

**AN APPRAISAL OF THE REVIVAL OF WORKPLACE FORUMS AND EMPLOYEE
PARTICIPATION IN SOUTH AFRICA**

by

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Abstract

The adversarial nature of labour relations in South Africa has been an artefact of the conflictual and discriminatory employment relations system which existed prior to the adoption of constitutionalism. The Ministerial Task Team, responsible for the drafting of the Labour Relations Act 66 of 1995 envisaged a move away from adversarial labour relations, to an employment relation based on corporatism and mutual trust between organised labour and employers through the establishment of workplace forums.

The envisaged objective of utilising workplace forums as a secondary channel of participation at the level of the undertaking to ensure efficiencies and legitimacy of rules and regulations binding employees at the workplace has not come to bear. The legitimacy of facilitating a secondary channel of participation at the level of the undertaking comes from a backdrop of the disintegration of orderly collective bargaining which the Labour Relations Act aims to achieve.

This dissertation undertakes a comparative assessment of the operation of works councils in Germany, specifically the independence of works councils within the German labour relations system. This study argues that the adoption of majoritarianism in the employment relations framework has, over the last 24 years since the enactment of the Labour Relations Act, rendered the workplace forum a “dead duck” in the regulation of the employment relationship in South Africa.

It is submitted that chapter 5 of the Labour Relations Act, regulating the establishment and operation of workplace forums, requires reform in order to facilitate a successful secondary channel of participation at plant level. This dissertation recommends that workplace forums should be revived, though collective bargaining is the preferred method of addressing terms and conditions of employment.

CHAPTER 1

INTRODUCTION

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1. Background to the study

With the transition into a post-apartheid democratic South Africa in 1994 and a supreme law guaranteeing efficient and proficient labour rights, the laws regulating the employment relationship had to be revamped. The Labour Relations Act ("LRA") is the centrepiece of the new model to regulating labour relations.¹

The LRA seeks to facilitate collective bargaining at sectoral level, as opposed to facilitating bargaining at plant level.² Botha argues that it is this objective of the LRA which makes collective bargaining inherently adversarial in nature.³ To counter the adversarial nature of South African labour relations, the legislature sought to enact regulations in the LRA to facilitate the establishment and operation of workplace forums.⁴

Kantarelis defines employee participation as follows:

"A process recognising the needs and rights of employees, individually and collectively, to participate with management in organisational decision making areas beyond those usually associated with collective bargaining".⁵

¹ Olivier 1996 *ILJ* 808.

² S1 of the LRA.

³ Botha 2015 *PER* 1812.

⁴ S 79 of the LRA. See also Klerck 1999 *Transformation* 1.

⁵ Kantarelis 1998 *B& ESI* 96.

Employee participation is further emphasised in the employment relationship by virtue of the following statement:

“Everyone who is affected by the decisions of a government should have the right to participate in that government.”⁶

The purpose of the establishment of workplace forums was to promote distributive collective bargaining, with a view of facilitating a move toward corporatism at plant level.⁷ Employee participation is sought to be facilitated in management’s prerogative and decision-making.⁸ This school of thought, argues that workplace forums were introduced as a form of participatory workplace governance and to create a system of participatory decision making in addition to collective bargaining.⁹

South African labour relations is based on a liberal market system which is inherently adversarial in nature and considered to be a system of labour relations that is less likely to institutionalise the opinions and interests of employees.¹⁰ This stands in contrast with a coordinated market system, where employees are accepted as core stakeholders who contribute to the sustainability of the business and a sense of institutional responsibility is fostered and promoted by the employer.¹¹

Trade unions have traditionally resisted, and continue to resist, the idea of co-existing with workplace forums due to trade unions’ perceptions that the enactment of workplace forums may result in “co-option by management”, thereby “blunting the class struggle” which trade unions traditionally form part of.¹² Trade unions resistance to the establishment of workplace forums is further closely linked to the current “shop steward structure” that trade unions currently operate within and are reluctant to change, as this will directly affect the influence that trade unions have in a workplace.¹³

Regarding the abovementioned, it must be questioned whether the purpose of the LRA regarding employee participation at plant level has been achieved, 24 years subsequent to

⁶ Botha 2015 *LLD* 171.

⁷ Explanatory Memorandum 1995 *ILJ* 310.

⁸ Godfrey, Theron and Visser *Development Policy Research Unit* 2007 3.

⁹ Davis and Le Roux 2012 *Acta Juridica* 318.

¹⁰ See Botha and Germishuys 2017 *THRHR* 352, the authors adopt the view that a deep seated nature of adversarialism presents itself in South African labour relations, which is why the necessary and divergent interests of employees are not institutionalised or formalised to give effect to employee participation.

¹¹ Botha 2015 *PER* 1815.

¹² See Hepple 2012 *SALJ* 265, the author makes reference to the negative perception that trade unions have towards workplace forums.

¹³ Satgar 1998 *Law, Democracy & Development* 54.

the adoption of the LRA into law.¹⁴ The drafters of the LRA envisaged workplace forums to operate independently of trade unions and employers, dealing with issues which collective bargaining cannot adequately address.¹⁵ This envisioned objective is in contrast to the manner in which workplace forums operate in practice.¹⁶ As a consequence, workplace forums are not afforded a degree of independence to operate within.¹⁷

This constraint on a workplace forum and its independence can be summarised as follows:

“Though it has some of the trappings of corporatism, the workplace forum will in practice be no more than a sophisticated and more powerful version of the shop stewards' committee. As the majority union uses it to fight battles that they have lost elsewhere, it will become yet another bargaining forum whose proceedings are characterised by aggressive distributive bargaining across an adversarial divide in the plant itself.”¹⁸

2. Significance of the study

Labour relations in South Africa is extremely adversarial as a result of the operating model of collective bargaining. The historical impact a discriminatory and unequal system of labour relations prior to the adoption of constitutionalism has further contributed to the extreme adversarial nature of labour relations.¹⁹ Two decades subsequent to the implementation of the LRA, labour relations in South Africa remains highly adversarial and conflictual.²⁰

This dissertation will highlight how the LRA, does not achieve the intention of the legislature regarding the establishment and facilitation of workplace forums in moving toward an effective corporative approach to engagements between employer and organised labour. This dissertation will further motivate a move away from adversarial labour relations is justified, through the revival of workplace forums as a vehicle for achieving employee participation in supplementing collective bargaining.

3. Research questions

This study will seek to address the following questions:

¹⁴ Weiss 2005 *Law, Democracy & Development* 157.

¹⁵ Explanatory Memorandum 1995 *ILJ* 310.

¹⁶ Du Toit 2007 *ILJ* 1427.

¹⁷ Du Toit 2000 *ILJ* 1553.

¹⁸ Brand and Brassey 1995 *Employment Law* 79.

¹⁹ Hepple 2012 *SALJ* 265-266.

²⁰ Grogan (2014) 371.

1. What shortfalls are identified in the current provisions of the LRA pertaining to workplace forums as a vehicle to achieving employee participation and co-determination?
2. What lessons can be learnt from Germany in relation to employee participation at plant level?
3. What amendments may be proposed and implemented to ensure proficiency in the current statutory framework of the LRA pertaining to workplace forums?

4. Research methodology

The methodology and approach to this dissertation will be a doctrinal approach to analysing critical principles and ideologies pertaining to employee participation and joint decision-making in South Africa.²¹ Through this research, I will seek to interpret, develop and assess the doctrines of employee participation and joint decision-making in South African labour relations.

This dissertation will further adopt a comparative approach of the model of employee participation in Germany will be explored. The comparative approach will include an analysis of the operation of the German system of employee participation and joint decision-making. The reason for the adoption of this approach is to gain understanding from the successful operation of a system of employee representation at plant level in a foreign jurisdiction and to identify the plausibility of transplanting collective labour laws from one jurisdiction to another.

5. Structure of the study

Chapter 1 of this dissertation provided insight as to the intention of this dissertation, which is to revive the doctrine of employee participation through utilising workplace forums as a vehicle to achieving workplace democracy.

In Chapter 2, the history of employee participation will be evaluated in order to give background to the scope and understanding of the study in a South African context. The adoption of adversarialism in labour relations, the development thereof and ensuing consequences of adversarialism will be evaluated in its present state in South Africa.

Chapter 3 will determine the current framework with regard to workplace forums under the LRA. This chapter will also encapsulate the criticism and reasons for the failure of the

²¹ As stated by Coetsee and Buys 2018 *South African Journal of Higher Education* 72, who adopt the view that doctrinal research differs from conventional research methods as a doctrinal approach is focused on the underlying doctrines relevant to the study in question.

statutory system of workplace forums. The amendments to correcting the shortfalls of workplace forums which were proposed in 2000 will further be outlined and form part of this chapter.

Chapter 4 will look at the historical development and current provisions of employee participation in Germany. This chapter will only seek to analyse the most important provisions of employee participation in German legislation, which has resulted in employee participation at plant level yielding successful results for the German economy. The transplanting of laws from one jurisdiction to another will also form part of the analysis of this chapter.

Chapter 5 of this dissertation will firstly identify the shortfalls of the current system of employee participation through the workplace forum, before seeking to identify which mechanisms of employee participation in German law has proven to be successful in relation to plant level employee participation. This chapter will lastly propose amendments to the current statutory framework regulating the establishment and operation of workplace forums in South Africa to promote doctrines of workplace legitimacy and workplace democracy.

CHAPTER 2

THE ADVERSARIAL NATURE OF LABOUR RELATIONS IN SOUTH AFRICA

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1. Introduction

South African labour relations is premised on facilitating distributive collective bargaining at industry level,²² evidenced by the majoritarian approach the Labour Relations Act (“LRA”) adopts in its provisioning for labour relations.²³ Collective bargaining is the process through which employees and employers make claims upon each other and resolve issues through a process of negotiation leading to collective agreements that are mutually beneficial.²⁴

This chapter will outline the history of employee participation in South Africa. The effect of the previous regime in South Africa, which was based on racial and political inequality, has hampered the legislature to achieving its objectives of moving away from adversarialism in the employment relationship. This is attributed to the deep seated mistrust that employers and trade unions alike have for the doctrine of participatory structures at the level of the undertaking.²⁵

This chapter will further outline the current adversarial nature of collective bargaining as a resource for workplace governance in labour relations, which has resulted in a fragmented system of labour relations.²⁶ This chapter will also seek to evaluate the relationship, or lack thereof, between trade unions and workplace forums and why trade unions are of the view that workplace forums are a hindrance to their operation. The drive to moving away from

²² Explanatory Memorandum 1995 *ILJ* 312.

²³ S1(1)(d)(ii) of the LRA.

²⁴ Botha 2015 *De Jure* 329.

²⁵ Collins *et al* (2000) 519. See also Botha 2017 *THRHR* 352.

²⁶ Du Toit 2007 *ILJ* 1407.

adversarial and conflictual labour relations through the enactment of the Advisory Arbitration Panel (“AAP”) by the legislature will further be expanded on in this chapter.

2. Historical development of employee participation

The apartheid government sought to enhance political, social and racial segregation in South Africa by limiting the rights of employees of colour concerning exercising labour rights.²⁷ Different laws were enacted for white employees and their black counterparts.²⁸ Due to the differentiation between employees on the basis of colour, the Industrial Conciliation Act (later the LRA) did not apply to black employees, as the definition of “employee” did not extend to black employees in terms of the Industrial Conciliation Act.²⁹

Black employees were further excluded from engaging in the activities of industrial councils.³⁰ The government sought to facilitate the participation of black employees on a lesser scale than that of their white counterparts,³¹ by seeking to facilitate the establishment of liaison committees, works committees, and coordinating committees to cater for the participation of black employees in the workplace.³²

The Wiehahn Commission was established to address the state of labour in South Africa in the 1970s and 1980s, and provide the government with solutions to the labour unrest during this time.³³ The report that was released by the Commission proposed several amendments to the climate of labour relations for employees of colour.³⁴ These amendments included the extension of full trade union rights to black employees, permitting unions established by black employees to operate within the industrial council system and the implementation of checks and balances in the employment relationship between the employer and black employees, which was only afforded to white employees at the time.³⁵

The deterioration of the old system of labour relations was further enhanced upon readmission of the South African market into the international market. South Africa becoming a member of the International Labour Organisation (“ILO”), and the adoption of

²⁷ Du Toit 1995 *ILJ* 786. See also Smith 2000 *GA Journal of International and Comparative Law* 596.

²⁸ As stated in Manamela 2002 *SA Merc LJ* 729, The Black Labour Relations Regulation Act 48 of 1953 regulated the employment relationship for employees of colour, whilst the Labour Relations Act 28 of 1956 regulated the employment relationship for white employees.

