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In searching for the reasons for the limited pool of available women judges, soft-law questions need to be explored, such as investigating whether the Judicial Service Commission has indeed created an environment conducive to women making themselves available to serve on the judiciary, and establishing how women could be accommodated<sup>170</sup> to effect true or substantive equality in what remains a male-dominated environment. In this regard, special attention should be paid to measures that would make it easier for women to succeed professionally without having to sacrifice their femininity and distance themselves from their own gender.<sup>171</sup>

We could also follow the example of the US-based National Association of Women Judges (NAWJ), the organisation that founded the International Association of Women Judges,<sup>172</sup> and spend time drafting realistic strategies for developing the judiciary pipeline, with a particular focus on increasing of the number of women judges. Such strategies should keep pace with new, emerging trends, including technology and shifts in law education, and could include collaborating with law schools on initiatives<sup>173</sup> to unlock the judiciary as a career option for women to the same extent as for men.

Finally, in an effort to establish a new leadership style in the judiciary that is not gender-bound, but draws on collective wisdom, collective well-being, collective power and collective leadership,<sup>174</sup> Netshitangani's call for the application of the ubuntu-as-unity philosophy could be of value.<sup>175</sup>

True, substantive gender equality cannot, as argued above, be achieved by legislation alone — neither in employment in general, nor in the judiciary in particular. True equality requires a real level playing field, without invisible social barriers impeding the advancement of some. By government's own admission in the text of the 2012 Women Empowerment and Gender Equality Draft Bill, mainstreaming gender equality

'involves neither the assimilation of women into men's ways, nor the maintenance of dualism between women and men, but establishing a new and positive form which becomes the mainstream and in which both men and women ... have an important role to play. Thus a change in the traditional role of men, as well as the role of women in society and in the family, is needed to achieve complete equality between men and women, and ... should be an integral part of the moral fibre of society'.<sup>176</sup>

<sup>170</sup> CGE Investigative Report n 57 above 43.

<sup>171</sup> Ellemers et al n 125 above 328.

<sup>172</sup> NAWJ *About NAWJ* <https://www.nawj.org/about-nawj>.

<sup>173</sup> *ibid*.

<sup>174</sup> Netshitangani n 120 above 199.

<sup>175</sup> *ibid* 208.

<sup>176</sup> See [https://www.gov.za/sites/default/files/35637\\_gen701\\_0.pdf](https://www.gov.za/sites/default/files/35637_gen701_0.pdf).

## The Extension of Bargaining Council Agreements: What Guidelines Can South Africa Gain from the International Labour Organisation?

MYNIE KRIEK\*  
STEFAN VAN ECK\*\*

### ABSTRACT

The extension of bargaining council agreements to non-members and minority parties is not a new phenomenon in South African labour law. Section 32 of the Labour Relations Act 66 of 1995 (LRA) provides that the Minister of Labour<sup>1</sup> has an obligation to extend collective agreements if the majority parties to a bargaining council so request. This provision has been amended on two occasions and it has also been contested in *Free Market Foundation v The Minister of Labour & others* (2016) 37 *ILJ* 1638 (GP). This contribution examines the question whether, measured by international standards, there is an inherent defect in s 32 of the LRA. It is recommended that the LRA should be amended to comply with all the guidelines of the International Labour Organisation.

### I INTRODUCTION

The extension of collective agreements concluded at centralised bargaining forums has been a prominent feature of labour legislation in South Africa since the introduction thereof in the early 1920s.<sup>2</sup> The effect of the extension provision has always been to protect centralised collective bargaining by extending the scope and application of collective agreements to non-party employers, minority unions, non-union members and those who do not agree with the contents of the collective agreement.<sup>3</sup> Although the initial provision under the Industrial Conciliation Act<sup>4</sup> was rudimentary in nature, it has evolved

\* This article is based on research conducted by Ms Mynie Kriek for purposes of her research master's degree in labour law at the University of Pretoria (UP) under the guidance of Professor Stefan van Eck.

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<sup>1</sup> As from May 2019 administratively the name of the Minister was changed to the Minister of Employment and Labour and the name of the Department of Labour to the Department of Employment and Labour. As yet, no amendment giving effect to this change has been reflected in labour legislation. The new terminology is used where appropriate.

<sup>2</sup> S Godfrey, J Maree, D du Toit & J Theron *Collective Bargaining in South Africa Past, Present and Future?* (Juta 2010) 42.

<sup>3</sup> *ibid*.

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

into a sophisticated system in terms of the current Labour Relations Act<sup>5</sup> (LRA).<sup>6</sup>

The extension mechanism serves as a powerful tool in the hands of employers and unions who have as their employees and members the majority of employees in the sector or industry. It bolsters collective bargaining: firstly, it minimises the undercutting of wages by competitor employers conducting similar business and it ensures uniform minimum conditions of employment for workers working in the same industry, and, secondly, it provides strong motivation for non-party employers to participate in centralised bargaining structures as it reduces the effects of the ebb and flow of market forces prevalent between business competitors.<sup>7</sup>

South Africa's extension provision has been subjected to legal challenges in the recent past and it has also been amended on two occasions during the past five years.<sup>8</sup> This article examines the question whether there is anything inherently wrong with the South African extension provision. It explores the latest amendments to the LRA and considers whether the current provisions of the Act comply with international norms developed by the International Labour Organisation (ILO) relating to the principles of freedom of association and majoritarianism. Finally, it asks whether this examination provides any lessons for the improvement of the current position as set out in the LRA.

