHB 524.

¹⁸⁸ *Idem* para 62.

In the judgment refusing leave to appeal,¹⁸⁹ Watt-Pringle AJ also described the bargaining council's actions as "generally slip shod"¹⁹⁰ and was of the view that the Labour Appeal Court would not "give its imprimatur to such a sham."¹⁹¹ These review applications bring to the fore an alarming realisation that there is some truth in the concerns that bargaining councils are likely to be self-interested and that the Minister has not always exercised her discretion in a manner that one would expect or hope. The safeguards of the criteria listed in section 32(a)-(g) of the LRA and the Minister overseeing the process, are therefore, not deserving of the emphasis that many commentators ascribe to them.

5. Conclusion

The extension of collective agreements has been taking place, in terms of South African legislation, for close to a century. Comparing section 32 of the LRA with the previous legislative dispensation, we see that the LRA of 1995 introduced a mandatory extension mechanism alongside the already existing discretionary extension mechanism.

Whereas there was a dual system of bargaining prior to 1979, with those excluded from the formal system typically bargaining at enterprise level and those falling under the auspices of the mainstream statutory system at a centralised level, post 1979 there was a move towards promoting collective bargaining for all concerned at sectoral level. Despite the promotion of sectoral level bargaining, the LRA of 1995 does not enforce bargaining at sectoral level, nor does it impose a duty to bargain.

There have been no significant challenges to section 32 of the LRA, in particular section 32(5). The arguments and judgments in the *CAPES* case do come into play in the analysis in this dissertation, however this case is distinguishable in that the criticism against section 32 was directed at the delegation of public power to a bargaining council.

¹⁸⁹ *National Employers Association of South Africa and Others v Minister of Labour & others* [2015] ZALCJHB 121.

¹⁹⁰ *Idem* para 16

¹⁹¹ *Idem* para 17.

CHAPTER 5

PURPOSE OF EXTENSIONS

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1. Introduction

In order to promote sectoral level bargaining and orderly collective bargaining, there is a need to ensure uniformity throughout industries by way of extending certain minimum terms and conditions of employment to apply to all employers and employees in the relevant industry. In this chapter, I discuss why the legislature has chosen the extension mechanism to secure uniform employment conditions throughout industries. I also discuss the challenges that have been raised against this policy choice and why it has caused so much controversy.¹⁹² I will also briefly address the reasons why I believe exemption from the provisions of the extended collective agreement is not a solution to the problem.

2. Purpose of Extensions

As I have already discussed, it was a policy choice of the legislature that collective bargaining at sectoral level would be promoted in the LRA.¹⁹³ Without extension, collective

¹⁹² Cooper (2014) 53-43 states that “[o]ne of the provisions of the LRA most vulnerable to constitutional attack under the right to engage in collective bargaining is section 32 of the 1995 LRA.”

¹⁹³ In *Merafong Demarcation Forum & others v President of the Republic of South Africa & others* 2008 (5) SA 171 (CC) para 63 it was stated that “[t]he fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial.” On the other hand, it must also still be born in mind that, as pointed out in *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) para 72, “[t]he Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values.” Therefore where legislation is alleged to infringe upon fundamental rights, this ought to be examined by the courts.

agreements tend only to bind the parties to the agreement.¹⁹⁴ Trade unions bargain for better wages and conditions of employment for their members and non-unionised employees will not have the benefit of these negotiated conditions unless the employer voluntarily agrees to apply the same terms uniformly to all employees, whether unionised or not. There is no motivation to belong to the trade union if membership could jeopardise the worker's employment. Trade unions therefore seek to prevent "undercutting" by non-unionised employees who may be willing to work for less.¹⁹⁵

From an employer point of view, it is beneficial for the organised employers to prevent other employers, who are in the same sector but who are not parties to the collective agreement, from competing with them by paying their employees lower wages.¹⁹⁶ It is also preferable, from the perspective of organised employers, if they have agreed to improved conditions of employment in their workplaces, that the conditions of employment are then improved across the particular sector. Firms should then rather compete by developing more efficient production methods¹⁹⁷ as opposed to competing by paying workers less or exploiting workers more. Another benefit of extensions is to maintain industrial peace throughout a sector for a period.

Hamburger states that protecting the collective agreement from "outside attacks" is beneficial to all employers and workers in an industry and is in the public interest "unless artificially high wages and prices will result."¹⁹⁸ The question then is how to protect the collective agreement from "outside attacks" and standardise working conditions across an industry?¹⁹⁹ One of the ways is through a closed shop arrangement, in terms of which all workers employed by the employer are required to belong to the representative trade

¹⁹⁴ S 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, on the one hand and, on the other hand-

(a) one or more employers;

(b) one or more registered *employers' organisations*; or

(c) one or more employers and one or more registered *employers' organisations*."

¹⁹⁵ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 founding affidavit para 12.1.

¹⁹⁶ This is one of the primary rationales for extensions (see *Kem-Lin Fashions CC v Brunton & another* (2001) 22 *ILJ* 109 (LAC) para 21).

¹⁹⁷ Calitz (2015) *SA Merc LJ* 2-3.

¹⁹⁸ Hamburger (1939) *ILR* 155.

¹⁹⁹ The involvement of the majority of those affected in the industry should guard against artificially high wages and prices being set because more employers will then have had a say in the setting of that wage or price. Hamburger (1939) *ILR* 192 makes an interesting statement that "[t]he collective agreement abhors a vacuum; the urge toward extension is inherent in it, and therefore anyone who opposes the standardisation of working conditions should oppose the collective agreements as such." This is particularly true insofar as sectoral level bargaining is concerned.

union or trade unions. In South Africa, closed shop agreements may only be entered into where a trade union, or more than one trade union acting in concert, represent a majority of the employees employed in that enterprise or employed by the members of employers' organisations in that sector.²⁰⁰

As mentioned above, another way is if employers, of their own volition, elect to apply the same conditions of employment to unionised and non-unionised employees. This is likely to be opposed by the unionised employees and their trade unions because the non-unionised employees are gaining all the benefits of their unionised counterparts, without incurring the costs of paying union subscriptions. This is the motivation behind agency shop agreements, whereby the non-unionised employees are required to pay an agreed agency fee to the trade union for negotiating terms and conditions from which they are benefitting. Again, in South Africa, a trade union may only conclude an agency shop agreement where the trade union, or trade unions acting in concert, have as their members the majority of employees employed in that workplace or by the members of employers' organisations in that sector.²⁰¹

According to Hamburger, it is only under "particularly favourable conditions" that unionised employees and employers can, "by their own action secure general application of collective agreements."²⁰² He refers to two direct ways to attain general application of a collective agreement. The first way is to compel all workers and employers in a trade or occupation to organise. The second is to extend the collective agreement to bind all workers and employers in that trade or occupation.²⁰³ For the reasons that the compulsory organisation of employers and workers is akin to a cartel and violates freedom of association or rather the freedom *not* to associate, the first of these he says is not an option, leaving only the extension of collective agreements as a viable method to ensure general application of collective agreements.²⁰⁴

If parties to a bargaining council are not able to extend their collective agreements, it is said that this would "discourage orderly collective bargaining" and "collective bargaining at sectoral level" with the result that there would be no reason for employers to join a

²⁰⁰ S 26(2) of the LRA.

²⁰¹ This threshold should not be any different where extensions are concerned.

²⁰² Hamburger (1939) *ILR* 156.

²⁰³ *Idem* 157.

²⁰⁴ Hamburger (1939) *ILR* 157.

bargaining council.²⁰⁵ A primary reason for collective bargaining in bargaining councils and the general applicability of agreements concluded there lies in self-regulation, based on the premise that those employers and employees engaged in the particular sector “know what is best for them”.²⁰⁶ Calitz describes the reason why the LRA makes provision for the extension to parties who are not, and often do not want to be, part of the agreement as “a policy choice based on the principles of self-regulation and majoritarianism.”²⁰⁷ This is true insofar as section 32(2) of the LRA is concerned, but not when considering the provisions of section 32(5).

3. Controversy Surrounding Extensions

3.1. High Wages and Unemployment

The extension of collective agreements has attracted widespread criticism and has been blamed for causing job losses and unemployment as well as being detrimental to small businesses. Some non-party employers may be able to implement and “weather” increased wages negotiated in the bargaining council, however other non-party employers, who wish to comply with the extended collective agreement, may need to decrease the number of workers they employ in order to increase the wages of the remaining workers.²⁰⁸

Classical economists tend to attribute the failure by the market to balance itself out to over-regulation.²⁰⁹ Vettori *et al*²¹⁰ discuss how the unemployed are affected by the extension of collective agreements and wages that are higher than the market would naturally allow for (the “market clearing wage”).²¹¹ They are of the view that unemployed people are discriminated against as a result. Brassey shares the view that “workers are no longer the least advantaged class ... now it is the jobless who make up this class” and the

²⁰⁵ *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC) para 21.

²⁰⁶ *Idem* para 18.

²⁰⁷ Calitz (2015) SA Merc LJ 2 with reference to *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC) paras 18-19.

²⁰⁸ Godfrey *et al* “Regulating the Labour Market: The Role of Bargaining Councils” (2006) ILJ 733. Teklè (ed) (2010) 196 states how advocates of labour market deregulation persistently argue that “labour law reform is needed to create jobs and facilitate economic growth” whereas those who oppose deregulation emphasise that labour laws are needed to “address the persistent inequality and discrimination in southern African labour markets.”

²⁰⁹ Brassey (2012) ILJ 3 states “to me, this proposition seems axiomatically correct, a ‘no brainer’ if you like; but most commentators (or at least most whose background is essentially political) seem to think otherwise, and propose solutions accordingly.”

²¹⁰ Vettori & Brown (2014) AJHTL 1.

²¹¹ *Idem* 6.

unemployed are willing to offer their services at a lower price.²¹² Calitz considers the impact that wage negotiations in bargaining councils have on wages. Considering the findings of Magruder²¹³ and Van der Westhuizen *et al*²¹⁴ she concludes that wages are “raised considerably” in sectors where there is a bargaining council and such sectors also have lower levels of employment by small businesses.²¹⁵ The findings of Borat *et al* reflect that workers who belonged to trade unions party to bargaining councils in 2005 enjoyed a “wage premia.”²¹⁶ The raising of wages is without a doubt beneficial for employees and addresses inequality, however it does not appear to be beneficial in the long-term if those wage increases are unsustainable and result in retrenchments and unemployment.

Godfrey *et al*, on the other hand, are of the view that the extension of bargaining council agreements has had minimal impact on unemployment.²¹⁷ Godfrey *et al* refer to some statistics published by Statistics South Africa in 2005 which show that the proportion of employees covered by bargaining councils was South Africa is 32.6% and the number of employees covered by extended bargaining council collective agreements was 4.6%.²¹⁸ Defenders of the extension of bargaining council collective agreements have relied on these statistics to argue that the criticism of the effect of extensions is largely misplaced or exaggerated.²¹⁹

A difficulty experienced by anyone who tries to collect statistics on bargaining council coverage is that a large number of non-party employers do not register themselves and their employees with the bargaining council, some quite deliberately.²²⁰ Godfrey *et al* report that bargaining council agents spend approximately 30% of their time tracking down unregistered firms.²²¹ Because the number of employers and employees in an industry probably exceeds the number reflected in statistics, what is likely thought to be sufficiently representative is actually nowhere near representative of the employers and employees in

²¹² Brassey (2012) *ILJ* 7.

²¹³ Magruder (2012) *AEJAE* 158.

²¹⁴ Van der Westhuizen *et al* “How much do Unions and Bargaining Councils Elevate Wages?” (2013).