²⁹ Klerck 1999 *Transformation* 8-9. See also The Industrial Conciliation Act 11 of 1924.

³⁰ Manamela 2002 *SA Merc LJ* 729.

³¹ Grogan (2014) 342.

³² See Collins *et al* (2000) 527 in confirmation hereof, who is of the view that the opposition from the trade union movement to the establishment of workplace forums as a secondary channel of employee participation lays in the deep rooted mistrust of trade unions resultant from the ineffective liaison committees which were established during the 1970s and 1980s.

³³ Vettori 2005 *De Jure* 383.

³⁴ Vettori 2005 *De Jure* 383.

³⁵ Manamela 2015 *LLD* 37.

recommendations under the ILO umbrella, saw the movement of equitable labour relations for all employees intensify. ILO Recommendation 94/1952 lays the foundation for employee participation.³⁶ It provides that member states should implement appropriate measures to ensure participatory structures between employer and employee at the level of the undertaking on issues that are not addressed within the collective bargaining machinery.

In 1994, President Nelson Mandela formally put the Reconstruction and Development Programme ("RDP") into place as a means for the government to eradicate the adverse effects of apartheid.³⁷ The purpose of the RDP was to address South Africa's past imbalances which were entrenched in colonialism, racism, apartheid, sexism and oppressive labour policies.³⁸

One of the central objectives of the RDP was the efficient and conclusive reform labour of policies that were racially driven to separate society and keeping skills in the hands of white employees.³⁹ The government's adoption of the RDP was indicative of promoting joint-decision making and social dialogue in obtaining solutions through the enactment of legislation and policies to achieve the objectives laid out by the RDP.⁴⁰

Du Toit further encapsulates the purpose of the RDP and the move away from adversarialism by capturing its essence in the following statement:

"A corresponding shift from adversarial towards more participative industrial relations is deemed imperative, not only for the reasons that apply in every country competing on the world market but, specifically, as part of achieving the developmental aims of the government's Reconstruction and Development Programme (RDP). From this perspective it is not only in labour's interests to cooperate with management over production related issues with a view to boosting the prospects of job security and higher wages; it is part of labour's responsibility as a key player in the formulation and execution of national policy."⁴¹

3. The current adversarial nature of labour relations

The Constitution provides every citizen the right to equitable labour relations.⁴² The right to engage in collective bargaining charges collective labour and this process of negotiation

³⁶ Manamela 2002 *SA Merc LJ* 729.

³⁷ African National Congress The Reconstruction and Development Programme: A Policy Framework ("RDP") 1994 *para* 4.8.6.

³⁸ RDP 1994 *para* 4.8.7. See also Manamela 2015 *LLD* 70.

³⁹ RDP 1994 *para* 4.8.8. See also Patel 1998 *Law Democracy and Development* 113.

⁴⁰ Patel 1998 *Law Democracy and Development* 113-114.

⁴¹ Du Toit 1995 *ILJ* 787.

⁴² S23 of the Constitution of the Republic of South Africa Act 108 of 1996.

between employer and employee.⁴³ The right to strike, which is also a fundamental right in the Constitution, is closely related to the laissez-faire approach which the LRA adopts in relation to collective bargaining.⁴⁴ This process seeks to coerce parties to actively negotiate on terms and conditions of employment where parties seek to not enter into the process of collective bargaining.⁴⁵ The Constitutional Court has emphasised that it is the right to strike that is organised labour's greatest weapon in asserting bargaining power in the employment relationship.⁴⁶

The term "orderly collective bargaining" as envisaged in the Constitution and the LRA is divorced from the current practice of labour relations in South Africa.⁴⁷

The LRA defines a strike as follows;

"The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee."⁴⁸

The normal course of industrial action in South Africa adopts violence, destruction to property, intimidation, assault and the infringement of various rights of citizens.⁴⁹ Collective bargaining seeks to counterbalance the interests of the employer with that of the employees in reaching mutually sought after objectives.⁵⁰ It is however the lack of parties willingness to compromise and "meet in the middle" which fosters the violent and adversarial nature of collective bargaining.

The legislative framework entrenching collective bargaining in South Africa forms the basis of the adversarial employment relationship.⁵¹ Labour law in South Africa emphasises a collective approach when stakeholders engage with one another.⁵² It is the collective approach to labour relations which underpins neglecting the interests of employees at the

⁴³ S23(5) of the Constitution. See also Dukes 2009 *MLR* 221.

⁴⁴ Dukes 2009 *MLR* 221.

⁴⁵ S23(5) of the Constitution. See also Maserumule 2001 *ILJ* 45.

⁴⁶ *National Union of Metal Workers of South Africa v Bader BOP (Pty) Ltd* 2003 (2) BCLR 182 (CC) para 13. See also S23(2)(c) of the Constitution.

⁴⁷ Botha 2017 *THRHR* 352.

⁴⁸ S213 of the LRA.

⁴⁹ Selela 2014 *International Journal of Social Sciences* 117.

⁵⁰ As confirmed by Dukes 2009 *MLR* 222-223, the author provisions the laissez-faire approach to labour relations being applicable to labour relations in South Africa.

⁵¹ Patel 1998 *Law Democracy and Development* 114.

⁵² Mishke 2004 *CLL* 51.

lower end of an organisation's spectrum.⁵³ As a consequence, industrial action often turns violent due to this distortion and misalignment of divergent interests of employees who may not carry influence in the workplace, in favour of the well paid, qualified and influential employees.⁵⁴

A strike will result from failure by the parties to the bargaining table to reach consensus on issues in dispute. Strikes can either be functional or non-functional.⁵⁵ The functionality of a strike must seek to achieve the purpose which collective bargaining has undertaken to propose.⁵⁶ This right in essence must establish a balance between the interests it seeks to promote and the interests that the exercising of this right may threaten.⁵⁷

Further reasons for the inherently adversarial nature of collective bargaining include a decline in negotiating capacity, the re-emergence of negotiations of non-workplace issues, and the rise of general mistrust between the parties.⁵⁸ Industrial action can take two forms, namely non-violent conventional industrial action which is preceded by good faith negotiation, and violent disruptive industrial action which is preceded by bad faith negotiations.⁵⁹

Where bad faith negotiations precede industrial action is where adversarialism thrives. The concluded industrial action at Sibanye-Stillwater's gold mining operations in Johannesburg in May this year was a clear example of the adversarial nature of labour relations and trade union fragmentation.⁶⁰ The five month long strike led to reports of the mining company seeking to initiate the procedure of retrenching 6000 of its employees.⁶¹

4. The advisory arbitration award

The introduction of the AAP by the legislature was purposed as a means to curb the potential of a strike which can turn violent or create a national crisis in terms of the Labour Relations

⁵³ This is as a result of organised labour being required to address the needs of all its members, the consequence hereof being that only the needs of the skilled and resourceful members of such an organisation are heard and addressed.

⁵⁴ As confirmed by Brassey 2013 *ILJ* 823, the author references the fact that in the Marikana saga, the lower skilled rock drill operators' needs were neglected.

⁵⁵ Fergus 2016 *ILJ* 1544.

⁵⁶ Van Eck and Kujinga 2017 *PER* 8.

⁵⁷ Grogan (2014) 193.

⁵⁸ National Planning Commission 2012 *para* 34.

⁵⁹ Rycroft 2013 *Pompeu Fabra University of Barcelona*.

⁶⁰ <https://ewn.co.za/2019/04/05/amcu-to-hold-mass-meeting-sibanye-mine-to-discuss-protracted-strike> accessed 04.04.2019.

⁶¹ <https://www.iol.co.za/business-report/companies/7000-jobs-set-to-go-at-sibanye-stillwater-19316582> accessed 04.04.2019.

Amendment Act (“LRAA”).⁶² The aim of the latest set of amendments contained in the LRAA was to proactively promote industrial peace in the wake of a failing bargaining system.⁶³ The purpose of this amendment was to prevent the upheaval of violent strikes in the past, with the Marikana disaster being the “cherry on top of the cake” in referring to the lawlessness of industrial action in South Africa.⁶⁴

Godfrey *et al* summarises the purpose of the AAP as follows:

“Finally, and most controversially, the Bill has inserted four new sections creating a process whereby a protected strike which has proved to be ‘intractable’ or ‘violent’ or capable of causing ‘a local or national crisis’ could be interdicted. But it does this with extreme circumspection, obviously seeking to remain within the limits of legitimate regulation of the right to strike as understood in international law and avoiding any unconstitutional infringement of that right.”⁶⁵

The AAP may be established by two institutions: When incorporated by instruction of the Minister of Labour,⁶⁶ or by order of the Labour Court.⁶⁷ The rules of the Commission for Conciliation Mediation and Arbitration (“CCMA”) emphatically state that a determination in providing support in establishing an AAP is that the CCMA must establish such a panel in the interest of the public where industrial action has the potential to become violent, or lead to a national crisis.⁶⁸

The CCMA is mandated to establish an AAP at any time after the CCMA has issued a certificate of unresolved dispute in accordance with S135(5)(a) of the LRA. The AAP must consist of an independent chairperson and representatives from both employer and the trade union.⁶⁹ The CCMA have the requisite mandate to establish the AAP in three instances: The first instance is when the strike or lockout is no longer functional to collective

⁶² <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2018/Employment/Downloads/Employment-Alert-3-December-2018.pdf> accessed 30.07.2019. See also the Labour Relations Amendment Act 8 of 2018.

⁶³ Godfrey *et al* 2018 *ILJ* 2162. See also Cheadle *et al* (2017) 62.

⁶⁴ Buitendag and Coetzer 2015 *Strategic Review for Southern Africa* 102.

⁶⁵ Godfrey *et al* 2018 *ILJ* 2173.

⁶⁶ S150A(a) of the LRAA. See also Godfrey *et al* 2018 *ILJ* 2172.

⁶⁷ <https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Employment/employment-alert-22-january-relief-for-violent-and-ongoing-strike-action-whats-on-the-cards-.html> accessed 30.07.2019.

⁶⁸ <https://www.labourguide.co.za/ccma-informations/316-guidelines-for-respondents> accessed 02.06.2019.

⁶⁹ S150B(1) of the LRAA.

bargaining in that it has continued for a prolonged period of time and no resolution of the dispute appears to be imminent.⁷⁰

Secondly, if there is an imminent threat that constitutional rights may be or are being violated by persons participating in or supporting the strike or lockout through the threat or use of violence or the threat to or damage to property. Lastly, if the strike or lockout causes or has the imminent potential to cause or exacerbate an acute national or local crisis affecting the conditions for the normal social and economic functioning of the community or society.⁷¹

The specific issue that the parties must engage the CCMA on, is when parties simply refuse to bargain or recognise any party as a bargaining party for purposes of collective bargaining.⁷² Failure to evidence that the issue in dispute was referred to advisory arbitration prior to serving notice of the impending strike will render the industrial action subsequent thereto unprotected.⁷³ If an award was not obtained for a number of demands, including the refusal to bargain and industrial action commenced on that premise, the industrial action will be unprotected due to the requirements and sequence of events rendering protected industrial action not being adhered to.⁷⁴

The establishment of the AAP by the CCMA does not interrupt an ongoing strike, or suspend the right to strike. The purpose of the amendments is to establish the AAP to facilitate and promote industrial peace when industrial action has become protracted and is no longer functional to collective bargaining.⁷⁵

The award handed down by the AAP must include its findings and recommendations for resolving the dispute in issue. If parties have however rejected an award handed down by the AAP, the party rejecting the award is required to provide reasons for the rejection of the CCMA's proposal, which will trigger the process of advisory arbitration again.⁷⁶ The concerted action by the legislature to curb the occurrence of prolonged and violent industrial action may prove to be a fruitless exercise as parties to the advisory arbitration are only bound by the award to the extent in which the award is accepted by either party.⁷⁷ It may be

⁷⁰ See Godfrey *et al* 2018 *ILJ* 2174, the author is of the view that this would have to be a factual assessment taking into account the circumstances which present themselves in this instance.

⁷¹ S150A(3)(a-c) of the LRAA.

⁷² See Cheadle *et al* (2017) 61, who states that parties are obliged to engage in advisory arbitration when a refusal to bargaining dispute has sufficed between the parties who are recognized as collective bargaining agents.

⁷³ *National Union of Mineworkers v Wanli Stone Belfast (Pty) Ltd* [2015] 3 BLLR 286 (LAC).

⁷⁴ Cheadle *et al* (2017) 61. See also *CEPPWAWU and Others v CTP Ltd and Another* [2013] 4 BLLR (LC) para 148, wherein which the Labour Court confirmed this principal.

⁷⁵ Pienaar and Jamieson 2018 *South African Labour Guide* 1-2.