## 2 INDUSTRY-LEVEL COLLECTIVE BARGAINING AND MAJORITARIANISM

As stated by the acclaimed Kahn-Freund, labour law seeks to protect employees in so far as it serves as a 'countervailing force' against employers' superior economic and social power.<sup>9</sup> He quite correctly pointed out that the main techniques for creating a more equitable balance are twofold. Firstly, labour law often establishes a floor of rights for employees, such as basic conditions of employment, and, secondly, it protects the institution of collective bargaining. In instances where legislation does not provide basic protection in respect of aspects like maximum working hours and minimum wages, trade unions bargain for acceptable conditions of service on behalf of their members. Consequently, collective agreements provide legitimacy to the end result of such negotiations.

Viewed from an international perspective, the conclusion of collective agreements subsequent to collective bargaining, and the extension

<sup>5</sup> Act 66 of 1995.

<sup>6</sup> See the discussion that follows in para 3 below.

<sup>7</sup> Godfrey et al n 2 above 43.

<sup>8</sup> See the discussion of the LRA Amendment Acts 6 of 2014 and 8 of 2018 as well as the discussion of the court decision in *Free Market Foundation v The Minister of Labour & others* (2016) 37 ILJ 1638 (GP) in the parts that follow.

<sup>9</sup> P Davies & M Freedland *Kahn-Freund's Labour and the Law* (Stevens and Sons 1983) 18.

thereof to non-parties is not unique to South Africa. As far back as 1939, Hamburger stated that it is frequently 'desirable that the collective agreement should be made applicable to the whole of the branch for which it is concluded — in other words, that working conditions should be standardised'.<sup>10</sup> According to a study conducted by the Hans Böckler Stiftung, despite the fact that there has been a general decline in trade union membership and an erosion of centralised collective bargaining in Western Europe, most countries of the region still have an 'erga omnes' rule whereby pay deals and agreements in companies covered by collective agreements apply to all employees and not just to those who are trade union members'.<sup>11</sup> In addition, the study concluded that in many countries collective agreements are also universally applicable to all employers in the industry even though they may not be members of the relevant employers' organisations.<sup>12</sup>

In South Africa, as reflective of the views of Kahn-Freund, the Basic Conditions of Employment Act (BCEA)<sup>13</sup> and the National Minimum Wage Act (NMWA)<sup>14</sup> establish floors of protection for employees pertaining to basic conditions of employment.<sup>15</sup> On the fronts of freedom of association and collective bargaining, the Constitution of the Republic of South Africa, 1996 unequivocally guarantees every worker's and every employer's right to freedom of association<sup>16</sup> and their 'right to engage in collective bargaining'.<sup>17</sup>

Even long before the Constitution and the current LRA, the Industrial Conciliation Act 11 of 1924 introduced a "Fordist" industrial council system<sup>18</sup> to South Africa that encouraged centralised collective bargaining at sector level. Area specific 'industrial councils' also made provision for the extension of collective agreements concluded at these bargaining fora.

In 1995 the LRA preserved the policy choice of industry-level collective bargaining by keeping the former industrial council system

<sup>10</sup> I Hamburger 'The extension of collective agreements to cover entire trades and industries' (1939) 68 (2) *International Labour Review* 155.

<sup>11</sup> See Hans Böckler Stiftung 'How Can We Stabilise the Collective Bargaining System?' (2012) [http://www.boeckler.de/32214\\_38631.htm](http://www.boeckler.de/32214_38631.htm); D du Toit 'The extension of bargaining council agreements: do the amendments address the constitutional challenge?' (2014) 35 *ILJ* 2653.

<sup>12</sup> *ibid.* These countries include Belgium, Finland, the Netherlands, France and Spain.

<sup>13</sup> Act 75 of 1997.

<sup>14</sup> Act 9 of 2018.

<sup>15</sup> Godfrey et al n 2 above 5.

<sup>16</sup> s 18 of the Constitution 1996.

<sup>17</sup> *ibid* s 23(5).

<sup>18</sup> Du Toit n 11 above 2637-8.

intact. Industrial councils were renamed 'bargaining councils'.<sup>19</sup> Section 1 of the Act spells out a central purpose of the Act which is to

'provide a framework ... for collective bargaining' ...

(d) to promote —

- (i) orderly collective bargaining;
- (ii) collective bargaining at sectoral level'.

It is significant that when South Africa's constitutional democracy was established in 1995, a conscious decision was taken not to adopt a decentralised model of collective bargaining in terms of which negotiations would occur at enterprise level with collective agreements binding only the parties to such agreements. In the words of the Ministerial Task Team that drafted the LRA, the new Act would promote 'bargaining at central or industry level'.<sup>20</sup> This resulted in the LRA making provision for the formation of bargaining councils in respect of particular economic sectors, such as the automotive industry, the building industry and the public service where sector-specific collective bargaining can occur.<sup>21</sup>

In terms of s 27(1) of the LRA, one or more registered trade unions and one or more registered employers' organisations may establish a bargaining council 'for a sector and area' by adopting a constitution and registering it with the Department of Labour.<sup>22</sup> The power and functions of bargaining councils include the conclusion and enforcement of collective agreements<sup>23</sup> that establish temporary labour peace between organised labour and business. Even though s 1 of the LRA makes it clear that the Act promotes collective bargaining at bargaining council level, it does not impose a duty to bargain at this level and leaves the door open for voluntary negotiations at individual workplaces or enterprises. This may occur especially where bargaining councils do not exist in any particular segments of the market place.