²¹⁵ Calitz (2015) *SA Merc LJ* 16.

²¹⁶ Borat *et al* (2007) *DPRU* 58.

²¹⁷ Godfrey *et al* (2012) 186.

²¹⁸ Godfrey *et al* “Regulating the Labour Market: The Role of Bargaining Councils” (2006) *ILJ* 735.

²¹⁹ *Idem* 734. Borat *et al* (2007) *DPRU* 17 opine in response to this that it appears that the evidence is not particularly strong of the suffering of non-parties as a result of the automatic extension of collective agreements.

²²⁰ Godfrey *et al* “Regulating the Labour Market: The Role of Bargaining Councils” (2006) *ILJ* 738-739.

²²¹ *Idem* 741.

a sector to which collective agreements are extended.²²² Anstey presumes that this is one of the reasons for the Minister's discretion in terms of section 32(5), referring to section 32(5) as a "backdoor".²²³ According to Murphy J in the FMF judgment, the numerical thresholds stipulated by section 32(3) of the LRA may prove difficult to achieve in practice and in order to overcome this hurdle, section 32(5) provides a recourse.²²⁴

3.2. *Divergent Interests*

Not all employers and employees within an industry have the same interests.²²⁵ For example, large employers' interests may differ from small employers' interests. Employers in a particular sub-sector may have different interests to employers in another sub-sector. Likewise employees' interests may differ depending on the sub-sector and type of work which the employees engage in.²²⁶ The same can be said for parties to a bargaining council which represent and bargain for the unique needs of their members.²²⁷

Therefore when collective bargaining takes place at a central or sectoral level, agreements should preferably be broader and create more of a framework as opposed to specifying in great detail actual terms and conditions and actual wages, leaving no room for employers to negotiate terms which are enterprise-specific.²²⁸ This should at least be the case where the intention of the parties is to extend the collective agreement concluded in the bargaining council to non-parties. Cheadle expresses the following view:

"The failure to understand the regulatory functions of the bargaining council agreement has led to parties agreeing to actual terms and conditions and accordingly setting no framework for variation at the level of the enterprise or workplace to accommodate differences between employers."²²⁹

²²² With reference to the clothing manufacturing industry, Anstey (2004) *ILJ* 1858 states that "paradoxically the problem lies in the extent of non-compliance – the more non-complying firms discovered, the less representative those party to the NBC become."

²²³ Anstey (2004) *ILJ* 1858.

²²⁴ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 para 22.

²²⁵ Calitz (2015) *SA Merc LJ* 19 states that "not once size fits all".

²²⁶ For example Theron *et al* (2015) *ILJ* 849-852 describe the unique needs of rock-drill operators in the platinum mining sector in South Africa and the failure of the National Union of Mineworkers to serve these needs, which set the stage for the disaster at Marikana.

²²⁷ Calitz (2015) *SA Merc LJ* 1.

²²⁸ Brassey (2012) *ILJ* 8 describes how divergent interests are dealt with in transnational law: "in the domain of transnational law, this proposition find expression in the notion that the central body should decide only what is common to the participation nations as a whole. Matters peculiar to individual states are to be decided by each state at its own discretion." We see this reflected in the broad terms in which ILO conventions are framed.

²²⁹ Cheadle (2006) 27 *ILJ* 696. This view is supported by Godfrey *et al* "Regulating the Labour Market: The Role of Bargaining Councils" (2006) *ILJ* 751.

3.3. Effect on Small Business

The effect of extensions on small businesses is a particular criticism of the mechanism.²³⁰ Goldberg recognises that there are certain hurdles which are unique to small firms, such as:

“inability to raise capital and the high cost of it, the lack of purchasing power, shortage of entrepreneurial and managerial skills, low administrative capability and the inability to offer professional services.”²³¹

This is clearly a generalisation and there are small businesses with high degrees of professionalism, skills, market power and some which are incredibly profitable.²³² However, one cannot deny at least the *potential* detrimental effect that extended collective agreements can have on small firms, non-parties and on unemployment in general.

There is a debate about the correctness of the widely held belief that companies who are members of employers' organisations which are parties to bargaining councils tend to be large firms. The average size of firms in bargaining councils is 27 employees, with non-party employers employing 11 employees on average.²³³ Godfrey *et al* question why small firms then take issue with the bargaining council system and believe that the problem lies within the voting power play that occurs within the employers' organisations. They state that small firms are more pliable and therefore willing to go along with the position taken by the large employers. The reason for this they attribute to small firms not having the expertise and sophistication that the bigger firms have²³⁴ and can therefore make “little impact on the more informed and eloquent arguments put forward by the representatives of the big firms”.²³⁵ Another reason attributed to the inability of small firms to play an active role is that human resources are limited to the extent that the profitability in a small firm is more directly linked to each individual's contribution, therefore placing more demands on management and human resource personnel.²³⁶

²³⁰ Teklè (ed) (2010) 197 observes that the South African government and employer groups “have been particularly concerned with the impact of the regulatory framework on small and medium sized enterprises (SMEs).”

²³¹ Goldberg (1997) *LDD* 90.

²³² In Czecho-Slovakia in the early 20th century, there was a concern about the unfair competition of small undertakings that were not bound by collective agreements (see Hamburger (1939) *ILR* 181).

²³³ Godfrey *et al* (2006) “The Role of Bargaining Councils” *ILJ* 743.

²³⁴ Godfrey *et al* (2006) “The Role of Exemptions” *ILJ* 1369-1370.

²³⁵ Godfrey *et al* (2006) “The Role of Bargaining Councils” *ILJ* 745.

²³⁶ Godfrey *et al* (2006) “The Role of Exemptions” *ILJ* 1370.

3.4. Firm Size

Having contributed to the controversy is the weight given to the size of an employer. Section 32(1)(b), in effect, prescribes that the size of firms²³⁷ is to be taken into account by requiring that the vote in the bargaining council to request the Minister to extend the agreement is supported by the employers' organisation whose members employ the majority of employees employed by members of employers' organisations belonging to the bargaining council. Section 32(3)(c) requires that the Minister must be satisfied that the employers' organisations party to the bargaining council will, upon extension, have as their members the employers employing the majority of all employees falling within the scope of the collective agreement.

On the trade union side it is simple. The more employees that are members of a trade union, the more representative that trade union will be. On the employer side it is more complicated.²³⁸ One can either base the representivity of the employers' organisations on the number of members which the organisation has, or, as section 32 does, on the number of employees employed by employer members of the employers' organisation. As things currently stand, in a multi-party bargaining council, one employers' organisation that has a limited number of members, but whose members employ great numbers of employees, can reach agreement with the trade unions and vote in terms of section 32(1) of the LRA to request the Minister to extend the agreement.²³⁹

3.5. Imposition of the Will of Others

Godfrey *et al* blame the controversy surrounding the extension of collective agreements, and identify what, in my view is the crux of the problem, on the fact that the "process binds

²³⁷ Goldberg (1997) *LDD* 88 points to two indicators of the size of a firm: (1) the number of employees employed by the firm; and (2) the assets and/or turnover of the firm. He says that size is normally measured taking into account the number of employees.

²³⁸ Rynhart (2004) 66 expresses the view that because enterprises are different sizes, a "simple application of the democratic principle 'one man, one vote' would not be very practicable and ultimately not very democratic." I am not certain if I agree with him. Trade unions look after the interests of employees and employers' organisations the interests of their members, which are companies. I am not sure that the vote of a large company should weigh more than that of a small company. I agree more with the view of Rynhart though where it is stated that "[e]mployer organizations therefore give more weight to larger enterprises, but at the same time, have to try not reduce to a minimum the influence of small enterprises. This is sometimes a balancing act." (also at 66).

²³⁹ This view is also expressed by Godfrey *et al* "Regulating the Labour Market: The Role of Bargaining Councils" (2006) *ILJ* 742.

non-parties to conditions that they have not had a role in negotiating.”²⁴⁰ According to them, whilst centralised bargaining has more of an impact on the labour market, enterprise level bargaining only has a limited impact on the labour market. The reason for this is that the bargaining unit is smaller and negotiations are specific to that enterprise and the “ability to pay of the firm.”²⁴¹ Non-parties to a bargaining council have not played a part in the negotiations and therefore their ability to pay has not been considered. The yardstick is, in theory, the ability to pay of the least profitable party firm or employer member of party employers’ organisations.²⁴²

My impression of these controversies is that is that I have not come across any study that has proved beyond all doubt that the extension of collective agreements and regulation in this regard causes unemployment and insolvency of businesses. Each bargaining council and sector is unique and large companies are also not exempt from financial difficulties. That only about 4.6% of employees in South Africa are covered by extended bargaining council agreements does not detract from the argument that there must still exist majority support for agreements concluded in bargaining councils and extended to non-parties. It is the principle underlying the extension mechanism that I am concerned with. Ensuring compliance is a mammoth task for bargaining councils and, when capacity for policing compliance is limited, more “willing compliance” by employers is paramount.”²⁴³ “Willing compliance” will more likely be achieved if the deal struck by the parties to the bargaining council is supported by at least 50% of the employers and employees in that industry.

4. Exemptions

Many advocates for the extension of collective agreements regard exemptions as the answer to much of the discontent surrounding section 32 and I must therefore deal with exemptions, at least briefly. The argument is that, if an employer for some or other reason contends that it should not be bound by an extended agreement or that it cannot afford wages or terms set out in agreement, then those employers have the option to apply for an exemption from the extended collective agreement or a part thereof.²⁴⁴ Godfrey *et al* state

²⁴⁰ Godfrey *et al* “Regulating the Labour Market: The Role of Bargaining Councils” (2006) *ILJ* 732.

²⁴¹ *Idem* 732.

²⁴² *Idem* 732.

²⁴³ Anstey (2004) *ILJ* 1859.

²⁴⁴ S 32(3)(dA) & s 32(3)(e) of the LRA.

that having exemption criteria provides no guarantee for a fair process and some councils' criteria are vague with no indication of the weight to be attached thereto.²⁴⁵

Godfrey *et al* conducted surveys on the number of applications made to bargaining councils in the years 2000, 2002 and 2004 for exemptions.²⁴⁶ Out of 17 councils that submitted data for all these years,²⁴⁷ on average 616 total exemption applications were made each year to bargaining councils. The number of applications for exemptions could reflect opportunistic attempts by employers to gain some advantage (on average 155 of these applications were rejected each year) but this nonetheless shows that, on average for each of these years, 616 employers were not satisfied with the terms of the collective agreement and expended time, resources and incurred the administrative burden of trying to be absolved from complying with an agreement which was supposed to have been representative of the best interests of the industry concerned. Surely it cannot be said that the agreements which are being extended are suitable to all affected parties in the industry?²⁴⁸ Furthermore, there is a burden on the bargaining councils to administer these exemption applications. All this supports the argument that there must be majority support for the collective agreement in the industry. It is not practical to have the majority of an industry applying for exemptions.

5. Conclusion

In this chapter I explained the purpose of extensions and why extensions promote sectoral level bargaining. Extensions assist in creating uniformity across an industrial sector. As Bendix puts it, the employer and employee representatives in a bargaining council do not necessarily represent all employers and employees in that industry, however because the purpose of bargaining at a centralised level is to achieve uniformity, the parties to the bargaining council will want all employers and employees in the industry falling within the scope of the bargaining council to be covered by their collective agreement.²⁴⁹

²⁴⁵ Godfrey *et al* (2012) 134.

²⁴⁶ Godfrey *et al* (2006) "Flexibility in Bargaining Councils: The Role of Exemptions" *ILJ* 1376.