⁷⁶ Godfrey *et al* 2018 *ILJ* 2174.

⁷⁷ Pienaar and Jamieson 2018 *South African Labour Guide* 1-2.

argued that in the highly adversarial climate of South African labour relations, that it will be highly unlikely that parties to advisory arbitration proceedings will accept the award handed down by the CCMA.⁷⁸

5. How trade unions perceive workplace forums

Workplace forums could have practical benefits as a second channel of bargaining in the negotiation process with the employer. Trade union officials may have the skills, resources or capacity to address all of the issues which workplace forums are entitled to address.⁷⁹ Trade unions may also have the added advantage that they can recruit more skilled employees through the workplace forum, thus giving a union more power.⁸⁰

The establishment of a workplace forum may also have the effect of facilitating trade union cooperation at plant level, whilst union rivalry continues at industry level.⁸¹ This means that trade unions will have more power regarding issues to be determined within the scope of the workplace forum, if trade unions unite and stand together, as opposed to acting individually where employers may impose their power over individual unions.⁸² An employer is also obliged, in terms of statute, to disclose all relevant information to enable joint-decision making by the workplace forum which may be of use to trade unions down the line when traditional collective bargaining is to take place.⁸³

Trade unions are of the view that the value of workplace forums is dependent on the type of industry such a forum is to be established in. If a workplace forum is established in an industry with a high literacy level, a workplace forum may benefit the representative trade union. However, the same is not applicable to industries with low levels of literacy, where training would need to take place in order to assist workplace forum members in determining complex issues falling within the scope of a workplace forum.⁸⁴

Trade unions also fear a decline of trade union membership, as the coverage of workplace forums extends to unionised and non-unionised members alike.⁸⁵ Trade unions further see workplace forums further as a tedious impairment to the functioning of a trade union, as

⁷⁸ Pienaar and Jamieson 2018 *South African Labour Guide* 1-2.

⁷⁹ Du Toit 1995 *ILJ* 796.

⁸⁰ Benjamin and Cooper 1995 *ILJ* 268.

⁸¹ Baskin and Satgar 1998 *South African Labour Bulletin* 50.

⁸² Botha 2015 *PER* 1819.

⁸³ See Vettori 2005 *SA Merc LJ* 300-301, the author is of the view that trade unions must keep bargaining to industry level in order to promote enterprise level participation of employees on production related issues.

⁸⁴ Botha 2015 *PER* 1818.

⁸⁵ Manamela 2002 *SA Merc LJ* 728. See also Steadman 2004 *ILJ* 1199.

shop stewards may not have the capacity or resources to undertake and actively facilitate the functions of a workplace forum.⁸⁶

6. Conclusion

The first finding from the contents of this chapter is that prior to the adoption of constitutionalism, a dual system of labour relations was in operation which regulated white employees and employees of colour respectively.⁸⁷ This dual system had minimal regard to the interests of employees of colour, resulting in a racial divide in the workplace. Employee participatory structures were used by employers as a façade to give the illusion that the interests of employees of colour were being considered.⁸⁸ It is this façade that has resulted in deep rooted mistrust which trade unions have towards employee participatory structures at the level of the undertaking.

The second finding from the contents of this chapter is that the nature of labour relations is still highly adversarial where parties to the employment relationship have a minimal degree of trust for one another.⁸⁹ Instances such as Marikana and Sibanye-Stillwater reveal just how adversarial labour relations in South Africa are.

The third finding from the contents of this chapter is that the perception which trade unions have towards workplace forums due to the adversarial nature of liberal market labour system has resulted in workplace forums being deemed a “dead duck”. Due to the deep rooted mistrust that unions have towards workplace forums, unions will favour bargaining at plant level as much as the employer in order to maintain their influence in the workplace concerned.

The fourth finding from the contents of this chapter is that the legislature has sought to move away from adversarial and conflictual labour relations. It introduced the AAP to curb the excessive nature of adversarial labour relations in South Africa.⁹⁰ The envisaged objective the legislature sought to achieve through the enactment of the AAP may not be realised as parties are still free to reject the advisory arbitration award with no ensuing consequences flowing from the choice of parties to reject the award handed down by the CCMA.⁹¹

⁸⁶ Du Toit 1995 *ILJ* 796.

⁸⁷ Vettori 2005 *De Jure* 383.

⁸⁸ Manamela 2002 *SA Merc LJ* 729.

⁸⁹ Davis and Le Roux 2012 *Acta Juridica* 309.

⁹⁰ See Botha 2015 *PER* 1835, the author states that the legislature has made concerted moves away from adversarialism through the 2014 enactment granting minority trade unions access to organisational rights. This intention is further enhanced by the fact that the 2019 amendment catering for the establishment of the AAP is an attempt by the legislature to absorb the consequences of adversarialism.

⁹¹ Pienaar and Jamieson 2018 *South African Labour Guide* 1-2.

CHAPTER 3

WORKPLACE FORUMS IN SOUTH AFRICA

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1. Introduction

The political landscape in South Africa prior to the adoption of a constitutional democracy in 1994, was built on racial, social and political divides, which saw an inherently violent society manifest as a result.⁹² During the apartheid era, trade unions were used as vehicles for voicing political ideologies in revolt against the ruling government.⁹³ The purpose of workplace forums in South Africa’s constitutional era is to allow for flexibility in adopting workplace efficiencies without sacrificing employees’ rights or job security, thereby contributing to the decisions that affect employees made at plant level.⁹⁴

The political ideologies that trade unions adopted during the apartheid era resulted in the adoption of adversarial labour relations subsequent to constitutionalism.⁹⁵ The rationale in adopting the Labour Relations Act (“LRA”) was to promote competitiveness of the South African market in the global economy.⁹⁶

⁹² Wood 2002 *Labour Studies Journal* 30.

⁹³ Du Toit 1995 *ILJ* 786.

⁹⁴ Du Plessis and Fouche (2014) 307.

⁹⁵ See Van Niekerk *et al* (2018) 411, the author is of the view that since the enactment of the LRA regarding collective bargaining and employee participation, there is no manner which prescribes the preferred manner of engaging in collective bargaining. The act further does not provision for when it should take place, by whom and what topics need to be discussed in the process of collective bargaining.

⁹⁶ Benjamin and Cooper 2016 *Swiss Programme for Research on Global Issues for Development* 3.

The Ministerial Task Team undertook to reforming labour in South Africa to ensure the global economic competitiveness of a South African market in the following statement:

“South Africa’s re-entry into international markets and the imperatives of a more open international economy demand that we produce value-added products and improve productivity levels. To achieve this, a major restructuring process is required. Studies of how other countries have responded to restructuring warn that our system of adversarial industrial relations, designed in the 1920s is not suited to this massive task. If we have any hope to successfully restructuring our industries and economy, then management and labour must find new ways of dealing with each other.”⁹⁷

This chapter will provide impetus to the statutory model regulating the establishment, powers and activities of workplace forums within the greater scheme of collective bargaining as a secondary channel of employee participation. This chapter will also highlight the proposed amendments that the legislature sought to input to chapter 5 of the LRA, to promoting the operational efficiency of the statutory model of workplace forums. The reasons for the failure of workplace forums will also be identified in this chapter.

In this analysis, the term “workplace” as defined in the LRA will be expanded on in determining whether the definition as contained in the LRA is conducive to the purpose the definition seeks to achieve within the ambit of workplace forums.

2. The drafting process of the LRA

The Ministerial Task Team, in its letter of appointment, was tasked with tabling a draft bill for discussion in seeking to facilitate a reform of labour law in South Africa. The overarching objective of the Task Team in tabling the draft document for public discussion was to give effect to the objectives of the Reconstruction and Development Programme (“RDP”).⁹⁸ The need for tabling a document which would provide for equitable labour relations was of upmost importance if South Africa was to be successfully reintegrated into the international market, as well as to maintain international competitiveness in the global market.⁹⁹

The Task Team evaluated practices of labour relations from a number of jurisdictions.¹⁰⁰ The Task Team emphasised that labour reform in South Africa should take place in an

⁹⁷ Explanatory Memorandum 1995 *ILJ* 310. See also Steadman 2004 *ILJ* 1171.

⁹⁸ Satgar 1998 *Law, Democracy & Development* 51.

⁹⁹ Du Toit 1995 *ILJ* 788.

¹⁰⁰ See Explanatory Memorandum 1995 *ILJ* 310, the Task Team in its analysis of all the different jurisdictions, arrived at the conclusion that workplace restructuring has been most successful in countries where participatory structures exist.

equitable manner for all, in order to move away from adversarialism in the employment relationship.¹⁰¹

The purpose of workplace forums was summarised by the Task Team as follows:

“Workplace forums are designed to facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem-solving and participation on certain subjects. In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realisation that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards.”¹⁰²

When the draft bill was tabled by the Task Team, organised labour was of the view that such a participatory structure will encroach firstly on its “area of business”. The second issue in contention was that such a participatory structure will undermine the sanctity of collective bargaining.¹⁰³ It was proposed at the National Economic Development and Labour Council (“NEDLAC”) that the sanctity of collective bargaining pertaining to terms and conditions of employment which are distributive in nature would not be impeded by the establishment of workplace forums.¹⁰⁴ The purpose of workplace forums was to supplement collective bargaining, in facilitating the consultation and joint-decision making capacity of the workforce on a range of non-wage issues.¹⁰⁵

The Task Team further provisioned for only a representative trade union being able to initiate the process of establishment of a workplace forum.¹⁰⁶ The Task Team was of the view that the framework of facilitating compulsory participatory structures had not been successful, thereby moving away from the notion that a workplace forum be used to move away from trade unionism.¹⁰⁷ To move away from adversarialism, the Task Team believed that issues of workplace participation at plant level that were subject to arbitration removes the right to strike as a deadlock-breaking mechanism.¹⁰⁸ Issues where arbitration could not be used to

¹⁰¹ Satgar 1998 *Law, Democracy & Development* 52-53.

¹⁰² Explanatory Memorandum 1995 *ILJ* 310.

¹⁰³ Du Toit 2000 *ILJ* 1545.

¹⁰⁴ See Explanatory Memorandum 1995 *ILJ* 312, the Task Team in its explanatory notes encapsulated the institutional separation of collective bargaining and workplace forums through addressing issues that are distributive in nature to the ambit of collective bargaining. The Task Team further believed that issues which are production related in nature is to be determined within the ambit of workplace forums.

¹⁰⁵ Du Toit *et al* (2015) 387.

¹⁰⁶ Steadman 2004 *ILJ* 1172.

¹⁰⁷ See Explanatory Memorandum 1995 *ILJ* 312-313, the Task Team’s proposal of a representative trade union initiating the process of establishment of a workplace forum promotes the majoritarian approach which the LRA adopts to labour relations.

¹⁰⁸ Basson *et al* (2009) 345.

reach a resolve, meant that the right to strike was inherently retained as a deadlock-breaking mechanism.¹⁰⁹

3. Statutory framework regulating workplace forums in terms of the LRA

3.1 Application for establishment of a workplace forum

A workplace forum is established in terms of chapter 5 of the LRA, in a workplace that has more than 100 employees in its employ. A representative trade union is permitted to apply for the establishment of a workplace forum if the number of employees exceeds the 100 employee threshold.¹¹⁰ The establishment of workplace forums applies only to employees in the private sector, public sector employees are regulated in a schedule promulgated by the Minister for Public Service and Administration in terms of section 207(4) of the LRA.¹¹¹

Only a representative trade union may apply to the Commission for Conciliation Mediation and Arbitration (“CCMA”) for the establishment of a workplace forum.¹¹² For purposes of chapter 5, “representative trade union” refers to a registered trade union, or two or more registered trade unions acting jointly, that have the majority of the employees employed by an employer in a workplace as members.¹¹³

This application must be in the prescribed form in which the CCMA must determine *inter alia* whether more than 100 employees are employed at the workplace in respect of which the application for a workplace forum is being made.¹¹⁴ The CCMA must further be satisfied that no functioning workplace forum is already established at the workplace in respect of which the application is being made.¹¹⁵ To ensure transparency in the process, a copy of the application for establishment of a workplace forum must be served on the employer in which the workplace forum is to be established, prior to serving such an application on the CCMA.¹¹⁶

If the CCMA is satisfied that the criteria for establishment of a workplace forum has been met, the CCMA must assist the parties to establish a workplace forum either by collective

¹⁰⁹ Explanatory Memorandum 1995 /LJ 313.

¹¹⁰ S80(1) and (2) of the LRA. See also Van Niekerk *et al* (2018) 434, who states that the requirements of workplace forums is intended to exclude the operation of a workplace forum in smaller organisations.