Within this framework, the LRA makes provision for the extension of collective agreements at two distinct levels. Section 23 provides for the extension of collective agreements at workplace level,<sup>24</sup> whilst s 32 provides for the extension of collective agreements concluded in bargaining councils.<sup>25</sup>

<sup>19</sup> ss 27 and 213 of the LRA. Prior to the adoption of the current LRA, the Explanatory Memorandum to the Draft Labour Relations Bill (1995) 16 ILJ 296 mentioned that the 'draft Bill gives effect to ... government's commitment to industry-level bargaining. This means that the draft Bill retains, in a broad sense, many of the existing provisions of the LRA [28 of 1956] relating to industrial councils. Such councils are renamed "Bargaining councils" because the draft Bill applies to all sectors of the economy, not only the industrial or private sector'.

<sup>20</sup> Explanatory Memorandum n 19 above 293.

<sup>21</sup> The South African public service also engages in collective bargaining at public service bargaining councils.

<sup>22</sup> Such registration occurs in terms of s 29 of the LRA.

<sup>23</sup> s 28(1)(a) and (b) of the LRA.

<sup>24</sup> 'Workplace' is defined in s 213 of the LRA.

<sup>25</sup> As stated in the title, this contribution places the emphasis on the extension of bargaining council agreements.

An additional characteristic of the LRA is that it unequivocally endorses the principle of majoritarianism. Majority trade unions are entitled to all organisational rights and to conclude closed shop and agency shop agreements, and, as will be discussed below, also have their way paved for the extension of collective agreements.<sup>26</sup>

In *Kem-Lin Fashions CC v Brunton & another*<sup>27</sup> the Labour Appeal Court (LAC) had the following to say about the legislature's endorsement of the majoritarian model in the context of the extension of collective agreements:<sup>28</sup>

'[T]he will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratization of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or sector should be discouraged.'

The principle of majoritarianism forms a central theme of collective bargaining in South Africa and it is submitted that there is nothing wrong with such an approach as long as it does not deny minority trade unions their right to exist.<sup>29</sup> In essence, majoritarianism entails that majority interests prevail over individual or minority interests. The stronger the membership base of a trade union, the more influence such a union has in the sphere of collective labour law.<sup>30</sup> In the words of the LAC in *Ramolesane & another v Andrew Mentis & another*:<sup>31</sup>

'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. Nonetheless, because of the principle of majoritarianism, such decision must be enforceable against them also.'

This article investigates the extension of collective agreements concluded in bargaining councils; the extension of such agreements concluded at workplace level falls beyond the scope of this discussion.

### 3 THE EXTENSION OF BARGAINING COUNCIL AGREEMENTS

In terms of the LRA 28 of 1956, the Minister of Labour had a wide discretion whether to extend, or not to extend, collective agreements. As highlighted by the Ministerial Task Team's Explanatory Memorandum published together with the draft LRA 1995, the Minister's unwillingness to extend collective agreements often 'undermined' majoritarianism

<sup>26</sup> See ch 3 'Collective Bargaining' in the LRA.

<sup>27</sup> (2001) 22 ILJ 109 (LAC).

<sup>28</sup> *Kem-Lin Fashions* ibid para 19.

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<sup>30</sup> *Police & Prisons Civil Rights Union v Ledwaba NO & others* (2014) 35 ILJ 1037 (LC) 1050.

<sup>31</sup> (1991) 12 ILJ 329 (LAC) 336A-B.

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<sup>26</sup> See ch 3 'Collective Bargaining' in the LRA.

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<sup>30</sup> *Police & Prisons Civil Rights Union v Ledwaba NO & others* (2014) 35 *ILJ* 1037 (LC) 1050.

and the underlying structure of industry-level collective bargaining.<sup>32</sup> It did not come as a surprise that with the introduction of the LRA the Minister's discretion not to extend such agreements was restricted in the case of majority parties to collective agreements. As discussed below, where the parties constitute the majority, collective agreements must be extended.

As mentioned, s 32 of the LRA regulates the extension of a collective agreement concluded in a bargaining council to 'non-parties'<sup>33</sup> and this section has in the recent past been subjected to legal challenge and was amended by the legislature during 2014 and 2018.<sup>34</sup>

There are two pathways regarding the extension of collective agreements. The first applies where the voting parties represent the majority of workers in the sector. Here, the Minister has no discretion and he or she must extend the agreement. The second applies in instances where the voting parties do not represent the majority of workers and, in this instance, the Minister has a discretion to extend the agreement.

### 3.1 The challenge

The compulsory extension of collective agreements where the voting parties represent the majority of workers was challenged in *Free Market Foundation v The Minister of Labour & others*.<sup>35</sup> The applicant sought to declare the extension mechanism under s 32(2) of the LRA unconstitutional because it inter alia constituted an impediment to the market growth of small businesses and infringed the right to fair administrative justice. The court recognised the central argument of the applicant to be that 'there is inadequate judicial supervision of the decision making involved in the extension of collective agreements to non-parties'.<sup>36</sup> The main challenge was based on the proposition that s 32(2) of the LRA makes provision for the extension of collective agreements by the Minister where the parties constitute a majority, in a mechanical way, without the necessary judicial supervision by the courts being present.<sup>37</sup>

The court in *Free Market Foundation* held that the extension mechanism is a necessary tool in the majoritarian landscape which the LRA created, and that where a majority requirement is present the legislature

<sup>32</sup> Explanatory Memorandum n 19 above 291.