²⁴⁷ According to Godfrey *et al* "Regulating the Labour Market: The Role of Bargaining Councils" (2006) *ILJ* 734 there were 48 functioning bargaining councils in South Africa in 2004, therefore less than half of the councils in the country submitted data.

²⁴⁸ The FMF supports this argument by stating that "[t]he sheer number of exemption applications received in one year, and particularly those launched by smaller firms ... provides evidence of the fact that the extension of the agreement to non-parties is inappropriate for those parties" (see *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 replying affidavit para 98.2).

²⁴⁹ Bendix (2010) 294.

Trade unions are largely motivated by not having their members “undercut” by non-unionised employees and employers are motivated by industrial peace and the regulation of unfair competition.²⁵⁰ Without having to defer to a closed shop arrangement, the best way to bind all workers and employers to a collective agreement is to have the agreement extended to them. The extension of collective agreements is underpinned by the benefits of self-regulation and, or at least ought to be, by the principle of majoritarianism. I also discussed many of the controversies associated with the extension mechanism, such as unaffordable wages, actual wages rather than minimum wages being specified and the effect on small businesses.

²⁵⁰ Something worthy of mention is that the Competition Act of 1998, which regulates anti-competitive behaviour and prohibits acts such as collusion and concerted practices by firms to fix prices and reduce competition in a market, does not apply to collective bargaining within the meaning of s 23 of the Constitution and the LRA or to collective agreements as defined in the LRA.²⁵⁰

CHAPTER 6
CHALLENGE TO SECTION 32(5)

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1. Introduction

Where there are divergent interests in an industry, which is to be expected, a collective agreement concluded in a bargaining council should have the support of the majority of the industry if it is to apply industry-wide. This will at least ensure that the majority of those affected confirm, by their vote, that their industrial relations needs are met by the negotiated instrument.²⁵¹ It is highly improbable that unanimous support for a collective agreement will be achieved. This points to a likelihood that the freedom of association and the rights of certain parties to engage in collective bargaining and freedom of association are limited by having a collective agreement imposed on them. In this chapter, I discuss in further detail the FMF's initial challenge to section 32(5). I also argue hereunder that, where the rights of the majority are infringed to give way to the will of the minority, then the principles of majoritarianism are disregarded and this infringement is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

2. FMF Challenge to Section 32(5)

In addition to its contention that section 32(5) of the LRA violates the principle of majoritarianism and infringes a host of fundamental rights, the FMF also made the following allegations in its founding papers:

²⁵¹ Brassey (2012) *ILJ* 8 gives the example of joining a bowling club. One would be bound to respect the majority's will when it comes to bowling matters, but not if the majority of members of the bowling club make a decision affecting your cricketing activities or book club.

- 2.1. Section 32(5)(a) only requires the Minister to consider whether the bargaining council is sufficiently representative and not whether the parties who voted in favour of the extension are sufficiently representative. Therefore, the representativeness of dissenters within the bargaining council counts against them and is used to inflate the perceived representativeness of the bargaining council.²⁵²
- 2.2. Section 32(5) gives the Minister a discretion in two respects and she may not grant the extension request if either requirement is not satisfied. The first is to decide whether the bargaining council is sufficiently representative within the sector. The second is whether a failure to extend the agreement *may* undermine collective bargaining at a sectoral level.²⁵³ The FMF pointed out that, with regards to the first aspect of the discretion, that in order to remain a registered bargaining council, the bargaining council must already be considered representative.²⁵⁴ Therefore the Minister does not really have a discretion where the first aspect is concerned. In terms of the second part of the discretion, the FMF stated that the term “undermining collective bargaining” is “so porous that its observance is all but impossible to police.”²⁵⁵ Therefore, the discretion to be exercised is framed in incredibly subjective terms, making resulting decisions difficult to review on grounds of rationality and reasonableness.²⁵⁶

I wholeheartedly agree with the FMF’s contention that it is absurd that dissenters to the agreement are counted when assessing whether the bargaining council is representative. This is a deterrent to non-parties joining the bargaining council or organisations that belong to the bargaining council because their “no” vote can be counted as a “yes” vote. With regards to the FMF’s statement allegation regarding the Minister’s discretion in section 32(5), or rather lack thereof, I also tend to agree with them. Just to remain in

²⁵² *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 founding affidavit para 54.2.

²⁵³ S 32(5)(b) of the LRA also provides, in the alternative, that the Minister must be satisfied that the failure to extend the agreement may undermine collective bargaining in the public service as a whole. As referred to elsewhere in this dissertation, my focus is on the private sector and collective bargaining in the public sector is beyond the scope of this discussion.

²⁵⁴ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 founding affidavit para 54.4. The FMF makes this argument based on s 61(3)(b) of the LRA in terms of which the Registrar can cancel the registration of a bargaining council if it is believed that the bargaining council has ceased to be representative for a period exceeding 90 days.

²⁵⁵ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 founding affidavit para 54.4.

²⁵⁶ *Idem* 54.5.

existence, a bargaining council must be considered representative. The LRA also does not specify any factors to be taken into account by the Minister when she determines if the failure to extend the agreement may undermine collective bargaining at sectoral level.²⁵⁷ It is a pliable and subjective requirement and it could conceivably always be argued that any failure to extend will undermine sectoral level bargaining.

In the answering affidavit of the Metal and Engineering Industries Bargaining Council (MEIBC) in the FMF application, it was argued that without the possibility of extensions, non-parties will undercut those who are members of the parties to the bargaining council and parties will respond by leaving the bargaining council to avoid being bound by the collective agreements concluded in the bargaining council.²⁵⁸ It also argues that the changes that the FMF seeks will result in the extension of agreements either not being granted or frustrated, which may result in the demise of the bargaining council system.²⁵⁹

Interestingly Du Toit takes issue with the FMF's failure to challenge the constitutionality of section 1(d)(ii) of the LRA²⁶⁰ simultaneously with their challenge to section 32(5).²⁶¹ Cheadle raises a similar argument when he states that the justifiability of the right to engage in collective bargaining largely depends on the justifications for sector level bargaining.²⁶²

Whilst I do not take issue with the proposition that the principle of extensions is important to ensuring that collective bargaining can take place at sectoral level, I do not agree with Du Toit and Cheadle and do not believe that a challenge to section 32(5) necessitates that section 1(d)(ii) also be challenged. Although the extension of collective agreements does promote sectoral bargaining, this does not mean that no criteria, including representivity criteria, may be established. Du Toit's argument supports a carte blanche for agreements to be extended irrespective of the representivity of the bargaining council and other safeguards provided for in section 32. That there are certain pre-requisites that need to be

²⁵⁷ As discussed in chapter 3 para, the ILO standards and supervisory bodies do not provide any clear guidelines on factors that would promote or undermine collective bargaining and, more importantly, collective bargaining at sectoral level.

²⁵⁸ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 answering affidavit of the 20th respondent para 19.

²⁵⁹ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 answering affidavit of the 20th respondent para 18.

²⁶⁰ S 1(d)(ii) of the LRA lists the promotion of collective bargaining at sectoral level as a primary object of the LRA.

²⁶¹ Du Toit (2014) *ILJ* 2644.

²⁶² Cheadle (2005) *LDD* 153.

met before an agreement may be extended (one of which I believe should be majority support), does not mean that the objective of promoting collective bargaining at sectoral level is rejected or contested.

In the FMF application, Cosatu argued that the “determinative consideration” is whether the agreement covers a sufficient number of employees to justify the extension and not if the union represents the whole workforce.²⁶³ In my opinion this argument fails in that, if employees are already covered by the agreement, then it is not them to whom the agreement is being extended. The agreement is being extended to non-parties.

3. Majoritarianism

The context in which the term “sufficiently representative” is used in section 32(5) of the LRA is markedly different to the context used in the sections governing organisational rights. Whilst the LRA states that a proliferation of trade union representation in a single workplace is to be avoided,²⁶⁴ it is conceivable how a plurality of trade unions at a workplace could nevertheless be effective and promote employees’ freedom of association. For example, practically it is possible for numerous trade unions to co-exist and operate in a single workplace, have access to the workplace²⁶⁵ and have subscriptions deducted.²⁶⁶

As already explained, extensions promote collective bargaining at sectoral level. The extension mechanism makes it possible for a single set of terms and conditions of employment to apply uniformly across an industry. A pluralism of employers’ organisations and trade unions is certainly possible and to be encouraged in bargaining councils, but a number of collective agreements on the same issues cannot all be extended. During the deliberations, there ought to be an inclusive negotiation process where the divergent needs of the various parties can be put forward and where the principles of fair representation are upheld, however at some point, a single set of terms and conditions need to be agreed upon before an extension can take place.²⁶⁷

²⁶³ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 para 40.

²⁶⁴ S 21(8)(a) of the LRA.

²⁶⁵ S 12 of the LRA.

²⁶⁶ S 13 of the LRA.

²⁶⁷ See discussion in chapter 2 about the views of Sachs J in *Democratic Alliance & Another v Maseko* 2003 (2) SA 413 (CC).

Section 32 is most similar to the extension of a collective agreement to bind all employees in an entity in terms of section 23(1)(d) of the LRA.²⁶⁸ You will recall from my earlier discussion of *Chamber of Mines of South Africa v AMCU and Others*²⁶⁹ that section 23(1)(d) of the LRA provides, amongst other things, that a trade union representing a majority of employees in the workplace can have its collective agreement with the employer extended to bind non-unionised employees in the workplace. Section 23(1)(d) of the LRA does not permit general applicability of the agreement where less than a majority is represented by the trade union and I submit that the same should go for industry level extensions in terms of section 32. One of the primary reasons that AMCU's challenge to the constitutionality of section 23(1)(d) of the LRA was dismissed by the Labour Court was because of the principle of majoritarianism.

In the answering affidavit of the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI), in the FMF application, the NBCRFLI argues that non-parties cannot complain if a "decision taken by a majority of those participating" is a decision by the minority affected.²⁷⁰ In other words, the choice of the majority not to join a bargaining council is the reason for this outcome. I could not disagree more. Collective bargaining in South Africa is supposed to be voluntary. When a minority trade union is not able to reach a threshold in order to obtain organisational rights in a company, it is up to the minority trade union to encourage employees to join the union and expend all its efforts to increase its membership. Similarly, it should be up to trade unions and employers' organisations who are parties to a bargaining council to increase their membership figures and encourage other trade unions, employers' organisations and/or employers to join the bargaining council. Therefore, if the parties do not represent a majority of the industry, it is up to them to increase their representivity. This may result in certain concessions being made to the interests of those that would typically fall outside the bargaining council, for example giving even more protection to the voice of very small employers.

If there must be an overriding of a certain group in order that a decision can be made, it must be the minority that is overridden and surely not the majority. In the matter of

²⁶⁸ See chapter 4 para 4.

²⁶⁹ [2014] 3 BLLR 258 (LC).

²⁷⁰ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 answering affidavit of the 3rd, 7th, 11th, 13th, 16th, 17th, 18th, 19th, 26th, 28th, 29th, 30th, 35th, 37th, 38th, 40th, 41st respondents para 78.2.