¹¹¹ S80(12) of the LRA.

¹¹² Grogan (2014) 367.

¹¹³ S78(b) of the LRA. See also Collins *et al* 2000 527, the author is of the view that aspects of majoritarianism are revived by the wording of the act.

¹¹⁴ Schedule 2 of the LRA provides for the format and procedure to be followed in giving effect to the provisions of chapter 5 of the LRA.

¹¹⁵ S80(5)(b)(i)-(iii) of the LRA.

¹¹⁶ S80(3) of the LRA.

agreement, or in terms of chapter 5 of the LRA.¹¹⁷ If a collective agreement for establishment is not executed is not executed for the purpose of establishing a workplace forum, the CCMA must assist the parties in obtaining consensus on the contents of the workplace forum's constitution.¹¹⁸

If the criteria for establishment in terms of chapter 5 of the LRA have not been met, employees and the employer may, on their own accord, establish a voluntary participatory structure by means of collective agreement.¹¹⁹ If a voluntary participatory structure is established, the functions, powers and duties in terms of chapter 5 of the LRA will not be apply to such a participatory structure.¹²⁰ A workplace forum can further attain legal personality when established by means of collective agreement. The provisioning of the legal capacity of a workplace forum must further be contained in the constitution of a workplace forum.¹²¹

3.2 Process of establishing a workplace forum

The establishment of workplace forums can be facilitated in various forms. Provision is made in the LRA for the establishment of a workplace forum by collective agreement between employer and the representative trade union.¹²² If a workplace forum is established in terms of chapter 5 of the LRA, the workplace forum is entitled to exercise all rights and extinguish all duties in terms of chapter 5 of the LRA.¹²³ This may be undesirous to the employer and employee alike as it may not be necessary that all the rights in terms of chapter 5 of the LRA need to be enforced for the successful operation of a workplace forum.¹²⁴

¹¹⁷ S80(6) of the LRA.

¹¹⁸ S80(9) of the LRA. The CCMA is tasked with determining when the workplace forum will conduct its first sitting for the election of its first members. The constitution of a workplace forum becomes more crucial if consideration is given to the fact that it is through a workplace forum's constitution where a workplace forum derives its functions and powers from.

¹¹⁹ As stated in *Steadman 2004 ILJ 1192*, the author is of the view that the establishment of voluntary participatory structures is deemed to be most legitimate for employer and employee alike. It promotes co-operative potentials between management and labour and enhances stakeholder engagement in the wealth creation process. This participatory structure has the potential to be established specifically to cater to the parties' needs exclusive of the operation of any statutory obligations.

¹²⁰ See *Du Toit et al (2015) 401*, this means that the employer and employees to such a participatory structure need to determine the participatory structure's powers and responsibilities which can be contained by collective agreement.

¹²¹ S80(7) of the LRA. See also *Du Toit et al (2015) 401*.

¹²² As confirmed in *Collins et al (2000) 527*, the view expressed herein is that statutory workplace forums cannot be established for purposes of avoiding unionism. Workplace forums should not be used to establish an alternate structure of collective bargaining at unorganized or partially organized plants.

¹²³ *Van Niekerk et al (2018) 435*.

¹²⁴ See *Du Toit et al (2015) 394*, whom argue that a specific organisation may not have the requisite skill and resources to facilitate all the rights emanating from chapter 5 of the LRA. Rather, specific rights with a specific focus on promoting workplace governance specific to the organisation in question is the approach which should be adopted.

If no collective agreement is concluded between employer and trade union, the CCMA must facilitate the process of establishing the workplace forum by meeting both parties to the forum.¹²⁵ The issues to be agreed upon are the obligatory issues contained in S82(1) of the LRA. These issues go to the very essence of the purpose of workplace forums, such issues must be concisely detailed and agreed upon to ensure that collective bargaining structures are not impaired with the activities of the workplace forum.¹²⁶

The LRA also provisions for optional matters to be addressed, as specified in S82(2) of the LRA. These matters must be contained in the workplace forum's constitution subsequent to the employer and the trade union agreeing on the issues in question.¹²⁷

Representatives of the representative trade union may be elected as candidates of the workplace forum.¹²⁸ If trade union representatives are elected as workplace forum candidates, such individuals will inherently be challenged through their conflicting interests by virtue of their tasks and duties in the workplace forum, and their obligations to the trade union which they represent.¹²⁹

The process of election of candidates of the workplace forum concerns an election of candidates to a workplace forum by all the employees in the workplace. The right to vote is not restricted exclusively to trade union members.¹³⁰ A workplace forum constitution must contain the relevant formulas pertaining to the number of seats in the forum and how such seats are distributed in the workplace forum.¹³¹

Workplace forums are legally obliged to conduct elections every 24 months. Of relevance to this topic is that, if another trade union that was not previously representative, becomes sufficiently representative, a call for elections may be made 21 months after the previous election.¹³² The process of transferring the duties and responsibilities of the workplace forum from one trade union to another takes place in the 3 month difference between normal elections and elections whereby another trade union has become representative in terms of chapter 5 of the LRA.

¹²⁵ Van Niekerk *et al* (2018) 435.

¹²⁶ Du Toit *et al* (2015) 398.

¹²⁷ S80(9) of the LRA.

¹²⁸ S81(2) of the LRA.

¹²⁹ See Du Toit *et al* (2015) 400-401, it is argued that this is one of the primary reasons which have contributed to the failure of workplace forums in South Africa.

¹³⁰ S82(1)(c) of the LRA.

¹³¹ S82(1)(b) of the LRA, these are the obligatory issues which the workplace forum's constitution must address. This requirement in terms of the LRA is extremely important if the value of a workplace forum is to be realised.

¹³² Du Toit *et al* (2015) 398.

3.3 Functions and powers of a workplace forum

The general function of a workplace forum is to promote the interests of all employees, whether unionised or non-unionised, to enhance productivity, drive efficiencies and facilitate workplace governance.¹³³ A workplace forum, in striving to achieve the above objectives functions as a consolatory structure between employer and employee in order to obtain consensus on matters listed in S84 and S86 of the LRA.¹³⁴

3.4 The right to disclosure of information

The first of the participatory rights, the right to information, is required to allow the workplace forum to proficiently exercise all the rights contained in chapter 5 of the LRA.¹³⁵ There are limits to the right to information, similar in nature to information which can or cannot be disclosed during the collective bargaining process.¹³⁶ If an employer cannot provide the forum with the information it requires to effectively conduct its activities, the employer must provide reasons in writing as to why such information cannot be disclosed.¹³⁷ The workplace forum's dispute resolution machinery will come into operation, which entitles a workplace forum to refer a dispute to the CCMA in writing for conciliation and, if necessary, arbitration.¹³⁸

The CCMA must, when determining the nature of the information to be disclosed, firstly establish whether the information in question is required or relevant for purposes of the workplace forum conducting its functions and duties. If the information sought is confidential in that it relates to an employee or the employer itself, the CCMA must evaluate all the prevailing circumstances, to determine whether the prejudice caused by the disclosure of information is greater than the prejudice which would have been present had the information not been disclosed.¹³⁹ Du Toit argues that the common law duty of good faith obligates employees to keep the information pertaining to the employer's operations confidential, if such information has been obtained in the course of a workplace forum conducting its duties.¹⁴⁰ The LRA remains silent pertaining to the ramifications of the disclosure of

¹³³ Van Niekerk *et al* (2018) 433.

¹³⁴ S78 of the LRA. See also Steadman 2004 *ILJ* 1171.

¹³⁵ As envisaged by Du Plessis and Fouche (2014) 309, the right to information is of critical importance for a workplace forum to conduct its duties in terms of consultation and joint decision-making.

¹³⁶ S89(2) of the LRA.

¹³⁷ S89(2A) of the LRA.

¹³⁸ See S89(3) of the LRA, the award handed down by the CCMA will be binding on both employer and employee pertaining to the disclosure of information in question.

¹³⁹ S89(7) of the LRA. See also Du Toit *et al* (2015) 408, who states that the purpose of the limitation to the disclosure of information is to protect trade or business secrets, which places a great duty on the workplace forum to maintain the strictest of confidentiality in this regard.

¹⁴⁰ Du Toit *et al* (2015) 408.

information acquired during the course of collective bargaining, consultation or joint decision-making.¹⁴¹

3.5 The right to consultation

A workplace forum is entitled to consult or be consulted on any matter listed in S84(1) of the LRA. A workplace forum must be consulted on issues in terms of S84(1) prior to the employer adopting and implementing such a proposal.¹⁴² A bargaining council is further empowered to confer on the workplace forum any additional matters it deems a workplace forum can be consulted on.¹⁴³ The LRA is not clear regarding the time in which a workplace forum has to be consulted on any of the above proposals.¹⁴⁴

In Germany, provision is made that works councils should be consulted in “good time”. In the Netherlands, works councils should be consulted at a time when it can have a decisive influence on the decision to be taken.¹⁴⁵ In this regard, it would be permissible from the view of workplace forums to be consulted on any proposal whilst the employer’s proposal is still subject to change.¹⁴⁶

The operation of workplace forums on issues to be consulted upon may be rendered ineffective if such issues fall within the ambit of collective bargaining.¹⁴⁷ The right to consultation presupposes that the employer and workplace forum need to work together in implementing amicable solutions to any proposal falling within the scope of the workplace forum.¹⁴⁸ This right to consultation, authors believe is different from international norms regarding the employee’s right to consultation, as the term consultation actually implies negotiation.¹⁴⁹ The argument in this regard is that the fact that an employer must attempt to reach consensus on matters that the workplace forum is to be consulted on means that the process of consultation can become lengthy. This would inherently require more time and

¹⁴¹ S201 of the LRA.

¹⁴² See Basson *et al* (2009) 349, the author states that if the employer’s proposal is implemented prior to consulting the workplace forum, the dispute resolution mechanism contained in the workplace forum’s constitution will come into operation.

¹⁴³ S84(2) of the LRA.

¹⁴⁴ See Grogan (2014) 369, who states that the right to consultation involves a notification by the employer in good faith on the employer’s proposed adoption of the said proposal. It is further argued that the obligation to consult arises only when the employer proposes a change to an existing policy already in place.

¹⁴⁵ Du Toit *et al* (2015) 405.

¹⁴⁶ Basson *et al* (2009) 349.

¹⁴⁷ The statutory establishment of workplace forums still allows for collective bargaining to supersede the operability of a workplace forum, if the consultation issue in question is contained in a collective bargaining agreement.

¹⁴⁸ S85(1) of the LRA.

¹⁴⁹ See Du Toit *et al* (2015) 402, this consultation process of workplace forums can similarly likened to the consultation and negotiation pertaining to the S189 retrenchment procedure.

effort on the part of employers to achieve consensus before implementing the proposed solution.¹⁵⁰

3.6 The right to joint decision-making

The right to joint decision-making obligates the workplace forum and the employer to consult with a workplace forum and reach consensus on a decision on any proposal, before the implementation thereof.¹⁵¹ This right is limited to a great extent when looking at the floor of rights which are enforceable by a works council in Germany, pertaining to this entitlement.¹⁵² There has been proposed extensions to the applicability of the right to joint decision-making, such as new technology and production planning systems, these proposals have however not been adopted.¹⁵³

This joint decision-making action may be taken in terms of any matters contained in a collective agreement in which the workplace forum is established, or matters listed in S86(1) of the LRA.¹⁵⁴ From a dispute resolution perspective, if a workplace forum does not support the proposal tabled by the employer, the only recourse to the employer in this regard is to have the issue arbitrated upon and to abide by the arbitration award which has been handed down.¹⁵⁵

The right to joint decision-making, even though limited in its scope of applicability, has significant implications for matters falling within the ambit of joint decision-making.¹⁵⁶ Parties are free to amend the rights to be exercised in terms of S86 of the LRA, if the issue in question already forms part of an existing bargaining agenda.¹⁵⁷ Issues such as disciplinary codes and procedures and affirmative action measures are usually determined within the scope of collective bargaining.¹⁵⁸ The argument against provisions which speak to the above mentioned issues being addressed in a collective bargaining agreement is that centralised

¹⁵⁰ S85(4) of the LRA. See also Steadman 2004 *ILJ* 1173, who argues that employers may as a result of the time taken to obtain consensus pertaining to consultation, unilaterally implement its proposal.

¹⁵¹ S86(1) of the LRA. See also Du Toit *et al* (2015) 406.

¹⁵² As stipulated in Du Toit *et al* (2015) 395, works councils in Germany are afforded 12 topics on which it can jointly decide with the employer. The same holds true for the Dutch Works Councils Act which provides works councils in the Netherlands with 12 topics on which it can jointly decide with an employer.