<sup>33</sup> These 'non-parties' include parties who are in the bargaining council and who did not consent to the collective agreement, and employers and employees who are not party to the bargaining council at all but whose services fall within the registered scope and area of the bargaining council in question. See D du Toit, B Conradie, T Cohen, C Cooper, G Giles, S Godfrey, A Steenkamp *Labour Relations Law: A Comprehensive Guide* 6 ed (LexisNexis 2015) 320; and J Grogan *Collective Labour Law* (Juta 2014) 170.

<sup>34</sup> See the discussion that follows in para 3.2 below.

<sup>35</sup> (2016) 37 ILJ 1638 (GP).

<sup>36</sup> *Free Market Foundation* ibid para 57.

<sup>37</sup> ibid n 35 above para 9.

considers it appropriate to lower the level of ministerial and judicial scrutiny.<sup>38</sup> Taking account of the historical background, the court found that parliament had intentionally refrained from giving the Minister a wide discretion in cases where the threshold of majoritarianism had been reached.<sup>39</sup> The court recognised that had the Minister been given a wide discretion, it would have weakened the effectiveness of the majoritarian system.<sup>40</sup>

Of significance for the purpose of this discussion is the fact that the court paid particular attention to majoritarianism in collective bargaining measured against international law principles. The court correctly recognised that the Constitution provides that when interpreting legislation the courts must consider international law.<sup>41</sup> It noted that a number of ILO instruments have confirmed that a collective bargaining system that extends exclusive rights to the most representative trade unions is compatible with the principles of freedom of association and the extension of collective agreements.<sup>42</sup> The extension of collective agreements in South Africa is one such example.

Before delving into the principles established by the ILO in relation to majoritarianism and the extension of collective agreements, it is deemed appropriate to analyse the extension of bargaining council agreements as provided for in the LRA.

### 3.2 The extension provision

The process to extend an agreement concluded in a bargaining council commences when a bargaining council requests the Minister in writing to do so.<sup>43</sup> Such request in terms of s 32(1) is subject to two preliminary prerequisites. Firstly, the members of the trade unions voting in favour of the extension must constitute the 'majority of the members' of the trade unions that are party to the bargaining council,<sup>44</sup> and, secondly, the employers' organisations 'whose members employ the majority of the employees employed by the members of the employers' organisation' party to the council, vote in favour of the extension.<sup>45</sup> It is significant to note that in respect of organised business, the requirement does not relate to the number of employers who are members of the employers' organisations, but the number of employees employed by them. In other words, one or two dominant employers that employ the majority of employees in a sector could swing the vote in favour of extension

<sup>38</sup> ibid para 21.

<sup>39</sup> ibid para 29.

<sup>40</sup> ibid.

<sup>41</sup> s 39 of the Constitution.

<sup>42</sup> *Free Market Foundation* n 35 above para 112.

<sup>43</sup> s 32(1) of the LRA. In practice, the parties to the bargaining council would first pass a resolution that an existing collective agreement should be extended.

<sup>44</sup> s 32(1)(a) of the LRA.

<sup>45</sup> ibid s 32(1)(b).

irrespective of how many smaller employers may be members of the employers' organisation.

In relation to the first pathway, s 32(2) stipulates:

'[S]ubject to subsection (2A), the Minister *must* extend the collective agreement, as requested, by publishing a notice in the Government Gazette, within 60 days of receiving the request, declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.'

The only change that the 2018 amendment to s 32(2) introduced was that the section was made subject to the new s 32(2A). The latter provides that in instances where the registrar of labour relations determines that the parties to the bargaining council are 'sufficiently representative' (thus not constituting a majority), the Minister must publish this notice within 90 days. In other words, this extends the time limit of 60 days that applies to majority parties to 90 days in the instance of sufficiently representative parties to the collective agreement. It is therefore clear that this amendment did not aim to respond to the constitutional challenge brought in *Free Market Foundation*.

When so requested, the Minister is obliged to extend the agreement within 60 days provided he or she is satisfied that a number of numerical requirements have been met: firstly, the Minister must be satisfied that the bargaining council's decision to request the extension of the agreement complies with the provisions outlined above concerning the resolution by the parties of the council to request the extension of the Minister,<sup>46</sup> and, secondly, the non-parties identified to be covered by the extended collective agreement in the request must fall within the registered scope of the bargaining council.<sup>47</sup>

Further numerical requirements were introduced flowing from *Valuline CC & others v Minister of Labour & others*.<sup>48</sup> In this case the extension of a bargaining council agreement was successfully challenged on the basis that the Minister had relied on an annual determination of the registrar that the majority of employees were employed by the employer parties to the bargaining council. However, the registrar's report was found to be factually incorrect. In response to this decision, the 2018 amendments included the provisos that the Minister must be satisfied that the registrar has determined that the majority of employees who will be covered by the bargaining council agreement upon its extension are members of the

<sup>46</sup> s 32(3)(a) of the LRA. Du Toit et al n 33 above 320 confirm that this resolution must be supported by both the majority of the trade union parties and the employers' organisation parties whose members employ the majority of the employees.