Ramolesane & Another v Andrew Mentis & Another,²⁷¹ the Labour Appeal Court considered the authority with which trade unions act on behalf of their members. The court relied on the English case of *Iwanuszezak v General Municipal Boiler Makers & Allied Trade Union*²⁷² where Lord Justice Lloyd stated the following:

“it is the primary function of the union to look after the collective interests of its members ... where the collective interests of the union conflict with the interests of an individual member, it only makes sense ... that the collective interests of the members as a whole should prevail.”²⁷³

Van Schalkwyk J in the *Ramolesane* case described some of the effects of the majoritarian principle:

“By definition, a majority is, albeit in a benevolent sense, oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. None the less, because of the principle of majoritarianism, such decision must be enforceable against them also.”²⁷⁴

In *Kem-Lin Fashions CC*,²⁷⁵ Zondo JP explained that the legislature made the policy choice that the will of the majority would prevail over that of the minority and were it the other way and the minority dictated to the majority, this would “quite obviously” be untenable.²⁷⁶ He also remarked that this was “good for orderly collective bargaining” and “for the democratisation of the workplace and sectors.”²⁷⁷

Hamburger argues that a middle ground of sorts is necessary. I cannot summarise or explain his reasoning in better words than he does:

“The extension is intended to affect outsiders. If the agreement, within its territorial scope, covers only a negligible minority of employers and workers, then it is those who are bound by the agreement who are really the outsiders and not those to whom it does not apply. The extension of such an agreement would mean enforcing the will of the minority on a majority. It would, in other words, be equivalent to State regulation of wages with a collective agreement as the starting point. At the other extreme it may be said that extension is out of place when the collective agreement already covers working conditions of the great majority. If, say, 80 or 90 per cent, of the workers in the trade are organised, in practice the collective agreement is

²⁷¹ *Ramolesane & Another v Andrew Mentis & Another* (1991) 12 ILJ 329 (LAC).

²⁷² *Iwanuszezak v General Municipal Boiler Makers & Allied Trade Union* 1988 IRLR 219 220.

²⁷³ *Ramolesane & Another v Andrew Mentis & Another* (1991) 12 ILJ 329 (LAC) 335 referring to para 8 of *Iwanuszezak v General Municipal Boiler Makers & Allied Trade Union* 1988 IRLR 219.

²⁷⁴ *Ramolesane & Another v Andrew Mentis & Another* (1991) 12 ILJ 329 (LAC) 336.

²⁷⁵ *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC).

²⁷⁶ *Idem* para 19. Cooper (2014) 53-44 expresses her view that s 32(5) is “more susceptible to constitutional challenge than extension based on the majoritarian requirement.”

²⁷⁷ *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC) para 19.

generally applied to non-union members as well. Even if that does not occur the margin of outsiders is so small that it cannot threaten the existence of the collective agreement or have a prejudicial influence on its application. Consequently, the extension of such of such an agreement may seem to be superfluous.”²⁷⁸

Hamburger continues on to say that most countries, at that time, required a minimum percentage of workers in the territorial scope must be represented by the bargaining union and this minimum percentage was “never less than 50 per cent.”²⁷⁹ He is very clear, however, that the number of workers covered by the agreement must not be less than the number of those not covered.²⁸⁰

In the expert report by Cheadle and Thompson, attached to the South African Clothing and Textile Workers’ Union’s answering affidavit in the FMF application, the authors make the submission that the more state intervention, the more flexibility there is regarding the representativeness of the parties who concluded the agreement or requested the extension.²⁸¹ They say that this implies that leaving the matter to the organisations that represent the interests of the majority is enough assurance that a decision to extend will be well considered.”²⁸² In section 32(5), there is not majority representation and, as argued, above, there is not terribly much discretion for the Minister. Of further concern is that, as we saw in the previous chapter, the Minister has previously exercised her administrative power to extend collective agreements irregularly and in a manner causing her decisions to be set aside.

In light of the above, I submit that section 32(5) is not in keeping with the legislature’s policy choice of majoritarianism for the LRA and it allows a minority to override the will of the majority. The safeguard of increased state intervention to offset the less stringent representivity requirements in section 32(5) is not having the desired effect, nor does the section provide suitable criteria or guidelines for the Minister to properly exercise her discretion. Whilst representivity levels by the parties to the agreement of 80 or 90 percent of the industry would not serve any purpose, as explained by Hamburger, I maintain that they must at least represent 50 percent of the employers and employees.

²⁷⁸ Hamburger (1939) *ILR* 168-169.

²⁷⁹ *Ibid.*

²⁸⁰ *Idem* 182-183.

²⁸¹ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 expert report prepared by Cheadle and Thompson “The Constitutionality of Section 32(3) of the Labour Relations Act 1995” (attached as annexure 52nd respondent’s answering affidavit) paras 108, 113, 115 and 116.

²⁸² *Idem* para 113.

4. Constitutionality: Infringement

Hereunder I assess whether the labour relations rights, right to freedom of expression, right of trade, occupation and profession and the rights to equality and dignity are infringed by section 32(5). I will consider whether the extension mechanism provided for by the LRA (irrespective of whether the extension takes place in terms of section 32(2) or section 32(5)) infringes a fundamental right. Where I believe the difference between section 32(2) and section 32(5) will come into play is in any justifiability analysis. It must also be remembered that an infringement must be “real and substantial” before progressing to a limitation analysis.²⁸³

4.1. Freedom of Expression

As already discussed, section 32(5) was amended by the LRAA of 2014 to provide for a twenty-one day comment period for parties (including non-partyS) affected by a proposed extension.²⁸⁴ The Minister may not extend the agreement in terms of section 32(5) until she has considered the comments received.²⁸⁵ As a result of this amendment, I do not think that section 32(5) impinges on freedom of expression. Whether voices are stifled within trade unions or employers’ organisations or within the bargaining council is a different consideration and cannot be attributed to section 32(5). I also do not see another basis on which it can be argued that this right is limited.

4.2. Right of Trade, Occupation and Profession

As mentioned in chapter 2, the occupational freedom of individual citizens is to be considered and I raised the argument that the extension of collective agreements may limit the right of trade, occupation and profession of job-seekers or employees facing retrenchment who would otherwise be willing to work for a lower wage. There is much logic in this argument, especially in a country where unemployment levels are soaring. If unaffordable wages are imposed on non-party employers and this affects their decision to employ job-seekers or retrench existing employees, in simple terms this would limit the right of occupation of those individuals who can no longer secure work for themselves, but would otherwise have been able to were it not for the imposed agreement. Whether this

²⁸³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO & others* 1996 (1) SA 984 (CC) para 252.

²⁸⁴ S 32(5)(c) of the LRA.

²⁸⁵ S 32(5)(d) of the LRA.

right is infringed would, however, depend very much on a particular set of facts and on the specific terms of the agreement. For example, the likelihood of the employee or prospective employee securing alternative work. There is no hard evidence to show a direct causal link between extensions and job losses or unemployment. For this reason, to find that there is a real and substantial infringement of the right to trade, occupation and profession is too speculative.

4.3. Equality

Applying the *Harksen v Lane*²⁸⁶ test, the first requirement is that there must be some type of differentiation in order for there to be a violation of section 9(1) of the Constitution. In the case of non-parties claiming that their right to equality is infringed by an extension in terms of section 32(5), I do not see how it can be argued that they are being differentiated against. On the contrary, the problem is that they are being treated exactly the same as parties to the collective agreement. In my view, the right to equality is not infringed by section 32(5).²⁸⁷

4.4. Dignity

As mentioned above and in chapter 2, the extension of collective agreements to non-parties may result in employers not being able to afford to pay their employees the imposed wages, resulting in retrenchments or a moratorium on hiring new employees. This not only affects the right to an occupation of the job-seekers and the employees facing retrenchment, but could also infringe their sense of dignity. Employment is the primary means through which people provide for their material needs, as well as derive a sense of fulfilment and purpose. On the other hand, paying existing employees a wage which falls below what can be considered a decent or living wage also impinges on employees' right to dignity. This is a debate we see currently being had regarding national minimum wages. Section 32(5) therefore may negatively affect the right to dignity of some but reinforces the dignity of others. Again, it cannot be said for sure that extensions stifle employment or definitively affect individuals' right to dignity and therefore to say conclusively that the

²⁸⁶ *Harksen v Lane NO 1998 (1) SA 300 (CC)* para 53.

²⁸⁷ Even if some differentiation could be shown, which is doubtful, as said by Currie & De Waal (2013) 218, in order for there to be discrimination and not mere differentiation, the differentiation ought still to be based on one of the prohibited grounds listed in section 9(3) of the Constitution. It is difficult to see how a non-party could rely on one of the prohibited grounds.

section infringes the right to dignity is speculative and is too dependent on the facts, the individuals in question and the terms of the collective agreement. I therefore cannot say that there is a real and substantial infringement of the right to dignity.

4.5. *Labour Relations*

According to Cheadle, the right to fair practices is secured by individual bargaining, supplemented by collective bargaining and supported by legislation which sets minimum employment standards, like the BCEA.²⁸⁸ Hofman points out that the legislature recognised that majoritarianism in the form of an extension of a collective agreement to non-parties can be unfair and, for this reason, provided certain safeguards in section 32 of the LRA.²⁸⁹ These safeguards apply notwithstanding that an extension needs to be considered in terms of section 32(5).

The safeguards that Hofman refers to are (1) that the collective agreement has majority support in the sector; (2) that the terms of the agreement do not discriminate against non-parties; *and* (3) that provision is made for an exemptions process to exempt “non-parties from unfair provisions.”²⁹⁰ In light of this reasoning, I am inclined to conclude that section 32(5) does infringe upon the right to fair labour practices as majority support is not required. The very process of binding non-parties to other parties’ negotiated agreements is an unfair imposition, particularly where collective bargaining is a voluntary process. The purpose behind extensions may justify this limitation and will be discussed below.

I do not see how the extension of a collective agreement to non-parties can affect workers’ and employers’ rights to form and join trade unions or employers’ organisations, as the case may be, or to participate in such organisations’ programmes and activities. It is also hard to see how the terms of a collective agreement could make drastic inroads into the inner workings of these organisations. The same argument stands true for the rights provided for the rights of trade unions and employers’ organisations to determine their own administration, programmes and activities, to organise and to form and join a federation.²⁹¹

²⁸⁸ Cheadle (2006) *ILJ* 674.

²⁸⁹ Hofman (2009) *Obiter* 201.

²⁹⁰ *Ibid.*

²⁹¹ S 23(4) of the Constitution, 1996.

Du Toit *et al* discuss whether, by promoting sectoral level bargaining (and by implication the extension of collective agreements),²⁹² the legislature is limiting the right to engage in collective bargaining at plant level. Nothing in section 23(5) of the Constitution specifies at what level bargaining must take place, nor does the ILO, and it is only in the LRA that the policy choice of sectoral level bargaining is promoted. This is a regulation of collective bargaining “to give effect to a specific form” of bargaining and, as Du Toit *et al* further point out, section 23(5) of the Constitution requires that such regulation must comply with section 36(1) of the Constitution if it limits any rights.²⁹³ In my opinion, because section 23(5) of the Constitution does not require sectoral level bargaining, where plant level bargaining must give way to the terms of an extended sectoral level agreement, there is a clear limitation to the right to engage in collective bargaining at plant level.

The extension mechanism also appears to limit non-parties from engaging in collective bargaining at sectoral level. For example, consider a situation where a trade union and an employers’ organisation who have not signed the collective agreement negotiate separately and conclude their own collective agreement. That they may or may not be more representative than the parties to the other collective agreement is a different consideration (this comes into play when considering the justifiability of the limitation). The fact of the matter is that extending a single collective agreement to cover an entire industry has the effect of overriding any other agreements arrived at between other parties in the industry.²⁹⁴

With regards to the right to strike, many collective agreements contain a “peace clause” whereby the parties covered by the agreement (including those non-parties to whom the agreement is extended) are not permitted to resort to industrial action over matters of mutual interest during the currency of the agreement over matters that are dealt with in the

²⁹² Du Toit *et al* (2015) 326.

²⁹³ *Idem* 325.