¹⁵³ COSATU Negotiations Bulletin 7-8.

¹⁵⁴ See S86(1) of the LRA, the issues which may be jointly decided upon subsequent to obtaining consensus are disciplinary codes and procedures, rules pertaining to the proper regulation of the workplace, measures to protect individuals who have been discriminated against and changes to employer controlled social benefit schemes.

¹⁵⁵ Du Toit *et al* (2015) 415.

¹⁵⁶ S 86(7) of the LRA. See also Steadman 2004 *ILJ* 1174.

¹⁵⁷ The fact that the right to joint decision-making may be limited by the operation of collective bargaining means that the provisions in the act dealing with collective bargaining and workplace forums are contradictory in nature to each other.

¹⁵⁸ Steadman 2004 *ILJ* 1175.

bargaining may not be in a position to determine the most ideal outcome for the workplace concerned. A workplace forum, due to it conducting daily operational activities, will be in a better position to determining what is in the best interests of all the employees at such a workplace.¹⁵⁹

4. Proposed amendments in 2000 to chapter 5 of the LRA

The shortfalls of chapter 5 of the LRA prompted the review of various provisions regulating the establishment of workplace forums. The purpose of the review was to amend various sections of chapter 5 of the LRA.¹⁶⁰ The legislature had knowledge of the inefficiency of the statutory model of workplace forums, which was the driving factor behind the proposed amendments being tabled.¹⁶¹ Back in 2000, the proposed amendments authors argued would have resulted in a more flexible approach to establishing a statutory workplace forum in which the dependency was not on majority trade unions to initiate the process of establishment of a workplace forum.¹⁶²

The Bill proposed various amendments, the first being that a workplace forum may be established where no representative trade union was recognised as such at a workplace where a workplace forum sought to be established.¹⁶³ The second amendment was that a registered trade union may apply for the establishment of a workplace forum if the application is supported by a majority of employees in the workplace.

Lastly and most importantly, it was proposed that workplace forums can be established in workplaces with less than 100 employees.¹⁶⁴ The resistance from trade unions and businesses to the proposed amendments was caused by trade unions feeling that the extension of establishing workplace forums to non-unionised employees would encroach on a trade union's territory to organise in the workplace.¹⁶⁵

The opposition to the amendments from business arose due to the fact that the amendments would see the establishment of workplace forums in small businesses.¹⁶⁶ This would have resulted in the extensive regulation of small businesses who may not have had the financial and skills resources to facilitate the establishment of workplace forums.¹⁶⁷ Business was

¹⁵⁹ Du Toit (2015) 407.

¹⁶⁰ See Du Toit 1995 *ILJ* 785, where the author already indicates in 1995 when the article was written that the shortfalls of chapter 5 of the LRA had already been expressed by various authors.

¹⁶¹ Botha 2015 *PER* 1832.

¹⁶² Olivier 1996 *ILJ* 810.

¹⁶³ S17 of the Labour Relations Amendment Bill, 2000.

¹⁶⁴ S18(a) of the Labour Relations Amendment Bill, 2000.

¹⁶⁵ Steadman 2004 *ILJ* 1175.

¹⁶⁶ Manamela 2002 *SA Merc LJ* 730.

¹⁶⁷ Botha 2015 *PER* 1833. See also Du Toit 1995 *ILJ* 796.

further of the view that a new adoption to the operation of workplace forums would result in the adoption of a method of enforcement as opposed to enablement, thereby moving away from the principle of voluntarism.¹⁶⁸ Business was further of the view that this new floor of rights would create “far-reaching” entitlements for employees with no corresponding protection for employers when such rights are misused and abused by employees.¹⁶⁹

5. The definition of “workplace” in the context of workplace forums

The provisioning for different operations within an organisation can have a contentious effect on the establishment and operation of workplace forums.

The LRA defines a “workplace” as the following:

“The place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation”.¹⁷⁰

From the above definition it emerges that the primary criterion in the determination as to whether a place is a workplace is the existence of an employment relationship.¹⁷¹ The definition of “workplace” contained in the LRA was interpreted by the court in *AMCU v Chamber of Mines of South Africa and Others*.¹⁷² The Constitutional Court was tasked with determining whether the extension of a collective agreement which prohibited a minority trade union from engaging in industrial action had been correctly extended to the minority union in terms of the LRA.¹⁷³

The key issue in dispute was that the collective agreement should have been extended in terms of S32 of the LRA to minority trade unions recognised as such in a workplace. This averment put the Court to task in determining whether the Chamber of Mines utilised S23 of the LRA to circumvent the provisions of S32 of the LRA.¹⁷⁴ The key for determining a workplace is the independence of its operations, not the locality of different workplaces.¹⁷⁵ The point raised by the Court to which this factual assessment applies is to determine

¹⁶⁸ Steadman 2004 *ILJ* 1175.

¹⁶⁹ Steadman 2004 *ILJ* 1176. See also Botha *PER* 1833.

¹⁷⁰ S 213 of the LRA.

¹⁷¹ Du Toit *et al* (2015) 395.

¹⁷² (2017) 38 *ILJ* 831 (CC).

¹⁷³ *AMCU v Chamber of Mines of South Africa and Others* 2017 38 *ILJ* 831 (CC) *para* 1.

¹⁷⁴ Van Eck *ILJ* 2017 1499.

¹⁷⁵ *AMCU v Chamber of Mines of South Africa and Others* 2017 38 *ILJ* 831 (CC) *para* 24.

whether operations of the different locations were independent of one another by virtue of size, function or organisation.¹⁷⁶ The Court held in conducting the factual assessment, with the facts before it indicated that all the individual mining houses operated in an integral fashion, which meant that all the mining houses irrespective of locality constituted one workplace.¹⁷⁷

The majoritarian principle which the LRA adopts in the exercise of labour rights may have negative consequences pertaining to employee rights to freedom of association and the right to collective bargaining.¹⁷⁸ The Constitutional Court in an earlier contradictory decision stepped away from majoritarianism which it viewed unjustifiably infringed on the employees' right to strike and bargain collectively.¹⁷⁹ The Court, in adopting a pluralist approach to the right to strike, weighed the fact that minority trade unions had no organisational rights which they could exercise was contrary to the objects of the International Labour Organisation's ("ILO") right to freedom of association and the right to strike.¹⁸⁰ The Court further held that there was no explicit provision preventing minority trade unions from engaging in industrial action in relation to non-statutory trade union rights.¹⁸¹

The meaning of "workplace" in terms of the LRA as encapsulated by the Constitutional Court seeks to promote principals of majoritarianism which the LRA is built on.¹⁸² In reference to workplace forums, the LRA limits each workplace forum to its own workplace. This creates a problem for the operational establishment and efficiency of workplace forums in instances where a multiplicity of workplaces is found in one organisation. A workplace forum will not be able to exercise its right to consultation and joint decision-making at a central level,¹⁸³ where the more important and strategic decisions are taken.¹⁸⁴ If parties cannot reach an

¹⁷⁶ *AMCU v Chamber of Mines of South Africa and Others* 2017 38 ILJ 831 (CC) para 37.

¹⁷⁷ Van Eck 2017 ILJ 1501.

¹⁷⁸ See Theron et al 2015 ILJ 853, the author is of the view that in order to avoid employees from taking the law into their own hands, new trade unions should be entitled to organize in the workplace and engage in collective bargaining. Where "sweetheart" trade unions remain in the majority without looking to the interests of employees, the effect thereof may be that employees will seek to have their voices heard by utilizing mechanisms falling outside the legislative framework of the LRA, such as engaging in violent strikes.

¹⁷⁹ *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BCLR 182 (CC).

¹⁸⁰ *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BCLR 182 (CC) para 29-32. See also Fergus 2016 ILJ 1544.

¹⁸¹ Maserumule 2001 ILJ 45.

¹⁸² Theron et al 2015 ILJ 856.

¹⁸³ With the facts of *AMCU* in mind, it would be a difficult task to establish where the central point of all the mining houses is. Differently put, it will not be known where the establishment of a workplace forum will be best placed in order to voice the interests of the workforce in the important and strategic decisions of the various workplaces.

¹⁸⁴ Du Toit et al (2015) 414.

agreement regarding what constitutes a workplace, the only recourse in this regard would be to have this determined by means of arbitration.¹⁸⁵

6. Reasons for the failure of workplace forums

Collective bargaining has traditionally been the primary means of engagement between an employer and its employees. The statement below by Du Toit summarises the precarious position of workplace forums;

“That of facilitating major restructuring of the economy by promoting a shift from adversarial collective bargaining on all matters to joint problem-solving and participation on certain production-related subjects. This would be done by creating a second channel of industrial relations, partly modelled on the works councils of Germany and the Netherlands.

The message thus sent to unions was ominous, restructuring and job losses that unions would fight tooth and nail in the bargaining arena were expected to find greater acceptance if negotiated with "non-adversarial" workplace forums. Not even the fact that the LRA ultimately gave unions' all but absolute control over workplace forums could disarm unions' suspicions or dispel the belief that workplace forums, however constituted, would inevitably serve as cats' paws for employers and sow divisions among workers.”¹⁸⁶

The above position makes it clear that trade unions oppose the establishment of workplace forums as trade unions seek to maintain control of production issues that does not form part of collective bargaining.¹⁸⁷ The current design of the LRA for the establishment of workplace forums depends on the representative trade union being the initiator to establishing a workplace forum.¹⁸⁸ The statutory obligation on trade unions to establishing workplace forums means that workplace forums become an extension of the shop steward structure of the representative trade union in the workplace.¹⁸⁹

Further criticism that has been tabled pertaining to the effectiveness of workplace forums regards the right to consultation being a right that leaves the power to exercise such a right in the hands of the employer.¹⁹⁰ Trade unions oppose the idea of establishing statutory

¹⁸⁵ Du Toit *et al* (2015) 415.

¹⁸⁶ Du Toit 2007 *ILJ* 1426.

¹⁸⁷ See Botha 2015 *PER* 1828, the author opines for the distinction of trade union activities to be premised on distributive issues. On the opposite side of the spectrum, production related issues it is argued are best left to be addressed by the workplace forum.

¹⁸⁸ See Botha 2015 *PER* 1828, who mentions that the power which trade unions have in establishing workplace forums means that workplace forums are wholly dependent on the intention and objective of the trade union.

¹⁸⁹ See Manamela 2002 *SA Merc LJ* 733, the author argues that workplace forums will never act autonomously, but will always act with trade union objectives forming the objectives of the workplace forum.

¹⁹⁰ See Olivier 1996 *ILJ* 813, the author argues that this makes the actions of workplace forums reactive in nature, which can be viewed as a hindrance for the effectiveness of workplace forums.

structures of participation as the LRA provides that an employer need only attempt to reach consensus on issues to be consulted upon.¹⁹¹ An employer, to this end, could still in the absence of consensus implement the proposal which the employer and the workplace forum could not reach consensus on.¹⁹²

The conflict in the fact that the statutory powers which a workplace forum can exercise is subject to being excluded from such operation if the issue in question is already on the bargaining agenda.¹⁹³ The matters listed in the LRA that workplace forums can jointly decide on with an employer absent a collective agreement to that effect is severely limited. An employer is further only required to attempt to obtain consensus with the workplace forum on matters requiring joint decision-making in terms of S86(1) of the LRA.¹⁹⁴ The list of matters in which a workplace forum can jointly decide upon with an employer can be also be completely excluded.¹⁹⁵

The LRA further only allows that a majority union in a workplace with more than 100 employees may apply for the establishment of a workplace forum. The ensuing consequences from this requirement are twofold, firstly, the majority of employees in South Africa will be excluded due to this requirement.¹⁹⁶ Secondly and more importantly, the dominant role of trade unions who have a majority in a workplace of this size will undermine the objectives the legislature sought to achieve through the adoption of chapter 5 of the LRA.¹⁹⁷ Trade unions are a business, and have to satisfy the needs of their members, which means that the needs of the non-unionised employees are consequently ignored.¹⁹⁸

Trade unions are further of the view that workplace forums can be manipulated by the employer which may result in the impotence of a trade unions' influence during collective

¹⁹¹ See S86(1) of the LRA, due to the LRA allowing for trade unions to essentially maintain control of production related issues within the workplace has crippled the establishment of workplace forums. Employers further need only attempt to reach consensus, there is no greater consequence for the employer if consensus is not obtained, which undermines the innate authority of workplace forums.

¹⁹² As stated in Steadman 2004 *ILJ* 1189 and confirmed by Du Toit 2000 *ILJ* 1557, the authors corroborate each other's views in that trade unions perceive workplace forums as a door mat because workplace forums are dependent on the trade union with limited recourse in the form of industrial action which again denotes an adversarial element to the operational efficiency of workplace forums.