<sup>47</sup> s 32(3)(d) of the LRA.

<sup>48</sup> (2013) 34 ILJ 1404 (KZP).

trade union parties to the council.<sup>49</sup> The same proviso obtains in respect of employers.<sup>50</sup>

In closing the door to further challenges in this regard, s 49(4A) was introduced<sup>51</sup> and states:

'A determination made by the registrar in terms of —

- (a) section 32(3)(b) is sufficient proof that the members of the employer organisations that are party to the bargaining council, upon extension of the collective agreement, employ the majority of the employees who fall within the scope of that agreement; and
- (b) section 32(5)(a) is sufficient proof that the parties to the collective agreement are sufficiently representative within the registered scope of the bargaining council.'

From the above it is clear that the amendment was specifically included to prevent similar challenges to the one lodged in *Valuline CC* referred to above. The idea was not to deviate from the principles of majoritarianism or the extension provision in general.

In addition to the numerical requirements pertaining to majority representation that must satisfy the Minister, he or she must also be satisfied about other 'safety valve' requirements.<sup>52</sup> Since the 2014 amendments to s 32, each bargaining council must have an effective procedure to process applications by non-parties for exemption applications and such applications must be decided within 30 days.<sup>53</sup> An additional requirement pertaining to appeals was also introduced in 2014. In the event that a non-party's application for exemption is turned down by a bargaining council, the collective agreement must provide for an independent appeal body, as soon as possible but before 30 days, to hear any appeals against the refusal of an exemption application.<sup>54</sup> The collective agreement must also contain fair criteria to be applied by the independent body when considering an appeal.<sup>55</sup> The 2014 amendments, in an effort to 'enhance the impartiality and credibility of appeal bodies',<sup>56</sup> also introduced the requirement that no representative, office bearer or official of a trade union or employers' organisation that is party to the bargaining council may be a member of the appeal body.<sup>57</sup>

Since the 2018 amendment, s 32(3B) also entitles the Minister to make regulations regarding the procedures and criteria that a bargaining

<sup>49</sup> s 32(3)(b)(i) of the LRA.

<sup>50</sup> See s 32(3)(b)(ii) that provides that the registrar, in terms of s 49(4A)(a), must determine 'that the members of the employers' organisations that are parties to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all the employees who fall within the scope of the collective agreement'.

<sup>51</sup> In terms of the Labour Relations Amendment Act 8 of 2018.

<sup>52</sup> Du Toit et al n 33 above 323.

<sup>53</sup> s 32(3)(dA) of the LRA.

<sup>54</sup> *ibid* s 32(3)(e).

<sup>55</sup> *ibid* s 32(3)(f).

<sup>56</sup> Du Toit et al n 33 above 321.

<sup>57</sup> s 32(3A) of the LRA.

council must take into consideration when deciding whether to grant an exemption. The final requirement is that the Minister must be satisfied that the terms of the extended collective agreement do not discriminate against non-parties.<sup>58</sup>

Du Toit et al quite correctly point out that these numerical and substantive requirements are built into the extension provision due to the impact these agreements may have on non-parties.<sup>59</sup> These provisions have been introduced to find a balance between the statutory purpose of promoting sectoral bargaining and fairness to non-parties.<sup>60</sup> Sectoral collective bargaining is based on the premise that competition is avoided by undercutting conditions of employment that could lead to a race to the bottom. However, particular circumstances of non-party employers may make it impossible to comply with extended collective agreements. To this extent, there is an exception procedure that is discussed in more detail below.

Once the Minister is satisfied with the numerical and jurisdictional requirements, the collective agreement must be extended within 60 days of the Minister receiving the written request.<sup>61</sup> All extensions are formalised through publication of a notice in the *Government Gazette* declaring that as from a certain date the collective agreement is extended to non-parties.<sup>62</sup> From the above it is clear that once the numerical and other requirements are satisfied in respect of majority parties to the bargaining council, the Minister exercises a non-discretionary function by extending an agreement.<sup>63</sup> This is a far cry from the situation that prevailed during the era of the former Industrial Conciliation Act. *Free Market Foundation* has also confirmed that there can be no qualms about this automatic extension as the high numerical threshold and other safeguards protect the subordination of minority parties against the rule of the majority.<sup>64</sup>

A different scenario applies in respect of applications for the extension of collective agreements where the parties requesting the extension do not represent the majority of employees. Under these circumstances, the Minister has a discretion to extend the collective agreement should a number of requirements be met. In the circumstance of the application of the extension provision in the absence of majority support, the impact of extension on minority non-parties does arguably raise concerns, which need to be addressed through mechanisms such as prior notification,

<sup>58</sup> *ibid* s 32(3)(g).

<sup>59</sup> Du Toit et al n 33 above 319.

<sup>60</sup> *ibid* 320.

<sup>61</sup> s 32(2) of the LRA.

<sup>62</sup> *ibid*.

<sup>63</sup> *Free Market Foundation* n 35 above para 21; H Cheadle 'Regulated flexibility: revisiting the LRA and the BCEA' (2006) 27 *ILJ* 697 describes this as an 'automatic' extension where the parties to the agreement constitute the majority.

<sup>64</sup> *Free Market Foundation* n 35 above para 21.

the opportunity to respond and appeal procedures. To this end, it is imperative that the LRA's exemption processes should be evaluated against ILO principles subsequent to the last round of amendments.