²⁹⁴ For example, see *National Union of Metalworkers of South Africa v National Employers Association of South Africa and Others* [2014] ZALCJHB 492. In this case, NEASA members had locked-out employees, including member of NUMSA, in response to the strikes which took place in the metal industry 2014 main agreement negotiations. NUMSA concluded an agreement with other employers’ organisations, which NEASA did not support. Despite an agreement having been concluded in the industry, NEASA members continued to lock-out NUMSA employees, insisting that they would not call off the lock-out until their demands were met. NUMSA accepted all NEASA’s demands and approached the Labour Court on an urgent basis to declare the lock-out to be unprotected. Basson J found that, because NUMSA had unequivocally accepted all of NEASA’s demands, the lock-out was unprotected and unlawful. After judgment was handed down, the main agreement in the metal industry was extended by the Minister to non-parties, therefore overriding the terms and conditions agreed upon between NEASA and NUMSA.

agreement.²⁹⁵ This provides employers with/the benefit of industrial peace during the currency of the agreement. This prohibition of a strike over any issue, regulated by the extended collective agreement, limits the right to strike at plant level and, without being able to strike, severely impedes the bargaining power of a trade union.²⁹⁶ This consequently further infringes the right to engage in collective bargaining of non-parties.²⁹⁷

4.6. Freedom of Association

I discussed in chapter 2 how many of the rights in the Bill of Rights overlap or are intertwined and that freedom of association forms the basis of the right to organise, belong to trade unions and employers' organisations, engage in collective bargaining and to strike.²⁹⁸ As a result, an infringement of the right to engage in collective bargaining and to strike necessarily implies a limitation on freedom of association.²⁹⁹ Members of trade unions and employers' organisations chose to belong to those organisations, pay membership fees to those organisations and have those organisations represent their interests. Where these organisations are prevented from engaging in collective bargaining on behalf of their members, they are prevented from representing the interests of their members.

On the fact of it, I do not perceive there to be a violation of freedom of association. Extensions are not the same as a closed-shop arrangement. Those who are not members of the bargaining council are not obligated to become members of trade unions and employers' organisations. This perhaps falls more in the category of a violating a "freedom not to associate". The FMF refers to this as the "freedom to dissociate".³⁰⁰ On the other

²⁹⁵ S 65(1)(a) of the LRA. See also *NEWU v MEIBC* [2002] 1 BLLR 62 (LC); *Profal (Pty) Ltd and National Entitled Workers Union* (2003) 24 ILJ 2416 (BCA); *Cape Gate (Pty) Ltd v NUMSA* [2007] 5 BLLR 446 (LC).

²⁹⁶ *Chamber of Mines of South Africa v AMCU and Others* [2014] 3 BLLR 258 (LC) para 42. See discussion in chapter 3 para 3 about Cooper's interpretation of the findings of the Committee of Experts.

²⁹⁷ As stated by Hepple (2005) 186 the right to strike is a "necessary complement" to the right to engage in collective bargaining. Cooper (2014) 53-43 is in agreement that s 32 infringes non-parties' rights to collective bargaining and rights to strike where agreement is reached to exclude industrial action as a means to resolve disputes.

²⁹⁸ Van Niekerk *et al* (2015) 366. Hepple (2005) 178 explains that the "foundation of collective labour relations is the freedom of association and the right to organise, which along with the right to engage in collective bargaining, are 'core' ILO principles."

²⁹⁹ Currie & De Waaal (2013) 403 state that "if many associational rights are buttressed by other constitutional rights, then the nature of the limitations review they receive will, in substantial part, be contingent upon the level of constitutional importance accorded to the buttressing rights."

³⁰⁰ *Free Market Foundation v Minister of Labour & others* 13762/13 [2016] ZAGPPHC 266 founding affidavit para 44. The FMF describes the freedom to dissociate as comprehending "the right of one person to decline, whether through

hand, in *Kem-Lin Fashions CC*³⁰¹ Zondo JP (as he was then) was of the view that a non-party, for all intents and purposes, becomes a party to the collective agreement, following its extension.³⁰²

An extension does not compel a non-party employer or employee to join an organisation or an employers' organisation or trade union to join a bargaining council. However where such an election has been made not to associate with an organisation or a bargaining council, is it fair to have the agreement of that organisation or bargaining council extended to become binding on non-parties? I think not, however, there has been no conclusive determination in South African law, of which I am aware, whether there is a right *not* to associate. For purposes of this discussion, I am prepared to assume that there is no right *not* to associate, however as a result of the infringements to the right to engage in collective bargaining and strike, it is my conclusion that section 32(5) does infringe the constitutional right to freely associate.³⁰³

In my assessment above, I have reached the conclusion that the extension mechanism provided for in the LRA, in particular section 32(5), infringes the right to fair labour practices, the rights to strike and engage in collective bargaining and freedom of association (hereinafter referred to as "the infringed rights"). That sectoral level bargaining is the policy choice of the legislature and that extensions serve an important objective is not relevant to the first stage of the enquiry into the section's constitutionality and is left for the second stage of the enquiry under the limitations clause.³⁰⁴

5. Constitutionality: Justifiability

Section 36(1) of the Constitution requires that, having found there to be a limitation of one of the Bill of Rights, we must enquire next as to whether the limitation is "reasonable and

operation of law or otherwise, to subscribe to a coerced association with another." It is not clear in our law whether such a right actually exists.

³⁰¹ *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC).

³⁰² *Idem* 117. This finding was applied by the Commissioner in *Profal (Pty) Ltd and National Entitled Workers Union* (2003) 24 ILJ 2416 (BCA) in reaching the conclusion that a trade union that did not belong to the bargaining council was nevertheless bound by the extended agreement and "was effectively 'turned into a party' ... by virtue of the extension" (at 2423).

³⁰³ In *Chamber of Mines of South Africa v AMCU and Others* [2014] 3 BLLR 258 (LC) para 46, Van Niekerk J held that, although a number of rights had been implicated by s 23(1)(d) of the LRA, the right to strike was most directly implicated and, for this reason, if the limitation of the right to strike was justifiable "then any incidental limitation of other right will also be justifiable."

³⁰⁴ Woolman & Botha (2014) 34-20.

justifiable in an open and democratic society based on dignity, equality and freedom.” In this assessment, I will only address those factors listed in section 36(1) which are most relevant.

5.1. Importance and Purpose of the Limitation

The purpose of the extension mechanism is to give effect to the objects of the LRA to promote collective bargaining at sectoral level and to promote orderly collective bargaining. These are policy choices. As discussed above, there is a right for parties to engage in collective bargaining, however no constitutional right exists to insist on bargaining at sectoral level. Centralised or sectoral bargaining is not without its disadvantages and enterprise level bargaining does offer certain benefits for the bargaining partners.³⁰⁵ Nonetheless, the legislature is entitled to make such policy choices and section 23(5) of the Constitution endorses such regulation of collective bargaining. Cheadle had the following to say in this regard:

“The justifiability of the limitation on the right to engage in collective bargaining depends very much on the justifications for sector level bargaining and the necessity of the extension mechanism for securing the integrity of sector level collective bargaining or its alternative (collective action). The right is also not absolutely abrogated – no bar is placed on joining the parties to the bargaining council and participating in collective bargaining through these institutions. Moreover provision is made for exemptions.”³⁰⁶

When considering the rationale behind the extension of collective agreements and its aims to prevent the exploitation of workers, prevent unfair competition and promote self-regulation, as discussed in detail in the previous chapter, it cannot be said that the principle of extending collective agreements, in general, is inconsistent with the values of an open and democratic society based on human dignity, equality and freedom.³⁰⁷ The ILO supports the principle, even where parties are only sufficiently representative, and many ILO states also have mechanisms whereby collective agreements may become generally applicable.

³⁰⁵ Bhorat *et al* “The South African Labour Market in a Globalizing World: Economic and Legislative Considerations” (2002) 53 note that “[o]ne of the criticisms of centralised bargaining is that it unnecessarily introduces rigidities and bureaucratisation to the industrial relations scenario, despite its provisions for exemptions” and that these rigidities “can harm the competitiveness of South African industries on global markets.” Bamber & Sheldon (2004) 544 explain some of the advantages of enterprise level bargaining, some of which are that employment arrangements can be adapted for the specific circumstances of that particular enterprise and that the parties who are directly responsible for administering the agreed upon rules have in fact created those very rules (more effective implementation).

³⁰⁶ Cheadle (2005) *LDD* 153.

³⁰⁷ Woolman & Botha (2014) 34-74.

It is, however, my opinion that there seems to be a lack of rationale where the majority do not support the agreement and its extension and the option of applying for an exemption does not save the extension mechanism in this case.³⁰⁸ Where there is insufficient “buy-in” from the affected parties in the industry, it concerns me that the wages and terms and conditions that have been agreed upon may not be reasonable and that the interests of a small few are being promoted, rather than the “self-interest” of the industry as a whole.³⁰⁹ This cannot be said to be the purpose of extending agreements and sectoral level bargaining. By allowing the will of a minority to be imposed on a majority, section 32(5) is not consistent with the abovementioned values. Both majoritarianism and bargaining at sectoral level were policy choices of the legislature. The two can co-exist and section 32(2) reinforces this. Hofman emphasises the important point that the justification for an extension lies in the principle of majoritarianism.³¹⁰

5.2. Nature and Extent of the Limitation

With regards to the extent of the limitation, the more invasive it is, the more justification is required.³¹¹ The infringement of the rights to fair labour practices, to strike and engage in collective bargaining and, by implication, freedom of association by section 32, in particular at plant level, is particularly invasive. Bargaining partners may elect to engage with one another on all labour issues at plant level. It is a voluntary system and this is their choice, however where an agreement is extended to them that already deals with all the issues which they would like to negotiate, they have no option but to abide by the extended agreement.

³⁰⁸ It is stated in the heads of argument for the Minister of Labour & various bargaining councils para 42 that “[b]argaining councils and their independent appeal bodies have specialist knowledge and expertise in resolving labour issues in their industries” and “are best placed to make the determinations whether a party should be exempted from some or all of the terms of a collective agreement on a case by case basis.” I agree with this argument in the case of a s 32(2) extension, however, to determine the exemption applications of a majority of the employers in an industry *on a case by case basis* is neither practical nor rational (see discussion about exemptions in chapter 5 para 4).

³⁰⁹ In *Chamber of Mines of South Africa v AMCU and Others* [2014] 3 BLLR 258 (LC) para 54, the court held that where a trade union enters into a collective agreement on behalf of its members and contracts out of the right to strike over issues dealt with in the agreement and where a strike over issues regulated in the agreement is prohibited, this is obvious and patently justifiable. This justification, however, applies in the case of the trade union and its members that are parties to the agreement and the court still needed to consider whether the justifiability applied in respect of non-unionised employees.

³¹⁰ Hofman (2009) *Obiter* 201, with reference to *Mzoku v Volkswagen SA (Pty) Ltd* (2001) 22 ILJ 1575 (LAC) para 55.

³¹¹ This was stated in the minority judgment of O’Regan J and Cameron AJ in *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 para 69.

In *Chamber of Mines of South Africa v AMCU and Others*,³¹² the Labour Court found that by extending the collective agreement to non-unionised employees in terms of section 23(1)(d), the principle of majoritarianism was being served and the interests of the minority were being protected by the constraints imposed on the extent to which the agreement might be extended. This may hold true for section 32(2) of the LRA, but these same constraints are not present in section 32(5), nor does it serve the principle of majoritarianism. In this regard, it appears that the extent of the limitation of the infringed rights by section 32(2) may be justifiable, but not in the case of section 32(5).