¹⁹³ See S84(1) and S86(1) of the LRA, where the wording of the provisions state that "unless matters for consultation or joint decision-making are regulated by collective agreement". The wording of these provisions expresses an intention that workplace forums will only deal with the limited matters which collective bargaining does deem to be important to such an extent where such a matter can be included in a collective agreement.

¹⁹⁴ Du Toit *et al* (2015) 406.

¹⁹⁵ To the extent that a collective bargaining agreement addresses such issues.

¹⁹⁶ Botha 2015 *PER* 1831.

¹⁹⁷ See Olivier 1996 *ILJ* 810, where it is stated that trade unions in an organisation of this size would have a prominent following. Such a union would not want to relinquish any of its powers to a workplace forum, which covers employees who are not members of the majority trade union.

¹⁹⁸ Brassey 2013 *ILJ* 833.

bargaining and at the workplace concerned. Trade unions further adopt the view that the workplace forums, in seeking to achieve its objectives, will result in a division of unionised employees, thereby promoting the interests of non-unionised and minority union members.¹⁹⁹

Authors have expressed further the following reasons for the inherent failure of the statutory model of workplace forums, the first being that the prevailing economic climate of downsizing, mergers and relocations is not conducive to the establishment of workplace forums.²⁰⁰ The second reason is that employees in practice, due to the requirements of their employment, have limited capacity to participate in workplace forums meaningfully and effectively.²⁰¹ The small size of many organisations poses an obstacle to the establishment of workplace forums, is another reason which has been expressed for the failure of workplace forums.²⁰²

7. Conclusion

The first finding from the contents of this chapter is that the Task Team sought to facilitate a secondary channel of employee participation meant to supplement collective bargaining. The Task Team ensured that the operation of this secondary channel would not move to determine issues meant for collective bargaining.²⁰³

The second finding from the contents of this chapter is that the trade union based approach to chapter 5 of the LRA does not succeed in achieving the objects of the legislature through its implementation of chapter 5 of the LRA.²⁰⁴ One of the reasons for the failure of workplace forums is that institutionalised mechanisms are not present that clearly demarcate the scope of operation of trade unions in collective bargaining, and the scope of operation of workplace forums supplementary to collective bargaining. The perception by trade unions to this effect is that workplace forums may be influenced by employers to reduce bargaining to plant level. The Task Team in its explanatory note envisaged and clearly outlined that workplace forums should never substitute the doctrine of trade unionism in collective bargaining.²⁰⁵ This is

¹⁹⁹ Du Toit 2009 *UWC* 3-4.

²⁰⁰ Steadman 2004 *ILJ* 1172.

²⁰¹ Steadman 2004 *ILJ* 1173.

²⁰² Steadman 2004 *ILJ* 1174.

²⁰³ See Botha 2015 *PER* 1823, reference is made that no distributive issues of terms and conditions of employment are to be dealt with in the ambit of a workplace forum's functionality.

²⁰⁴ Explanatory Memorandum 1995 *ILJ* 310.

²⁰⁵ Explanatory Memorandum 1995 *ILJ* 312.

however not the reality of the situation, which may be one of the primary reasons why workplace forums have failed in South Africa.²⁰⁶

The third finding from the contents of this chapter is that the legislature identified a clear *lacunae* in the law pertaining to the provisions regulating workplace forums, yet these provisions were never formally adopted into law.²⁰⁷ The failed adoption of the proposed amendments goes to the heart of the issues of workplace forums.²⁰⁸ It is clear from the opposition which the proposed amendments received from business and trade unions that adversarialism is still central to and drives the employment relationship.²⁰⁹

The fourth finding from the contents of this chapter is that the definition of “workplace” contained in the LRA may require amendment specifically in relation to the definition of workplace in purposively interpreting the provisions of chapter 5 of the LRA. As mentioned previously, the notion of “workplace” may become a complex term to define if a workplace forum is required to be established in a multiplicity of workplaces.²¹⁰

This according to Du Toit may become an issue, in that a workplace forum may be established at every workplace, but not at the central location where the important and strategic decisions are made, as no right to consult or joint decision-making will fall open to a workplace forum in such an instance.²¹¹ If management’s prerogative cannot be challenged at this level, then it suffices that the purpose and effectiveness of workplace forums will be called into question.

²⁰⁶ Collins *et al* (2000) 527.

²⁰⁷ Steadman 2004 *ILJ* 1174.

²⁰⁸ Botha 2015 *PER* 1837.

²⁰⁹ Steadman 2004 *ILJ* 1174-1175.

²¹⁰ See chapter 4 above, the definition of “workplace”.

²¹¹ See Du Toit *et al* (2015) 415, it is argued that employers will seek to adopting this approach if a multiplicity of workplaces are found to be in operation for the same employer in order to minimize trade union influence.

CHAPTER 4

THE GERMAN MODEL OF EMPLOYEE PARTICIPATION

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1. Introduction

The Ministerial Task Team sought to achieve a labour relations system based on corporatism through the implementation and operation of workplace forums, in facilitating a second channel of employee participation at plant level.²¹² The Ministerial Task Team undertook to implement a model of employee participation at plant level within the framework of labour relations in a South African perspective upon enactment of the Labour Relations Act (“LRA”).²¹³

In moving away from the adversarial unequal labour relations that were in place upon the pending adoption of the LRA, a similar model of employee participation to that found in Western European countries such as Germany was deemed to be the best solution in facilitating this secondary channel of employee participation in South Africa.²¹⁴

The essence of the collective labour law transplant pertaining to employee participation from Germany to South Africa is envisaged in the below statement:

“Even though South Africa copied the German model of worker participation, it is clear that South Africa deviated somewhat from the way in which Germany regulates worker participation.”²¹⁵

This chapter will outline the historical development employee participation in Germany. The framework in place regulating employee participation at plant level in Germany will further

²¹² Du Plessis and Fouche (2014) 309.

²¹³ Explanatory Memorandum 1995 *ILJ* 310.

²¹⁴ Vettori 2005 *SA Merc LJ* 300. See also Davis and Le Roux 2012 *Acta Juridica* 318.

²¹⁵ Manamela 2002 *SA Merc LJ* 733.

be expanded on. Only the most prevalent characteristics of German collective labour law will be outlined in relation to understanding the practice of employee participation at plant level in Germany. Two pertinent reasons can be identified as to why plant level employee participation in Germany will be analysed in this chapter. The first reason is that the Task Team sought to achieve a coordinated labour relations system where employer and employee could engage on production related issues in conjunction with collective bargaining.²¹⁶

The second reason for adopting Germany as a comparative champion of employee participation is that the system of employee participation in Germany has been concisely developed to cater for employee participation and collective bargaining as two separate channels of employee participation.

This chapter will further analyse the adoption by the legislature to implementing a system of employee participation similar to the system of employee participation found in Germany. The recommendation by the Ministerial Task Team to implement such a second channel of participation within a South African framework, and why such “transplanting of laws” has not yielded the desired result as encapsulated by the Ministerial Task Team and the legislature will be will be discussed in this chapter.²¹⁷

2. Historical development of employee participation

In the early 1900s, large corporations sought to implement voluntary participatory structures ensuing from the social movement and influence of trade unions.²¹⁸ Four reasons were identified for the establishment of these participatory structures.²¹⁹ The first reason for the adoption of this approach was that large firms utilised the implementation of participatory bodies to legitimise rules and regulations in the workplace by integrating employees input into the promulgation of rules which would regulate employees in the workplace.²²⁰

Secondly, large corporations delegated social assistance schemes to participatory bodies, as these activities were burdensome on the employer with little return in the form of profits and efficiency which was the employer’s primary objective. Organisations at the time saw it

²¹⁶ Botha 2015 *PER* 1837.

²¹⁷ Explanatory Memorandum 1995 *ILJ* 311.

²¹⁸ Weiss and Schmidt (2008) 28.

²¹⁹ Weiss 2005 *Law, Democracy and Development* 159.

²²⁰ See Weiss 2004 *Managerial Law* 74, who is of the view that a distinguishing characteristic of trade unions in Germany is that all the different political and ideological wings are contained in one association. Throughout history, it is clear that trade unions in Germany encompassed ideological and political objectives in catering for the needs of their members inside and outside of the workplace.

as a proactive strategy to alleviate themselves of this administrative task by delegating such tasks to employee participatory bodies.²²¹

Thirdly, due to members of participatory bodies being subject to the choosing of the employer, employers could exert influence on the elected employees to these representative bodies. Employees saw the appointment of employees to a participatory body as a promotion, which the employer could persuade employees elected as such to act in the interests of the employer.²²²

Lastly, firms sought to implement participatory bodies as employers were of the view that participation by employees would promote integration of employees into the firm. The result was that employees were of the view that they could identify with their employer, thereby thwarting employees from joining socialist trade union movements.²²³

It was not until the strategy debate of the early 1900s that a concerted move was made toward institutionalised participation, impugning limitations of power on employers through consultation with employees in the decisions and operations of management.²²⁴ The realisation that capitalism in itself is not necessarily a culprit in the realm of organised labour, but rather that capitalism ought to be approached differently brought about an end to the socialist trade union movement.²²⁵ The result from the move away from the socialist trade union movement was that trade unions were seen as vehicles through which employees could exert their influence over employers. It was with the agreement concluded between the biggest unions and employers in 1920, known as the *BetriebsrateGeset* in which the first works council law was enacted.²²⁶

Trade unions not only sought to train members of works councils, but were further entitled by law, through an amendment to the act in 1928 to submit lists of individuals to be elected to become members of works councils. Trade unions undertook the activity of training works council members, as opposed to adopting the view that works councils are encroaching on its territory.²²⁷

The Works Constitution Act of 1972 (“WCA”) was enacted to further drive the process of employee participation. In this process, trade unions concern themselves with sectoral

²²¹ Weiss and Schmidt (2008) 29.

²²² Weiss 2005 *Law, Democracy and Development* 160.

²²³ Weiss 2005 *Law, Democracy and Development* 160.

²²⁴ Weiss and Schmidt (2008) 29-30.

²²⁵ Weiss 2005 *Law, Democracy and Development* 160.

²²⁶ Manamela 2002 *SA Merc LJ* 733.

²²⁷ Already in 1928, corporative measures were being engaged upon, as trade unions came to realise the value of works councils, thereby entrenching the need for training and support to the operations of works councils.

bargaining, whereas the day to day labour issues within a specific firm are left to and determined by the works council in operation.²²⁸ The logic behind this thought process is that trade unions do not concern themselves with minute issues at a micro level. Instead, the provisioning of trade union activities takes place at a macro level where bargaining is more extensive and can influence employers to a greater extent.²²⁹

3. The current model of employee participation

Current employee participation in Germany is based on two primary pillars: The first of these pillars is collective bargaining contained in the German Basic Law.²³⁰ The second pillar is through the operation of works councils. Joint decision-making and participation at plant level mean the involvement of the works council in all issues affecting employees at the workplace.²³¹ The WCA is the legislation that drives the regulation, establishment, powers and functions of works councils.²³² The WCA only applies to and facilitates the regulation of works councils in the private sector. The Federal Law on Staff Committees, known as the *Bundespersonalvertretungsgesetz*, regulates employee participatory structures in the public sector.

Oberfichtner and Schnabel report that in Germany, 60% of employees are covered by the ambit of collective bargaining, and 47% of employees are covered by works councils in operation at workplaces nationwide.²³³ Research undertaken by the IAB Establishment Panel, which included over 16000 establishments shows that 93% of public sector employees are covered by a staff council.²³⁴ The table below is indicative of plant based participatory behaviour in Germany regarding the establishment and operation of works councils:

Size of the establishment	% of employees represented by works councils
5 to 50 employees	5.1
51 to 100 employees	24.2
101 to 199 employees	58
200 to 500 employees	65.6
More than 500 employees	93.3

²²⁸ Weiss 2005 *Law, Democracy and Development* 164.

²²⁹ Weiss 2005 *Law, Democracy and Development* 164.

²³⁰ Addison et al 2010 *IZA Institute of Labour Economics* 3.

²³¹ See Federal Ministry of Labour and Social Affairs 2018 4, it is argued that the “heavy lifting” in the employment relationship will be done through collective bargaining, while workplace issues are determined within the ambit of the works council structure independent of collective bargaining.

²³² S1 of the WCA.

²³³ Oberfichtner and Schnabel 2017 *IZA Institute of Labour Economics* 18.

²³⁴ www.iab.de/en/daten/arbeitsmarktbarometer.aspx accessed 27.07.2019.