The requirements for discretionary extensions are as follows. Firstly, the registrar must have determined that the parties to the bargaining council are 'sufficiently representative' within the registered scope of the bargaining council.<sup>65</sup> Secondly, the Minister must be satisfied that the failure to extend the collective agreement may undermine collective bargaining at sectoral level.<sup>66</sup> This fluid requirement has been present since the inception of the current LRA, and, as has been pointed out, it may in the context of a sectoral framework of collective bargaining almost always be argued that the non-extension of collective agreements would undermine collective bargaining.<sup>67</sup> Thirdly, since the 2014 amendments, the Minister must publish a notice in the *Government Gazette*, stating where a copy of the application can be obtained and inviting comment within a period of no less than 21 days from the publication of the notice.<sup>68</sup> This requirement should be viewed in a positive light in so far as it provides an avenue for non-party members to respond to an application for extension and establishes an opportunity for them to present arguments on why they would be unable to comply with the minimum requirements set out in the collective agreement. Fourthly, also since the 2014 amendments, the Minister must consider the comments received after the publication of the notice in the *Government Gazette*.<sup>69</sup> This requirement goes hand-in-hand with the previous requirement and provides some protection to minority parties.<sup>70</sup> Finally, when the registrar determines whether the parties to the bargaining council are sufficiently representative, he or she may take into account the composition of the workforce in the sector by considering the extent to which there are employees of temporary employment services, employees employed on fixed-term contracts or part-time employees.<sup>71</sup> This, it is argued, is a constructive development. In instances where trade unions find it difficult to gain majority support in a sector due to the extensive reliance on temporary employment workers, fixed-term workers and part-time workers, this could undeniably have an undermining effect on any framework of sectoral collective bargaining. The inclusion of this criterion to determine whether parties may be sufficiently representative was an attempt to streamline it with protective measures introduced elsewhere in the LRA in terms of which lower

<sup>65</sup> s 32(5)(a) of the LRA. Previously, it was within the discretion of the Minister to determine representativeness. The 2018 amendments transferred this function to the registrar.

<sup>66</sup> *ibid* s 32(5)(b).

<sup>67</sup> Du Toit et al n 33 above 322.

<sup>68</sup> s 32(5)(c) of the LRA.

<sup>69</sup> *ibid* s 32(5)(d).

<sup>70</sup> Du Toit n 11 above 2651.

<sup>71</sup> s 32(5A) of the LRA.

earning employees engaged through a temporary employment service are deemed to become indefinitely employed by the client after three months of service.<sup>72</sup>

Despite the fact that statistics reveal that less than 5% of affected employers apply for exemption and that exemptions have a high rate of approval, this does remain a contentious issue.<sup>73</sup> As mentioned by Du Toit et al, criteria to determine whether in fact exemptions should be granted are not defined in the LRA.<sup>74</sup> The only requirement for an exemption application in the LRA is that there must be fair criteria captured in the collective agreement concerned that promote the objects of the LRA.<sup>75</sup> This takes us back to one of the main goals of the LRA, namely to promote a system of orderly collective bargaining at sectoral level. However, this seems like a circular argument that does not really provide decision makers with additional clarity.<sup>76</sup>

Similarly, the LRA does not provide guidelines, apart from making reference to non-standard employees, to determine when parties would be deemed to be 'sufficiently representative' for the purposes of the extension of the agreement. However, such a provision is provided in respect of the granting of organisational rights in terms of s 21(8) of the LRA and there is an argument to be made that a similar attempt ought to have been made in respect of the extension of bargaining council agreements.<sup>77</sup>

The 2018 amendments have, for the first time, also introduced measures pertaining to the renewal and extension of 'funding agreements'. Section 32A of the LRA defines a 'funding agreement' as a collective agreement concluded in a bargaining council that includes one or more provisions relating to, among other things, the operational activities of the bargaining council, a dispute resolution fund, or a pension scheme, provident fund or medical aid.

The new section makes provision for the extension of such agreements for a period of 12 months,<sup>78</sup> and for the extension thereof to non-parties, subject to a number of requirements. The Minister must be satisfied that the failure to renew such agreement 'may undermine collective bargaining at sectoral level'.<sup>79</sup> In addition, the Minister must, before deciding to

<sup>72</sup> See ss 198A-198C of the LRA.

<sup>73</sup> Du Toit et al n 33 above 323.

<sup>74</sup> *ibid.*

<sup>75</sup> s 32(3)(f) of the LRA.

<sup>76</sup> Du Toit et al n 33 above 323-4 do, however, suggest that among others, the following criteria could be considered: whether an exemption would give an employer an added advantage; whether the employer is proposing an acceptable alternative to extending the collective agreement; the consent of the affected employees; the fact that the non-party employer will suffer detriment and the need to create a conducive environment for small business; and the employer's past record of compliance.

<sup>77</sup> See s 21(8) of the LRA.

<sup>78</sup> *ibid* s 32A(2).

<sup>79</sup> *ibid.*

extend the agreement, publish a notice in the *Government Gazette* calling for public comment on the request within a period stipulated in the notice and consider the comments received.<sup>80</sup> The inclusion of these provisions will have a noticeable practical effect on the operation of bargaining councils, and, to some extent, it reflects the requirements for public comment that have previously been introduced in respect of the non-mandatory extension of collective agreements. However, these amendments, it is submitted, will not have a significant impact on deflecting challenges that may be lodged against the current extension mechanisms of the LRA. It is argued that the norms established by the ILO could have a greater impact on determining whether the current system is appropriately aligned to South Africa's constitutional values and its international obligations in this regard.