The Labour Court also found that “functional collective bargaining” requires that peace obligations agreed to by a majority should be capable of extension to the minority of employees that are non-unionised and that this is not only compatible with freedom of association but is also recommended. I submit that the same does not hold true where a minority extends its peace obligations to the majority and this would not constitute functional collective bargaining or be compatible with freedom of association.³¹³

One thing that I must concede is that these rights are not denied in their entirety, where sectoral level bargaining is concerned. As remarked by Cheadle, those affected may join bargaining councils and apply for exemptions.³¹⁴ However, this begs the question, in the case of section 32(5) extensions, why a majority of an industry should be required to apply for exemptions and join a bargaining council where only a minority of stakeholders are bargaining.

By making an extension possible where the agreement does not enjoy majority support, in light of the limitations, section 32 has not been tailored in narrowly enough.³¹⁵ As already explained above, in my view the “safeguard” of the Minister’s involvement is also cold comfort. Whilst a review application of this decision can be brought, it is illogical that the majority of an industry is required to have recourse to litigation, after the extension, to seek relief.

³¹² [2014] 3 BLLR 258 (LC) para 57.

³¹³ *Idem* para 69.

³¹⁴ Cheadle (2005) *LDD* 153.

³¹⁵ Woolman & Botha (2014) 34-82. In *Chamber of Mines of South Africa v AMCU and Others* [2014] 3 BLLR 258 (LC) para 70, one of the reasons that the Labour Court held that the limitation of the right to strike in s 23(1)(d) of the LRA is narrowly tailored is because the trade unions represent a majority of the workers.

5.3. *Relation between the Limitation and its Purpose*

There is certainly some rational connection between the extension of a collective agreement in terms of section 32(2) of the LRA and the limitation of the infringed rights, at least in respect of sectoral level bargaining. For example, the objective of extending agreements is to ensure industrial peace in the industry during the currency of the agreement. This naturally leads to the right to strike and right to engage in collective bargaining being limited over those issues contained in the agreement over that period. Or in the case where a bargaining council agreement provides that artisans shall earn a specific minimum amount per hour. If the agreement is extended, it makes sense that a trade union and employers' organisation, which do not belong to the council, cannot together agree on a lower minimum wage for artisans in order to under-cut their competition. In this regard, the limitation of their right to engage in collective bargaining is rationally connected to the purpose of extensions. However, even where the limitation is the only way to achieve the purpose, where the limitation of the right is particularly serious, it may still be disproportionate to the benefit of achieving the purpose.³¹⁶

5.4. *Less Restrictive Means*

There are certainly less restrictive means to achieve the objectives of sectoral level bargaining and to extend collective agreements than in terms of section 32(5) of the LRA. The answer lies in removing section 32(5) and only extending collective agreements where the majority requirements in sections 32(2) and 32(3) are met. This will ensure that the infringed rights are limited no more than they need be.

5.5. *Principle of Democracy*

I have expressed my views on how the principle of majoritarianism has been flouted by section 32(5) and throughout this chapter, I have stressed my point, *ad nauseam*, that the limitation of the infringed rights by section 32 of the LRA are not justifiable or reasonable where there is not majority support in the industry for the collective agreement and its extension. In chapter 2, I dealt with the principle of democracy. I pointed out that this does not only refer to merely the concept of majority-rule or winner-takes-all, but rather that an inclusive democratic decision making process should respect and uphold the fundamental

³¹⁶ Rautenbach & Malherbe (2009) 352.

rights of all affected parties. Where a single outcome must be reached, then at some point the debate will need to come to an end and a solution settled on which is agreeable to as many of the affected parties as possible.³¹⁷ Proper deliberation, the equal treatment of all participants and the opportunity for each participant to contribute its viewpoint should produce a better outcome. Where only a minority of the employers and employees in an industry belong to a bargaining council, there has not been participation in the deliberation process, over the terms of the collective agreement or over the decision to extend, by most affected parties in the industry. Until the bargaining council is more representative, it should not be able to extend such its agreements.

As explained above, although there is a rationale behind the principle of extensions, there is not a rationale for an extension where the will of a minority is imposed on a majority and section 32(5) is therefore not consistent with an open and democratic society based on human dignity, equality and freedom. The many divergent interests across an industry are not being taken into account, nor is the need to promote democratisation of the workplace and sectors. Whilst the will of the majority, on its own, is not reason to justify a limitation of the infringed rights, when considering that principle of democracy and what this entails in an open and democratic society, section 32(2) of the LRA is far more likely to pass constitutional muster than section 32(5).

5.6. *International Law*

Insofar as considerations of international law and South Africa's obligations as a member state of the ILO are concerned, as discussed in chapter 3, Recommendation 91 does indeed support the extension of collective agreements where the parties are merely sufficiently representative. However, this is not in itself determinative because firstly, recommendations are not binding and, secondly, the CFA has expressed concern where minority organisations have extended collective agreements to bind majority organisations in the face of opposition by the latter.³¹⁸ Furthermore, the ILO standards and its supervisory committees have left it up to member states to determine an appropriate level or levels of bargaining. Therefore South Africa's international obligations, in my view, do not alter my findings above.

³¹⁷ *Democratic Alliance & Another v Masondo* 2003 (2) SA 413 (CC) para 43.

³¹⁸ ILO Digest (2006) para 1052.

5.7. *Proportionality*

There are no competing constitutional rights at play here. In essence, we are weighing up the constitutional labour relations rights and freedom of association with policy choices of the legislature. There are, rather, competing policy choices in that, in the case of section 32(5), the principle of majoritarianism is in conflict with the promotion of sectoral level bargaining. Any benefits of extending collective agreements in terms of section 32(5) are simply outweighed by the negative implications. In my view, the inroads by section 32 into the infringed rights are substantial and the grounds of justification, where section 32(5) is concerned, are insufficient.

6. **Conclusion**

In this chapter I have argued for the deletion of section 32(5) of the LRA because it seems to infringe the right to fair labour practices, to engage in collective bargaining, to strike and freedom of association. If parties to a bargaining council wish to have their collective agreement extended, however are not able to meet the requirements in section 32(2), then it is up to them to organise themselves better and recruit more members so that their representivity increases. If any group is to be overridden, then in the context of collective bargaining, it should not be the collective interests of the majority that are overridden to give heed to the interests of a small few. Majoritarianism and democratisation of the workplace are supported by the LRA and this leads to orderly collective bargaining. Where the parties to the council are not representative of a majority of the industry, the “discretion” provided for in section 32(5) does not act as a safeguard for the rights of non-parties and ultimately, in my opinion, blindly promotes sectoral level bargaining to the detriment of a host of other objectives of the LRA.

Given the importance of the extension mechanism to the system of sectoral level bargaining, I do not believe that sections 32(2) and 32(3) of the LRA unreasonably or unjustifiably limit the labour relations rights and freedom of association because they are compatible with principles of democracy. However, because there is no constitutional right for parties to engage in collective bargaining at sectoral level, there seems to be a lack of rationale for allowing a minority in an industry to dictate to the majority, and in the process infringing the labour relations rights and freedom of association of that majority. Rights

should not be limited by policy choices where less restrictive means exist to promote that policy choice.

The objective of promoting sectoral level bargaining can be achieved by the provisions of sections 32(2) and (3) of the LRA. By deleting section 32(5), section 32 will be more consistent with the Constitution. This would be a less invasive limitation of the infringed rights and would strengthen the relationship between the extension mechanism provided in the LRA and the purpose it is meant to achieve. As a result of wider acceptance and support for the collective agreement, there is increased likelihood that the extended agreement will be honoured and there will be less compliance related issues.

CHAPTER 7 FOREIGN POSITION

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1. Introduction

Our courts may take into account the practices in other countries when interpreting and applying South African laws.³¹⁹ The extension of collective agreements to non-parties to cover an entire industry is not unique to South Africa. The nature of this mechanism and the levels of bargaining differ from country to country. The extension of collective agreements is generally a common practice in member states of the European Union and a practice which has been around for roughly the last century, wavering in some countries from time to time.³²⁰

In this chapter, I begin by providing a brief description of the international history of extending collective agreements and an overview of the various positions adopted by countries worldwide. I will then explain the position in Portugal and Germany in greater detail and describe some of the recent developments that have taken place in these two countries insofar as their extension mechanisms are concerned. I will thereafter discuss some possible lessons which we can learn from these examples. It must be remembered that the social dynamics South Africa are markedly different from those typically present in European countries.³²¹ Nevertheless, sectoral level bargaining and the extension of

³¹⁹ S 39(1)(a) and (b) of the Constitution, 1996.

³²⁰ Ahlberg & Bruun "The Future of Extension of Collective Agreements in Estonia" (2009) 6 & Hendy "McGowan and Collective Bargaining in Ireland" (2014) 38.

³²¹ Du Toit (2007) *ILJ* 1424 states that labour markets in Southern Africa are "characterised by massive poverty, 'stark income inequality'" high unemployment, low levels of skills, widespread HIV/AIDS, labour migration and a vast informal sector.

collective agreements is a common feature of collective bargaining in the European Union and for this reason, the situation there is worth considering.

2. Overview

2.1. Historically

In the mid-nineteenth century, most governments and employers did not recognise trade unions. This started to change towards the end of the nineteenth century as trade unions grew in strength. With the strengthening of trade unions, collective bargaining began to play a more central role in industrialised economies.³²² The first country to start extending collective agreements was New Zealand in 1890s. Their legislature permitted a system whereby arbitration award, which could be equated to a collective agreement, could be binding made generally applicable to all employers in an industry.³²³ Australia followed shortly thereafter with a similar system.³²⁴

In 1918, Germany introduced legislation which provided for the extension of collective agreements.³²⁵ By the start of World War II, there were eleven countries in Europe where the extension of collective agreements was legislated.³²⁶ Following the war, most of continental and southern European countries continued with a system of administrative extension forming an integral part of their collective bargaining, whereas Anglo-Saxon and Scandinavian countries tended to move away from extending collective agreements.³²⁷

In the United States of America, the National Industrial Recovery Act of 1933 made provision for codes which regulated terms and conditions of employment and standardised conditions of employment throughout whole industries.³²⁸ This Act also allowed employers and workers to conclude collective agreements which, once approved by the President, Certain collective agreements could be declared generally binding once approved by the

³²² Bamber & Sheldon (2004) 513.

³²³ Hamburger (1939) *ILR* 157.

³²⁴ *Idem* 159-161. Also see Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 361. According to Creighton (2011) *ILJ* 116, the system of conciliation and arbitration that the Conciliation and Arbitration Act of 1904 established was highly collectivised and highly centralised.

³²⁵ Hamburger (1939) *ILR* 162.

³²⁶ Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 367.

³²⁷ *Ibid.*

³²⁸ Hamburger (1939) *ILR* 164.

President.³²⁹ From 1934, Canadian also adopted a similar system of codes that could be declared generally binding.³³⁰

2.2. Modern Era

As already mentioned in earlier chapters, the existence and frequency of use of extension mechanisms is largely influenced by the level at which collective bargaining takes place in a country. In Europe, 17 out of 26 countries have systems which provide for the extension of collective agreements.³³¹ The nature of the mechanism or process differs from country to country, some allowing for automatic or quasi-automatic extension of collective agreements, for example in Austria, Belgium, Spain, Finland, France, Luxembourg and Greece, whereas in other European countries, a request or demand by the social partners is required, such as in Portugal, the Netherlands and Lithuania.³³² In some European countries, as in South Africa, a decision by the ministry of labour is required in order to extend the collective agreement.³³³ In many of the countries, the extension is dependent on certain conditions or thresholds of representivity being met, for example Greece, Latvia, Slovenia and Germany.³³⁴

Since the mid-1980s, collective bargaining in New Zealand and Australia has become far more decentralised³³⁵ with the abolishment of the arbitration award system.³³⁶ Collective bargaining in Canada, the United States, the United Kingdom and Japan nowadays takes place primarily at enterprise level³³⁷ and collective agreements are not extended to cover sectors or industries.³³⁸ In Japan, there are extension mechanisms however they are rarely used.³³⁹

³²⁹ *Idem* 163.