Total % of employees covered by works councils	47
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In order to understand the current legal framework regarding employee participation in Germany, the relationship between trade unions and works councils must be outlined and understood, as a means to arrive at a workable hypothesis as to the failure of workplace forums in South Africa. The most prevalent characteristics of the relationship between trade unions and works councils include the fact that there is a clear and distinct derogation of activities between works councils and trade unions.²³⁵

Furthermore, collective agreements provide employers and works councils with a framework for determining activities of the workplace.²³⁶ Such agreements are legally enforceable contracts that regulate the engagements between the works council and the employer, driven by the provisions of the WCA.²³⁷ Trade union representatives may attend works council meeting only under certain circumstances and with the permission of the works council.²³⁸

S1 of the WCA provides that a works council shall be established in an organisation at the discretion of the employees of the organisation in question.²³⁹ In an organisation where more than five employees are permanently employed, all employees who are over the age of 18 years who have been permanently employed for at least six months are eligible to vote in terms of the WCA.²⁴⁰ The establishment of a works council is driven and dependant on the employees employed in a particular workplace, and is not automatically established when the organisation in question meets the prerequisites for establishment contained in the WCA.²⁴¹

Another difference in the circumstances of works councils and that of workplace forums is that workplace forums are often perceived to be an extension of trade union shop steward

²³⁵ See Weiss 2004 *Managerial Law* 73, the author is of the view that trade unions not only represent the interests of their members, but they represent the interests of all the employees as a whole.

²³⁶ This is also known as a works agreement.

²³⁷ Collective agreements are the conceptual paradigms on which works agreements are built and enforced.

²³⁸ See Weiss 2005 *Law, Democracy and Development* 165, it is clear that the approach in Germany to works councils is that works councils are empowered to act independently of trade union influence.

²³⁹ An employee based participatory structure as found in Germany yields benefits in the form of employees being subject to the rules and regulations they approve of.

²⁴⁰ Addison *et al* 2002 *IZA Institute of Labour Economics* 6.

²⁴¹ This key principal is mentioned by Oberfichtner and Schnabel 2017 *IZA Institute of Labour Economics* 5, mention is made to the fact that the employees in an organisation are still obligated to initiate the process of establishment of works council, even where the requirements for the said council have been met. The move away from adversarialism becomes clearer in that the system of participation at plant level is driven by the employees in an organisation, whether unionised or not as opposed to this process being in the hands of the trade union.

lists. Works councils' actions, decisions and tasks are representative of the entire workforce.²⁴² Authors argue that this is due to the fact that the resources and skill to successfully facilitate a workplace forum is a difficult task to achieve. The success of works councils may be due to organised labour's ability to share skills and resources to facilitate achieving the objectives of the WCA.²⁴³

The WCA provides for transparency in that works councils are to be elected every four years. All votes during this election process are determined by secret ballot.²⁴⁴ Works councils, to a greater extent are representative of the employees employed within the firm concerned. An example of this would be that if there are 16 females and 4 males forming part of the employees who are eligible to be council members, 80% of council members will be females.²⁴⁵ Employees can be further determine members of works councils without fear or prejudice, as works council members are elected by secret ballot, thereby ensuring free and fair elections of council members.²⁴⁶

The WCA provides for the integrity of the works council to be maintained as far as is possible and for the fact that the employer bears the costs of the electoral process of the works council.²⁴⁷ An employer is not entitled, in terms of the WCA to reduce an employee's remuneration due to an employee taking part in the activities of the works council.²⁴⁸

The WCA further empowers a works council with the authority to execute functions such as the right to co-determination,²⁴⁹ the right to be consulted, the right of veto and the right to be informed and stay informed on any matter relevant to the executing of its duties and functions.²⁵⁰ The WCA obligates the employer to provide information that would be relevant to the works council for determination on any decision to be made by the works council, in order to properly conduct its activities.²⁵¹ If the employer undertakes to make a decision without the prior approval of the works council, a works council is empowered, in terms of

²⁴² Botha 2015 *PER* 1820-1821.

²⁴³ See Botha 2015 *PER* 1822, the author states that the WCA further specifically provides that the operational expenses of a works council is to be borne by the employer. In South Africa, due to the financial market unrest not allowing for same, this may not be a permissible hypothesis as small to medium organisations may not have the financial resources and requisite skills to facilitate workplace forum activities.

²⁴⁴ S21 of the WCA. See also Carley *et al* 2004 *EIRO Thematic Features* 12.

²⁴⁵ S27 of the WCA. See also Federal Ministry of Labour and Social Affairs 2018 5.

²⁴⁶ McGaughey 2015 *LSE Law, Society and Economy Working Papers* 10/2015 2.

²⁴⁷ Addison *et al* 2010 4.

²⁴⁸ The act facilitates the operation of a works council, in that employees who are works councils members will not incur a reduction in remuneration. To this end, the employer remains accountable for the costs of the operation of a works council, including the remuneration of works council members.

²⁴⁹ The right to co-determination is regulated by the Co-determination Act.

²⁵⁰ S80(2) of the WCA. See also S87 of the WCA.

²⁵¹ S80(1) and (2) of the WCA.

the WCA to veto the decision taken by the employer until the employer has provided the works council with the requisite information and time to make a decision of the matter in question.²⁵²

A pivotal function of a works council highlighting the maturity of the operation of German labour relations, is that a works council is to be furnished with a notice of dismissal of an employee within the workplace concerned and the reasons for such a dismissal.²⁵³ A notice of dismissal cannot be issued to the employee before the notice has been issued to the works council. An action in to this effect would deem the notice of dismissal as null and void. If the works council objects to the dismissal of an employee, such objections must be raised within seven days of the notice of dismissal being issued to the works council.²⁵⁴

If an employer undertakes to recruit, grade, regrade or transfer an employee or prospective employee, a works council must be informed of the pending action by the employer.²⁵⁵ The works council may object to the proposed move by the employer if the works council is of the opinion that such an action will be contrary to any works agreement, collective agreement or the WCA itself.²⁵⁶

The WCA further provides for joint decision-making on various issues between the employer and the employees, which is not specifically provided for in a collective agreement or by law.²⁵⁷ S87 of the WCA provides the platform of joint decision-making between employer and the works council on a range of social issues such as rules of conduct, operational performance and employee hours.²⁵⁸

If a works council and employer cannot reach agreement on an issue at hand, the issue in question must be referred to a Conciliation Committee. The decision of the Conciliation Committee will be binding on all parties to the works agreement. The Conciliation Committee acts at the request of either the works council or the employer and the Committee's award is prescribed to be reduced to writing, which will form part of an annexure to the existing

²⁵² S80(1) of the WCA.

²⁵³ See S102(1) of the WCA, The Conciliation Committee of a works council tasked with resolving disputes between employer and works council has the functions and powers comparable to that of the Commission for Conciliation Mediation and Arbitration ("CCMA") from a South African perspective within a specific workplace.

²⁵⁴ S102(2) and (3) of the WCA.

²⁵⁵ S99(1) of the WCA.

²⁵⁶ See S99(1) of the WCA, a clear difference presents itself between works councils and workplace forums in that workplace forums may only suggest solutions to proposed restructuring and job grading once approached for input by the employer. Works councils however can initiate the process of consultation, thereby becoming more proactive in extinguishing its duties and responsibilities.

²⁵⁷ S 87 of the WCA. See also Du Toit *et al* (2015) 408, the author is of the view that the right to joint decision-making is far-reaching in Germany, with 12 topics being subject to joint decision-making in Germany.

²⁵⁸ S87 of the WCA. See also S76 of the WCA.

works agreement that is in place. This means that the Committee's order becomes enforceable by law as it is part of a legally enforceable works agreement.²⁵⁹

A works agreement is the legally binding agreement which encompasses the scope of the engagement between the works council and employer. Mention must be made of the autonomy of the works agreement within the greater framework of collective bargaining.²⁶⁰ A works agreement will not regulate any issue or condition of employment specifically addressed by collective bargaining.²⁶¹ S87 of the WCA provisions for the distinction between issues to be dealt with by a works council, and issues to be dealt with in the process of collective bargaining.

This is a burning issue within the current framework of workplace forums in South Africa, as there is no clear distinction of matters to be dealt with falling within the exclusive jurisdiction of the workplace forum, and matters to be dealt with in the process of collective bargaining.²⁶² The WCA, however, provides for ancillary mechanisms which can form part of a collective agreement where supplementary works agreements can be utilised to achieve the objectives of the sectoral collective bargaining agreement.²⁶³

The structure of works councils further promote efficiency through the restriction of industrial action within the workplace.²⁶⁴ The WCA obligates the employer and employees to jointly maintain the peace and stability within the workplace.²⁶⁵ In moving away from industrial action, the WCA vests the power of the Conciliation Committee to determine matters which cannot be agreed upon between the employer and the works council as a dispute resolution mechanism.²⁶⁶ The Conciliation Committee in terms of the WCA is to comprise of members appointed from both the employer and the works council.²⁶⁷

The composition of the Conciliation Committee encourages objectivity in all matters that the committee is required to co-determine. In dealing with issues that are non-distributive in

²⁵⁹ See S76(5) of the WCA, which provides for the Conciliation Committee of a works council structure which is similar in nature to that of the Commission for Conciliation Mediation and Arbitration ("CCMA"). The order of the Conciliation Committee becomes an annexure to the works agreement currently in operation and is binding on the parties to the works agreement.

²⁶⁰ This notion of autonomy may however have ensuing consequences as pointed out by Waas (2012) 88-89. It is well known that both works councils through the execution of works agreements and trade unions through the execution of industry wide collective agreements have the power to execute agreements with employers.

²⁶¹ See S77(3) of the WCA, that provides for works agreements to exclude matters already dealt with by means of collective agreement.

²⁶² Olivier 1996 *ILJ* 808.

²⁶³ The act provides for works agreements which must give effect to the provisions of collective agreements. From this conclusion, works councils operate alongside collective bargaining, not in its place.

²⁶⁴ S74(2) of the WCA.

²⁶⁵ S74(2) of the WCA.

²⁶⁶ S76(1) and (2) of the WCA.

²⁶⁷ This provision ensures the objectivity of the Conciliation Committee in determining the issue in dispute.

nature, the Conciliation Committee can make binding decisions that will be incorporated into the works agreement. In other instances, the Conciliation Committee will make non-binding decisions when a decision regarding management's prerogative on distributive issues.²⁶⁸ The power of a Conciliation Committee is subject to judicial scrutiny, in that the employer or works council may appeal a matter that a Conciliation Committee has adjudicated on the basis of the conciliation having exceeded its authority.²⁶⁹

4. A legal system transplant: problem solver or problem creator?

As mentioned above, the Ministerial Task Team drew on local and international individuals to assist in the drafting of the LRA.²⁷⁰ The prospective engagements within the Ministerial Task Team in analysing foreign markets led to the adoption of certain provisions to workplace representivity commonly found in Western European countries, such as Germany and the Netherlands.²⁷¹ The Ministerial Task Team were of the view that certain provisions pertaining to employee participation found in these countries had to be included in the framework of the LRA. There were still provisions of chapter 5 of the LRA that had to be tailored specifically to the requirements and circumstances present in the South African labour market when the draft bill was first presented to Parliament.²⁷²

In view hereof, the question as to when provisions of collective labour law can be transferred from one jurisdiction to another is a contentious course which has great implications for the course of application of newly indoctrinated rules.²⁷³ It may be argued that the forces of collective labour law may not be transferred, as collective labour law requires due consideration be given to a country's social, economic and political climate.²⁷⁴ Collective labour law requires consideration of issues greater simply than the contract of employment, and no two countries will have the same social, political or economic landscapes by which the transplanting of regulations that regulate collective labour law can be successfully implemented and legitimised.²⁷⁵

²⁶⁸ See S76(1) of the WCA, provision is made for the independence of the works agreement, and the independence of collective bargaining.

²⁶⁹ S76(6) of the WCA.

²⁷⁰ See chapter 3 above pertaining to the drafting process of the LRA.

²⁷¹ As encapsulated by Addison et al 2010 *IZA Institute of Labour Economics* 4, the author states that in Germany, the dualist system to employee participation has been successfully adopted. The relationship between trade unions and works councils is dualistic in that both trade unions and works councils will seek to achieve the objectives of the other.

²⁷² Explanatory Memorandum 1995 *ILJ* 311-312.

²⁷³ Weiss 2011 *Comparative and Labour Law and Policy* 511.

²⁷⁴ Summers 1995 *ILJ* 809.

²⁷⁵ Kahn-Freund 1974 *MLR* 2.