#### 4 ILO NORMS

In the arena of labour law, South Africa's main international law obligations can be inferred from ratified ILO conventions and related recommendations.<sup>81</sup> Before the adoption of the LRA, the Ministerial Task Team<sup>82</sup> confirmed its view that the new dispensation should give effect to the decision of policy makers to commit the South African government to the principles contained in the ILO's conventions.<sup>83</sup> The ILO has established important norms pertaining to the principle of freedom of association, collective bargaining and the rights of majority and minority trade unions that could have a bearing on the extension of bargaining council agreements.

Article 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work<sup>84</sup> provides that all ILO members, even if they have not ratified the conventions in question, have an obligation to promote, among other things, the principles concerning the 'freedom of association and the effective recognition of the right to collective bargaining'. The right to freedom of association stems from the Freedom of Association and Protection of the Right to Organise Convention 87

<sup>80</sup> *ibid* s 32A(3)(a)-(b).

<sup>81</sup> Du Toit et al n 33 above 85. See also *National Education Health & Allied Workers Union v University of Cape Town & others* 2003 (3) SA 1 (CC), (2003) 24 ILJ 95 (CC) para 34 where it was confirmed that the LRA must be interpreted by courts and tribunals with guidance from domestic and international experience. This is discussed in M van Staden 'Towards a South African understanding of social justice: the International Labour Organisation perspective' (2012) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 91.

<sup>82</sup> See in this regard the Explanatory Memorandum n 19 above 279.

<sup>83</sup> See ILO Report of the Fact-Finding and Conciliation Commission 'Prelude to Change: Industrial Relations Reform in South Africa' LXXV, Series B (Special Supplement) GB.253/15/7 (1992) iii where it is explained that the Minister had the authority to refuse to promulgate collective agreements, to exempt or exclude certain areas or classes of work from the ambit of collective agreements or to promulgate employment conditions proposed by employers.

<sup>84</sup> Adopted by the International Labour Conference at its 86th Session, Geneva (18 June 1998) (annexure revised 15 June 2010).

of 1948 (freedom of association convention)<sup>85</sup> and the Right to Organise and Collective Bargaining Convention 98 of 1949 (collective bargaining convention). Conventions are deliberately constructed in as wide a sense as possible to provide member states with the required flexibility to import them into their own unique legal systems.<sup>86</sup> Recommendations often contain more detailed provisions and guidelines to assist member states in implementing conventions.<sup>87</sup>

The freedom of association convention does not define freedom of association but rather provides for the components thereof. These include that employees and employers have the right to join organisations of their own choice, that trade unions and employers' organisations may draw up their own constitutions and rules, and that they may elect their own representatives without state interference.<sup>88</sup> It goes without saying that the freedom of association and the collective bargaining conventions should be read together.

The collective bargaining convention provides that member states should implement measures to encourage and promote voluntary negotiation between employees and their representatives and between employers and their representatives. These measures are aimed at regulating terms and conditions by means of collective agreements.<sup>89</sup> From this it is evident that ILO norms provide support for the implementation of national legislation concerning voluntary collective bargaining and the conclusion of collective agreements.

Recommendations give content to conventions but cannot be enforced like conventions. However, in the South African context it has been argued that there is a moral obligation to abide by their provisions.<sup>90</sup> The Collective Bargaining Recommendation 91 of 1951 (collective bargaining recommendation) supplements the collective bargaining convention.

The labour standards set out in ILO conventions are amplified by the decisions of the ILO's supervisory and investigatory bodies. The most significant of these bodies are namely the committee on freedom of association and the fact-finding and conciliation commission on freedom

<sup>85</sup> In *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC), (2003) 24 ILJ 305 (CC) para 29 the Constitutional Court confirmed that the key supervisory bodies that ensure that these two conventions are observed are the Committee of Experts of the Application of Conventions and Recommendations and the Freedom of Association Committee of the Governing Body.

<sup>86</sup> A Wisskirchen 'The standard-setting and monitoring activity of the ILO: legal questions and practical experience' (2005) 144 *International Labour Review* 259.

<sup>87</sup> M Weiss 'International developments in labour law in the last 20 years' (2018) 39 *ILJ* 696 states that recommendations lack the quality of enforcement associated with conventions.

<sup>88</sup> arts 2 and 3 of the freedom of association convention.

<sup>89</sup> art 4 of the collective bargaining convention.

<sup>90</sup> C Aletter & S van Eck 'Employment agencies: are South Africa's recent legislative amendments compliant with the International Labour Organisations' standards?' (2016) *SA Merc LJ* 299.

of association.<sup>91</sup> The committee on freedom of association examines allegations of breaches of the freedom of association.<sup>92</sup> In addition, the ILO's committee of experts has confirmed 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 further observed 'that such measures are envisaged in several countries'.<sup>93</sup>

The reports of the committee on freedom of association are condensed into the *Digest of Decisions and Principles of the Freedom of Association* which is a rich source of international law.<sup>94</sup> The digest addresses the extension of collective agreements as a category of its own,<sup>95</sup> and states that the extension of a collective agreement to non-member employees does not per se infringe the principles of freedom of association provided that the most representative organisations bargain on behalf of all employees.<sup>96</sup> However, it does recognise that the extension of a collective agreement concluded and supported by a minority may infringe the sufficiently representative parties' right to free collective bargaining.<sup>97</sup>

The collective bargaining recommendation also supports the idea that member states should implement measures to extend the application of collective agreements (or parts thereof)<sup>98</sup> to all employers and employees within the industrial and territorial scope of the agreement.<sup>99</sup> Of significance for the purpose of this discussion is the fact that the conditions required for extending collective agreements as prescribed by the collective agreements recommendation include:<sup>100</sup>

'(a) that the collective agreement already covers a number of employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative.