³³⁰ *Idem* 165.

³³¹ Du Toit (2007) *ILJ* 1415.

³³² Eurofound Background Paper "Extension of Collective Bargaining Agreements in the EU" (2011) 2.

³³³ *Idem* 1.

³³⁴ *Idem* 1 & 2.

³³⁵ Bamber & Sheldon (2004) 546.

³³⁶ According to Creighton (2011) *ILJ* 116, the 1990s saw a shift towards collective bargaining at enterprise level in Australia.

³³⁷ Bamber & Sheldon (2004) 516.

³³⁸ Traxler "Collective Bargaining: Levels and Coverage" (1994) 170 & 178. Hepple (2005) 252 refers to liberal market economies (LMEs) and co-ordinated market economies (CMEs), with the USA, Canada, Britain, Australia and New Zealand being used as examples of LMEs and Germany, Japan, Switzerland, the Netherlands, Belgium, Sweden, Norway, Denmark, Finland and Austria being referred to as CMEs.

³³⁹ Traxler "Collective Bargaining: Levels and Coverage" (1994) 179.

3. Portugal

Previously, the extension of collective agreements in Portugal was common practice and collective bargaining took place mostly at branch (sectoral) level.³⁴⁰ Collective agreements could be extended by the Ministry of the Economy and Employment publishing collective agreements in its official bulletin. The agreement would then be legally binding. Extension decrees are issued by the Ministry at the request of the signatories to the collective agreements.³⁴¹ There was previously no requisite criteria for extensions and the Ministry could extend all collective agreements upon request by employers or trade unions.³⁴² The system was one of quasi-automatic extension. This, together with the fact that collective agreements would remain valid until a new agreement was concluded resulted in high levels of coverage.³⁴³ Companies in the Portuguese economy are typically smaller companies and therefore employers are particularly motivated to eradicate unfair competition amongst firms³⁴⁴ resulting in strong support for extensions by both trade unions and employers' organisations.³⁴⁵

In 2011, due to the economic crisis, Portugal sought a bailout from the European Union and the International Monetary Fund. As a result, Portugal was required to sign a Memorandum of Understanding ("MoU") with the Troika (which is comprised of the European Commission, the European Central Bank and the International Monetary Fund).³⁴⁶ The MoU regulated labour market policy and aimed to reduce labour costs and promote wage flexibility for individual enterprises.³⁴⁷ The MoU also obligated Portugal to define criteria for the extension of sectoral collective agreements to those not affiliated to the negotiating organisations. Portugal gave effect to this obligation by implementing a Resolution of the Council of Ministers (90/2012)³⁴⁸ in October 2012. In terms of this regulation, collective agreements could only be extended if the firms represented by the employers' organisations employed at least 50% of the employees in the industry, region

³⁴⁰ Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 375.

³⁴¹ Eurofound Background Paper "Extension of Collective Bargaining Agreements in the EU" (2011) 9.

³⁴² Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 375.

³⁴³ Tavora & Gonzalez "The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: Portugal" (2014) 6.

³⁴⁴ Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 375.

³⁴⁵ *Idem* 378.

³⁴⁶ *Ibid.* Hepple (2005) 11 refers to a comment by a former chief economist of the World Bank where he said that "the IMF has fought for what is euphemistically called 'labour market flexibility', which sounds like little more than making the labour market work better but as applied has simply been a code name for lower wages and less job protection."

³⁴⁷ Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 378.

³⁴⁸ Resolução do Conselho de Ministros No. 90/2012.

or occupation to which the agreement applies.³⁴⁹ Resolution 90/2012 did, however, permit an exemption where the extension request excluded micro-small and medium-sized enterprises.³⁵⁰

Despite the MoU requirement that changes to the labour market should be the subject of consultation amongst the social partners, the Portuguese government implemented this criteria unilaterally.³⁵¹ The new regulation was met with great hostility, even from employers' organisations who considered the criteria to be too restrictive.³⁵² Unsurprisingly, trade unions were also against the new representativeness criteria.³⁵³

Alongside the stricter criteria for extensions, attempts were made by the government to bring about "organized decentralization" to promote enterprise level bargaining. In 2012, a modification to the Labour Code was introduced (Law 23/2012) in terms of which workers' councils were able to negotiate at enterprise level where the firm employed at least 150 employees (compared with 250 employees, as previously required), subject to delegation by trade unions.³⁵⁴

The promotion of company level bargaining and the introduction of the representativeness criteria appear to have had severe paralysing effects on sectoral bargaining in Portugal.³⁵⁵ In most sectors, firms belonging to the employers' organisations negotiating the agreement do not employ 50% of the employees in the sector, which made extensions unlikely.³⁵⁶ After 2011, there was a significant decline in the number of collective agreements extended and a dramatic fall in bargaining coverage to record lows of less than 10%.³⁵⁷

³⁴⁹ Tavora & Gonzalez "The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: Portugal" (2014) 22.

³⁵⁰ ILO "Tackling the Jobs Crisis in Portugal" (2014) 112.

³⁵¹ Tavora & Gonzalez "The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: Portugal" (2014) 22.

³⁵² Pedroso "Portugal and the Global Crisis: The Impact of Austerity on the Economy, the Social Model and the Performance of the State" (2014) 18.

³⁵³ *Ibid.*

³⁵⁴ ILO "Tackling the Jobs Crisis in Portugal" (2014) 68 & 69.

³⁵⁵ Pedroso "Portugal and the Global Crisis: The Impact of Austerity on the Economy, the Social Model and the Performance of the State" (2014) 18 & 19. Muller "The King is Dead – Long live the King: what follows after the Troika?" (2015) 21 states that in Portugal, the number of both sectoral and company level agreements fell after the crisis began and within a year, the number of workers covered by collective agreements had fallen by three quarters from 1.2 million in 2011 to no more than 300 000 in 2012.

³⁵⁶ Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 379.

³⁵⁷ *Ibid.*

Following the growing criticism received from trade unions and employers' organisations alike, the Portuguese government passed Resolution 43/2014³⁵⁸ in June 2014 in terms of which the representativeness criteria was amended so that extensions would be possible if the signatory employers' organisations' members employed 50% of the employees in the sector *or* at least 30% of the signatory employers' organisation's members are small, medium and micro-companies.³⁵⁹ As mentioned above, because companies in Portugal tend to be typically small and medium sized, this meant that most employers' organisations could conclude collective agreements capable of extension.³⁶⁰ As this is a recent amendment, the results on the state of collective bargaining in Portugal largely remain to be seen³⁶¹ and it is difficult to generalise when there are "multiple realities within and between these sub-industries" that "add to the complexity of firm relations and interest representation at the sectoral level,"³⁶² however there has been some evidence of an inversion of the declining trend of industry agreements in 2014.³⁶³

According to Bruun,³⁶⁴ the restrictions on the extension system in Portugal probably undermine the whole system of voluntary collective bargaining and might be in violation of ILO Convention 98.³⁶⁵ For the reasons already provided in chapter 3, I do not agree that regulation in this manner is a violation of Convention 98. It is also difficult to analyse the state of collective bargaining following the austerity measures because the Portuguese government had, already in 2003, begun a process of regulatory change which favoured the employer side in collective bargaining.³⁶⁶ One must also be wary of assessing possible contributing factors to a decline in collective bargaining in isolation. What does seem clear though is a willingness to abandon strict representativeness criteria for the sake of increasing the number of extensions of collective agreements.

³⁵⁸ Resolução do Conselho de Ministros No. 43/2014.

³⁵⁹ Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 380 & Tavora & Gonzalez "The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: Portugal" (2014) 24.

³⁶⁰ Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 380.

³⁶¹ *Ibid.*

³⁶² Tavora & Gonzalez "The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: Portugal" (2014) 36.

³⁶³ *Idem* 37. Tavora & Gonzalez "The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: Portugal" (2014) 38 state that when employers' organisations know that collective agreements concluded on behalf of their members will be extended to all other companies, the employers' organisations may be more inclined to conclude such collective agreements.

³⁶⁴ Bruun "Social Policy and Labour Law during Austerity in the European Union" (2015) 10.

³⁶⁵ C98 Right to Organise and Collective Bargaining Convention, 1949.

³⁶⁶ Tavora & Gonzalez "The Reform of Joint Regulation and Labour Market Policy during the Current Crisis: Portugal" (2014) 52.

4. Germany *i*

Collective agreements are extended in Germany by the Ministry of Labour and Social Affairs, however certain conditions must first be fulfilled. The parties to the agreement must apply for the extension, the extension must be in the public interest and four of the six committee members (this is the committee members that decide on the extension, consisting of three trade unionists and three employer representatives) must be in favour of the extension.³⁶⁷ Importantly, the position was that the employer parties that signed the collective agreement needed to employ at least 50% of the workers in the sector or area covered by the agreement.³⁶⁸ Since 1999, the Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales (BMAS)) has been authorised to declare conditions of employment to be generally binding instead of the committee.³⁶⁹

In Germany, collective bargaining has typically taken place at sectoral level, however since around the mid-1980s, there has been increased decentralisation towards enterprise level bargaining, in particular over working hours, with works councils being able to effect some amendments to sectoral agreements.³⁷⁰ There has only been moderate use of the German extension mechanisms.³⁷¹ Of the 64 300 collective agreements registered with the BMAS in 2008, only 640 had been extended.³⁷² The WSI Discussion Paper No. 171 shows how there was a steady decline in the extension of collective agreements in Germany between 1991 and 2009.³⁷³

The Act on the Promotion of Collective Bargaining Autonomy was introduced in 2014³⁷⁴ to, as its name illustrates, to promote collective bargaining and the state's role in wage-

³⁶⁷ Eurofound Background Paper "Extension of Collective Bargaining Agreements in the EU" (2011) 6 referring to Article 5 of the Collective Agreements Act of 1949.

³⁶⁸ Eurofound Background Paper "Extension of Collective Bargaining Agreements in the EU" (2011) 6. Something noteworthy to point out is that the German Federal Constitutional Court has confirmed that, while the extension of collective agreements does impose restrictions on a firm's freedom to decide, this should not be considered as a breach of a negative freedom of association because there is no obligation on the firm to become a member of a particular organisation (Schulten *et al* "The Role of Extension for the Strength and Stability of Collective Bargaining in Europe" (2015) 366).

³⁶⁹ *Idem* 6.

³⁷⁰ Traxler "Collective Bargaining: Levels and Coverage" (1994) 175 & 176.

³⁷¹ *Idem* 178.

³⁷² Eurofound Background Paper "Extension of Collective Bargaining Agreements in the EU" (2011) 6.

³⁷³ Bispinck *et al* "German Collective Bargaining in a European Perspective: Continuous Erosion or Re-Stabilisation of Multi-Employer Agreements?" (2010) 5.

³⁷⁴ Gesetz zur Stärkung der Tarifautonomie (Tarifautonomiestärkungsgesetz), 2014.

setting.³⁷⁵ This act includes mechanisms to simplify the extension of sectoral wage agreements and the requirement, that the agreement covers more than 50% of the employees in the sector in order to be declared generally binding, was removed. The only pre-requisite for extension is that it must be in the public interest and that the agreement should have “predominant importance”.³⁷⁶ It remains to be seen if the removal of the 50% threshold will increase the number of extended collective agreements but this does demonstrate a willingness to apply more flexible criteria in the hope that there will be more extensions.