<sup>91</sup> D du Toit 'Collective bargaining and worker participation' (2015) 36 *ILJ* 78; A van Niekerk & N Smit *Law@work* (LexisNexis 2018) 30.

<sup>92</sup> *ibid.*

<sup>93</sup> ILO committee of experts 'General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Convention on Social Justice for a Fair Globalization' (2008) Report III [Part 1B] 99 para 245.

<sup>94</sup> 5 ed (2006); Du Toit et al n 33 above 78.

<sup>95</sup> *ILO Digest of Decisions* paras 1052-3.

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

<sup>98</sup> Collective agreements are defined in the collective agreements recommendation as 'all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.'

<sup>99</sup> art 5(1) of the collective agreements recommendation.

<sup>100</sup> *ibid* art 5(2). In the *Bader Bop* case n 85 above para 30 it was confirmed that the committee of experts on the application of conventions and recommendations has developed a complex jurisprudence on the application of conventions which is contained in its *Digest of Decisions*, and that such jurisprudence is an important resource in developing the labour rights contained in the South African Constitution.

- (b) that, as 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'.

As quite correctly pointed out in the *Free Market Foundation* case, South Africa is compelled to give effect to the obligations placed on it as a member state of the ILO when considering the extension of collective agreements locally.<sup>101</sup> It is also clear that the court endorsed the principle of majoritarianism. Nonetheless, it did raise an obiter caution in this regard. In a footnote the *Free Market Foundation* case<sup>102</sup> referred to the ILO collective agreements recommendation and stated:

'It may be that ... the ILO [recommendation] sets a higher standard of procedural fairness than that in section 32(2) of the LRA by providing that non-parties should be given an opportunity to "submit their observations" before any extension. No argument was made, or relief sought from us, that section 32(2) of the LRA should be corrected.'

This quote confirms that the court acknowledged the principle contained in the ILO collective agreements recommendation in so far as it requires that 'non-parties should be given an opportunity to "submit their observations" before any extension' of collective agreements. South Africa's extension provisions clearly do not contain such a safeguard. Although the applicants in the *Free Market Foundation* case did not rely on this point, there is an argument to be made that South Africa's extension mechanism does not, in its entirety, adhere to the principles contained in the ILO collective agreements recommendation.

## 5 CONCLUSION

In the light of the above principles associated with the extension of bargaining council agreements in South Africa, it is submitted that a number of salient findings can be made. Firstly, it is evident that the extension mechanism enjoys both historical and international support. The extension of collective agreements concluded at bargaining councils has been a feature of collective labour law in South African labour law legislation since the introduction of the Industrial Conciliation Act in 1924.

Secondly, South Africa is constitutionally bound to comply with international law principles. Viewed from a labour law perspective, the most significant of these norms emanate from ILO conventions and recommendations.

<sup>101</sup> *Free Market Foundation* n 35 above para 112.

<sup>102</sup> *ibid* n 63 in the case.

Thirdly, through its conventions and recommendations the ILO directs that collective agreements that enjoy majority, and even sufficiently representative, support should be extended to non-parties. This does not infringe the rights to freedom of association and to engage in collective bargaining.

Fourthly, even though the ILO leaves ample room for the principle of majoritarianism, it does recommend that a number of preconditions should be met before collective agreements are extended to non-parties. One of these requirements dictates that, as a general rule, before any collective agreement is extended, the employers and workers to whom the agreement would be made applicable should prior to its extension be 'given an opportunity to submit their observations'. This, it is submitted, also implies that these non-parties should be provided with prior notice of the impending extension.

Fifthly, even though it is clear that the LRA does comply with ILO norms as established in the freedom of association convention and the collective bargaining convention, it does not give effect to all of the requirements pertaining to the extension of collective agreements in terms of the collective agreements recommendation.

This article has explained that the current mechanism for the extension of bargaining council agreements allows for two types of extension depending on whether numerical requirements have been met or not. The discretionary extension applies to those instances where the majority requirement has not been met, but where the collective agreement is concluded by parties that are sufficiently representative. Where the Minister receives such an application, he or she must afford potentially affected non-parties prior notice to submit their representations, which must be considered by the Minister. However, such prior notice does not apply in instances of a mandatory extension where the Minister is seized with the obligation to extend the majority support agreement within 60 days of receipt of the application. Potentially affected non-parties are not given prior notice and they are not granted the opportunity to submit representations.

This article recommends that that the legislature should amend the mandatory extension provision to allow for prior notice and for representations to be made by non-parties in accordance with the collective agreements recommendation. This, it is submitted, will ensure alignment of the LRA's extension mechanism with ILO norms in its entirety and close potential loopholes as referred to in the *Free Market Foundation* case.