5. Decentralisation

The landscape for collective bargaining worldwide has been changing since the 1970s as a result of structural changes in the workplace and the labour market, commonly referred to as “globalisation”.³⁷⁷ With large corporations expanding their global footprint, the relationship between employer and trade union has become distorted. As a result of this expansion, the employer bears more power, however the ability of trade unions to organise is affected and consequently trade unions lose power.³⁷⁸

Accompanying globalisation is a trend of decentralisation in countries like Austria, Denmark, Finland, Germany, Italy, the Netherlands, Norway and Sweden which have predominantly intersectoral or sectoral level bargaining.³⁷⁹ Decentralised collective bargaining is favoured by mostly employers and, with the strengthening of employers as they form multi-national conglomerates, trade unions find it harder to resist and advocate for centralised bargaining³⁸⁰. According to Bamber and Sheldon, there is a trend towards multiple levels of bargaining, probably because there are advantages and disadvantages which accompany different levels of bargaining.³⁸¹

³⁷⁵ Aumayr-Pintar *et al* “Developments in Working Life in Europe: EurWORK annual review 2014” (2014) 17.

³⁷⁶ Aumayr-Pintar *et al* “Developments in Working Life in Europe: EurWORK annual review 2014” (2014) 17 & 18 & Schulten *et al* “The Role of Extension for the Strength and Stability of Collective Bargaining in Europe” (2015) 370.

³⁷⁷ Du Toit (2007) *ILJ* 1406.

³⁷⁸ Du Toit (2007) *ILJ* 1410. Hepple (2005) 253 stresses that a “universal cause-and-effect relationship between globalisation and deregulation has not been established.”

³⁷⁹ Schulten “Changes in National Collective Bargaining Systems since 1990” (2005).

³⁸⁰ Du Toit (2007) *ILJ* 1416.

³⁸¹ Bamber & Sheldon (2004) 547.

6. Possible Lessons for South Africa

In Germany there has been a move away from a strict extension mechanism and in Portugal, a similar relaxation of criteria has occurred after widespread disgruntlement following the restrictive criteria imposed as an austerity measure. Portugal's decline in the number of collective agreements must be assessed with decentralisation, and the fact that it may be multiple influencing factors, in mind. Using Germany as an example, coupled with the disgruntlement in Portugal over the decreasing rate of generally applicable collective agreements, there appears to nevertheless still be favour for the extension of collective agreements in Europe and acceptance that if collective bargaining is to be promoted at sectoral level, then criteria that impedes extensions (such as representativeness of 50% of the workforce) should be done away with. This supports retaining section 32(5) of the LRA as it is and supports Du Toit's argument that if one challenges section 32(5) of the LRA, then a challenge ought equally be mounted against section section 1(d)(ii) of the LRA.³⁸²

I must, however, reiterate that the promotion of sectoral level bargaining is not required by the Constitution³⁸³ and therefore the support for the extension of collective agreements in certain European countries is neither here nor there when it comes to an assessment of the *constitutionality* of section 32(5) of the LRA. If decentralisation becomes unavoidable due to globalisation, then it remains to be seen whether the legislator will choose to abandon its intent to promote sectoral level bargaining or whether it will remain steadfast and rely more ardently on the flexibility that section 32(5) provides for extensions. The rationale behind the Troika's insistence on a more regulated labour market is to reduce labour costs and promote flexibility for companies. This raises questions of policy and whether South Africa can benefit from keeping wages lower to bolster employment levels, or whether an approach aimed at redressing vast income inequality is more necessary.³⁸⁴

7. Conclusion

From the above we see that countries worldwide have been extending collective agreements for some time now and the principle of extensions is generally accepted, at

³⁸² Du Toit (2014) *ILJ* 2644.

³⁸³ The Constitution, 1996.

³⁸⁴ These are questions which are pivotal to the ongoing debate about the introduction of a national minimum wage.

least in Europe, particularly when bargaining takes place at industry level. Countries, like Germany, that require majority representivity by the signatory employer parties may soon abolish such criteria in order to encourage the extension of collective agreements across industries. This is supported by the ILO Recommendation 91 endorsement that the parties should be “sufficiently representative”, as opposed to requiring representivity of a majority of employers or employees in the industry.

The purpose of the brief analysis in this chapter is to understand the global context within which South Africa’s extension mechanism lies. If South Africa’s legislative framework placed a premium on enterprise level bargaining, then the lack of regulation of extensions in countries like the USA, the United Kingdom, Canada, Australia and New Zealand could be relied upon in support of an argument that extension criteria in South Africa should be strict and extensions only permitted where there is majority support for the collective agreement. However, South Africa’s legislation aims to promote sectoral level bargaining and therefore the situation in Europe is instructive and supports the flexibility provided by section 32(5) of the LRA, but does not assist in determining whether section 32(5) passes constitutional muster. The effects of the trends of decentralisation and globalisation on the extension of collective agreements remain to be seen in South Africa.

CHAPTER 8 CONCLUSION

In this dissertation, I examined whether there is merit in the FMF's initial allegations that section 32(5) violates the principle of majoritarianism and infringes certain rights in the Bill of Rights. The principle of democracy was discussed herein in order to assist in the limitations analysis and to explain why I submit that the extension of collective agreements should be preceded by a democratic process.³⁸⁵ The extension mechanism also needed to be evaluated with the absence of a duty to bargain in mind.³⁸⁶ Where there is a voluntary system of bargaining, it is no wonder that the imposition of the terms of a collective agreement on non-parties is so controversial, in particular where non-parties have deliberately not joined the bargaining council where the agreement was concluded.

ILO Recommendation 91 supports the extension of collective agreements, even where parties are only sufficiently representative, as opposed to representative of the majority of the affected parties. Whilst Recommendation 91 condones the representivity criteria³⁸⁷ in section 32(5) of the LRA, in the commentary by the CFA, we see concerns expressed over minority organisations binding majority organisations to collective agreements. The ILO standards and the findings of the supervisory bodies leave it completely up to member states to decide what the appropriate level of bargaining is.³⁸⁸ I was not able to gather any guidance from the ILO principles as to what could be regarded as undermining collective bargaining and, given that there is no prescription as to the level of bargaining, there is similarly no guidance as to what will undermine collective bargaining at sectoral level. In summary, the ILO standards and committees do not provide much direction, but I do find support for the principle of majoritarianism in the findings of the CFA and perhaps also some intimation that sectoral bargaining need not necessarily be treated as sacrosanct.

³⁸⁵ See discussion about the principle of democracy in chapter 2 para 2.

³⁸⁶ See discussion in chapter 2 para 3 where it was pointed out that, whilst there has been some uncertainty, it seems unlikely that the Constitutional Court would be willing to confirm a constitutional duty to bargain.

³⁸⁷ The criteria that parties to the bargaining council must be sufficiently representative within the registered scope of the bargaining council.

³⁸⁸ See discussion of the findings of the CFA and the Committee of Experts in chapter 3 para 3.

Extensions do serve some important purposes, for example preventing unfair competition by firms and the under-cutting of trade union members by non-unionised workers. Sectoral level bargaining allows members of an industry to regulate their own labour relationships and the extension of their collective agreements most certainly provide uniformity, encourage peace and stability in the industry and, in general, promote sectoral level bargaining.³⁸⁹

Majoritarianism is a policy choice and is a theme that runs throughout the LRA. Section 32(5) of the LRA is clearly not in keeping with the principle of majoritarianism and, whilst majoritarianism is not an inflexible rule, it most certainly leads to orderly collective bargaining and towards ensuring fair labour practices.³⁹⁰ I also explained how the “safeguards” of the ministerial discretion in section 32(5) do not seem to be having the desired effect and, upon closer inspection, the Minister’s discretion in any case seems to be incredibly limited and capable of manipulation.³⁹¹

I found that section 32(5) of the LRA does infringe the right to fair labour practices, to engage in collective bargaining, to strike and freedom of association.³⁹² I also found that these limitations were not justifiable in terms of section 36 of the Constitution and that there are less restrictive means to extend collective agreements by only permitting extensions in terms of section 32 of the LRA, which is in keeping with democratic principles. Section 23 of the Constitution does not specify at what level bargaining must take place. Sectoral bargaining is a policy choice of the legislature and we see it promoted in the LRA. I argued that rights should not be limited by policy choices where less restrictive means exist to promote that policy choice.³⁹³ The objects of the LRA, can therefore, still be served by section 32(2) of the LRA and thus a declaration that section 32(5) is unconstitutional does not necessitate that section 1(d)(ii) also be challenged.³⁹⁴

³⁸⁹ The purpose of the extension mechanism was set out in chapter 5 para 2.

³⁹⁰ *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC) para 19.

³⁹¹ See discussion of reviews of the Minister’s extension decisions where the decision has been set aside in chapter 4 para 5.

³⁹² See chapter 6 para 4.

³⁹³ The justifiability of the infringement, or lack thereof, was discussed in chapter 6 para 5.

³⁹⁴ In chapter 6 para 2, I explain why I disagree with Du Toit where he contends that a challenge to the constitutionality of section 32(5) of the LRA requires a simultaneous challenge to the constitutionality of section 1(d)(ii) of the LRA.

I explained in chapter 7 how the extension of collective agreements is frequently seen in countries where bargaining takes place at industry level or at a central level, such as in many of the European Union member states. Whilst there appears to be looming threat to centralised collective bargaining in the form of globalisation and accompanying trends of decentralisation,³⁹⁵ if we take Portugal and Germany as examples, there is a certain degree of resilience being seen in the extension mechanism where sectoral level bargaining is favoured.³⁹⁶ In order to ensure that collective agreements continue to be extended, or to increase the number of extensions, these two countries have recently relaxed the strict requirement of 50% representivity. Therefore, despite my findings that section 32(5) is unconstitutional and breaches the principle of majoritarianism, an argument to retain section 32(5) seems to be in line with the position in other countries which share the policy of sectoral level bargaining.³⁹⁷

My suggestion is that section 32(5)(a) and (b) of the LRA should be deleted, leaving only an extension where the parties in the bargaining council are representative of the majority of the industry. It would also be preferable if sections 32(3)(c) and (d) are amended to so that the representivity of the parties to the *agreement* and not the parties to the *bargaining council* (in other words to exclude dissenters) is taken into account.³⁹⁸ The deletion of the Minister's over-arching discretion will also then be curtailed to the less subjective factors set out in section 32(3) of the LRA.³⁹⁹ I do believe, however, that the provisions in section 32(5)(c) and (d), relating to an opportunity for non-parties to submit comments, should be retained and form part of the process for an extension of a collective agreement in terms of sections 32(2) and 32(3) of the LRA, however the parties to the *bargaining council* should rather be required to assess the comments and decide whether any amendments to the collective agreement are required.

If a middle ground must be settled on, rather than the complete deletion of sections 32(5)(a) and (b) of the LRA, then I suggest that a similar exception to the one introduced recently in Portugal is allowed, namely, where the signatory parties to the collective agreement are not representative of a majority of the industry, but 30% of the employers'

³⁹⁵ See brief discussion of globalisation and decentralisation in chapter 7 para 5.

³⁹⁶ See chapter 7 paras 3 & 4.

³⁹⁷ Lessons which South Africa can learn from the international position were addressed in chapter 7 para 6.

³⁹⁸ Whilst preferable, this was only peripheral to challenge raised in this dissertation.

³⁹⁹ As mentioned in chapter 4 para 4, it is preferable for the Minister to have as little interference as possible and, in addition, previous challenges to the exercise of the Minister's discretion have highlighted concerns about her objectivity and rationality.

organisations' members are small, medium and micro-companies, then the collective agreement will be capable of extension. No doubt the issues raised in the abandoned constitutional challenge of the FMF will at some point come before our courts again and it will be interesting to see the court's assessment.

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