Kahn-Freund encapsulates three reasons as to why provisions of collective labour would be transferred from one jurisdiction to another. The first reason for the transplanting of laws was to give rise to social change, which the implementation of provisions of foreign law adoption was created to give effect to.²⁷⁶ Secondly, the adoption of the same laws in different jurisdictions encapsulates universal acceptance thereof. Thirdly, the adoption of foreign laws are undertaken in order to effect social change in the same manner as the change that occurred in the country where the foreign law derives from.²⁷⁷

Hepple notes four criteria to the adoption of employee participatory structures that require consideration before the transplanting of laws from one jurisdiction to another jurisdiction can be effected. The first criterion to be determined by stakeholders is the manner and extent of power relations between the employer, trade unions and the state.²⁷⁸ Secondly, the social, political, economic and ideological considerations specific to one country must be taken into account.²⁷⁹ Thirdly, the differences between collective bargaining structures and the institutions that facilitate collective bargaining must be determined with sufficient certainty.²⁸⁰ Lastly, the historical circumstances that the impending foreign law aims to address needs to be noted.²⁸¹

The implementation of workplace forums into the framework of the LRA was meant to achieve the same social change that occurred in Germany as a result of the German adoption of works councils.²⁸² In achieving the social change sought from the transplanting foreign collective labour laws, the objective was that workplace forums would achieve the same success as the system of works councils in Western Europe had achieved.²⁸³ The adoption of these collective labour laws require due consideration be given to social, economic and political factors which has overridden the positive influence which the exercise

²⁷⁶ Kahn-Freund 1974 *MLR* 2.

²⁷⁷ Kahn-Freund 1974 *MLR* 2-3.

²⁷⁸ See Hepple 2012 *Acta Juridica* 14, the author is of the view that although the LRA has its objective of facilitating collective bargaining at industry level, in practice, the negotiation of wage and non-wage issues sees trade unions and employers align and maintain bargaining at plant level.

²⁷⁹ Hepple 1999 *ILJ* 2-3.

²⁸⁰ Hepple 1999 *ILJ* 2-3.

²⁸¹ See Hepple 2012 *Acta Juridica* 14, reference is made to the model of regulated flexibility in the employment relationship.

²⁸² Davis and Le Roux 2012 *Acta Juridica* 316.

²⁸³ See chapter 4 above for an outline of the development of employee participation in Germany. The adoption of works councils and the provisions regulating such councils were transplanted to the various jurisdictions in Western Europe including The Netherlands, France, Germany and Belgium.

of transposing of laws from one jurisdiction to another has sought to achieve in South Africa.²⁸⁴

At the time when the system of workplace representivity was implemented in Germany and South Africa respectively, there were clarion differences between the two jurisdictions at the time of the implementation of the workplace participatory systems of the two countries.²⁸⁵ It is imperative in the words of Klerck, that to dealing with the continuous challenges put forward by collective labour law, requires that a continuous cooperative relationship to exists between labour and management.²⁸⁶

5. Conclusion

The first finding from the contents of this chapter is that the relationship between trade unions and works councils in Germany is found to be clear, concise and objectively structured in order to avoid misalignment or duplication in the operation of a works council and collective bargaining.²⁸⁷ This state of affairs is in stark contrast to the current South African system of employee participation at plant level in using workplace forums as a vehicle to achieve such participation.²⁸⁸

The second finding from the contents of this chapter is that a works council can be established without having a representative trade union operating within such an organisation.²⁸⁹ Works councils and their activities, as contained in works agreements, seek to promote corporatism between trade union and employer objectives. It is clear that trade unions see the value in the establishment and operation of works councils when considering that trade unions in Germany seek to establish, facilitate and promote the activities of works councils.²⁹⁰

The third finding from this chapter is that the Conciliation Committee in Germany has extensive powers that prohibits the right to engage in industrial action in terms of works agreements.²⁹¹ The Conciliation Committee may determine non-distributive issues, in which

²⁸⁴ This statement is confirmed by Ngcukaitobi 2013 *ILJ* 840, the author is of the view that labour laws encapsulate various socio-economic and socio-political factors. A simple transplanting of such laws requires an innate analysis in determining whether the transplanted law will yield positive results.

²⁸⁵ Manamela 2002 *SA Merc LJ* 734.

²⁸⁶ Klerck 1999 *Transformation* 14.

²⁸⁷ Manamela 2002 *SA Merc LJ* 735.

²⁸⁸ See Manamela 2002 *SA Merc LJ* 735, the author is of the view that a workplace forum is a trade union itself, not an employee controlled system of participation representative of all the employees in the workplace.

²⁸⁹ Botha *PER* 2015 1835.

²⁹⁰ G Klerck 1999 *Transformation* 27.

²⁹¹ S2(1) of the WCA.

case, its determinations are binding in nature, and advise on distributive issues with results that are not binding in nature.

This advisory function thwarts the need for industrial action, as the Conciliation Committee is representative of both the employees and the employer.²⁹² This Committee ensures efficiency and workplace harmony in the workplace is maintained, something that is crucially amiss in South Africa when taking into account the prevalence of industrial action and the devastating nature thereof.²⁹³

The fourth finding denotes that different countries require different approaches to the same issues, due to differences in the social, political and economic backgrounds determining the success of the law to be transplanted. Although the need to transplant laws provides value in that the same results may be reached from its application in a foreign jurisdiction, without due regard to prevailing circumstances where the law is to be implemented, the efficiency of the sought after objective will not be realised.²⁹⁴

²⁹² The Conciliation Committee consists of both representatives of the works council and representatives of the employer, with an independent chairperson who may be required to vote in the case of a deadlock of votes.

²⁹³ See Botha 2015 *PER* 1833, the author is of the view that this may however change with the introduction of the Advisory Arbitration Panel ("AAP").

²⁹⁴ Weiss 2011 *Comparative and Labour Law and Policy* 511-513.

CHAPTER 5

RESEARCH QUESTIONS REVISITED AND CONCLUSION

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5.1 Research questions revisited

In chapter 1 of this dissertation, three research questions were identified which this study has addressed. The chapter below will seek to answer the research questions which were posed in the introduction to this dissertation. Subsequent to answering the research questions which have been identified, I will conclude this dissertation by giving my viewpoint on the issue of employee participation at plant level and the value thereof if facilitated in a meaningful manner.

5.1.1 What shortfalls are identified in the current provisions of the LRA pertaining to workplace forums as a vehicle to achieving employee participation and co-determination?

The 100 employee requirement for the establishment of workplace forums is the primary and most relevant shortfall of the workplace forum system in South Africa.²⁹⁵ Due to this requirement, the establishment of workplace forums in terms of chapter 5 of the Labour Relations Act ("LRA") only applies to organisations where the workforce is in excess of this number, with a representative trade union in operation at such an organisation.²⁹⁶ Essentially, this denotes chapter 5 of the LRA only applying to large scale corporations, leaving the small and medium enterprise industry with no manner of achieving workplace democracy through the workplace forum.

Manamela opines the following critique around this requirement in the LRA:

"This high threshold of 100 workers in the workplace has been criticised, as an estimated 74 per cent of the workers in the formal sector may well be excluded."²⁹⁷

²⁹⁵ Steadman 2004 *ILJ* 1175. See also S80(1) of the LRA.

²⁹⁶ Botha 2015 *PER* 1831.

²⁹⁷ Manamela 2002 *SA Merc LJ* 730.

The second shortfall of the provisions of chapter 5 of the LRA is that it only makes provision for the establishment of a workplace forum to be initiated by a representative trade union.²⁹⁸ The expectation from trade unions is that workplace forums will “dance to their tune” as trade unions know that the continued operation of the workplace forum is directly linked to the representative trade union’s activities.²⁹⁹ The danger herein lies in the fact that employers will deem it simply as an extension of the trade union structure. This has the waterfall effect that non-unionised employees will be discouraged from taking part in the decisions and activities of the workplace forum.³⁰⁰

The third of the provisions of chapter 5 of the LRA is that chapter 5 of the LRA in its current dynamic does not facilitate the provisioning of creating legally binding agreements that will regulate the workplace forum and employer’s activities. The consequence thereof is that workplace forum agreements are only binding in so far as the contents thereof are contained in a term in an employee’s contract of employment, a workplace rule or by collective agreement.³⁰¹

The fourth shortfall of the provisions of chapter 5 of the LRA relates to the engaging in industrial action when a workplace forum and an employer cannot attain consensus on specific matters for consultation.³⁰² Employees may undertake to proceed with industrial action where an employer has implemented a proposal that the workplace forum has not consented to.³⁰³ The overlapping of matters pertinent to distributive and non-distributive issues becomes grey and indecisive.³⁰⁴

The fifth shortfall of the provisions of chapter 5 of the LRA is that a workplace forum is only consulted or required to jointly decide with an employer on an issue contained in S84(1) and S86(1), when the employer is of the view that there is a need for consultation or joint decision-making.³⁰⁵ A workplace forum cannot initiate the process of consultation or joint decision-making, thereby thwarting the proactivity and efficiency at the level of the undertaking.³⁰⁶

²⁹⁸ S80(2) of the LRA.

²⁹⁹ S93(1) of the LRA. See also Botha 2015 *PER* 1831.

³⁰⁰ See Steadman 2004 *ILJ* 1201, the author argues that the operation of workplace forums in practice is that trade union representatives become workplace forum members, which deters non-unionized members from engaging in workplace forum activities.

³⁰¹ S81(1) of the LRA.

³⁰² S84(1) of the LRA. See also Olivier 1996 *ILJ* 808.

³⁰³ S84(1) of the LRA.

³⁰⁴ Du Toit *et al* (2015) 416. See also Olivier 1996 *ILJ* 813.

³⁰⁵ Du Toit 1995 *ILJ* 795.

³⁰⁶ Botha 2015 *PER* 1837.

The sixth shortfall of the current provisions of chapter 5 of the LRA is that matters listed in S84(1) and S86(1) of the LRA are normally dealt with in the process of collective bargaining.³⁰⁷ The retraction regarding the operation of workplace forums lies in the fact that representivity at plant level is a task where the competing interests of workplace forums and trade unions are in conflict.³⁰⁸

5.1.2 What lessons can be learnt from Germany in relation to employee participation at plant level?

A primary reason for the great number of works councils established in Germany is due to the qualifying criteria in terms of the Works Constitution Act (“WCA”) allowing for the establishment of a works council in most, if not all organisations. The WCA provisions for the criteria that only 5 employees who have been permanently employed for longer than 6 months in a specific workplace are required to apply for the establishment of a works council in the prescribed format.³⁰⁹

In Germany, the provision is made for works agreements to be legally enforceable contracts between employer and works councils independent of collective bargaining.³¹⁰ This provision that is contained in the WCA seeks to promote the structural and institutional independence of works councils and collective bargaining respectively. This state of affairs evidences a move towards corporatism based on a coordinated market system approach to labour relations where employees are considered to be important stakeholders to the organisation that such employees service.³¹¹

Works councils are further entitled to initiate engagements with the employer on any matter requiring consultation or joint-decision making.³¹² A works council’s action to this point will not be proactive in nature, therewith evidencing its value for employees and trade unions alike.³¹³ Olivier is of the view that the wording of the LRA in terms of the powers and functions of workplace forums can exercise is reactive in nature.³¹⁴ The provision of the powers of a works council entails that works councils may determine and implement proposals on a

³⁰⁷ See S84(1) and S86(1) of the LRA. See also Steadman 2004 *ILJ* 1173-1174.

³⁰⁸ See Collins *et al* (2000) 527, where the author states that the expansion of the operation of workplace forums will result in the precarious decrease of influence of collective bargaining structures.

³⁰⁹ S1 of the WCA.

³¹⁰ S76(1) of the WCA.

³¹¹ Davis and Le Roux 2012 *Acta Juridica* 316. See also chapter 1 above for a brief overview on the definition of a coordinated market system.

³¹² See Olivier 1996 *ILJ* 805, the author is of the view that this state of affairs is in stark contrast to the legislative framework in terms of chapter 5 of the LRA.

³¹³ Botha 2015 *PER* 1827.

³¹⁴ Olivier 1996 *ILJ* 805.

plethora of issues.³¹⁵ A works council may endeavour to jointly decide on no less than 12 issues contained in the WCA.³¹⁶

In Germany, the Conciliation Committee is tasked with resolving matters requiring intervention between the works council and the employer.³¹⁷ It is through the Conciliation Committee that works council and employer maintain industrial peace. The legitimacy and objectivity of the Conciliation Committee is further entrenched when consideration is given to the composition of such a Committee.³¹⁸

5.1.3 What amendments may be proposed and implemented to ensure proficiency in the current statutory framework of the LRA pertaining to workplace forums?

The number of employees required to be employed in a workplace to meet the requirement for the establishment of a workplace forum in terms of S80(1) of the LRA must be reduced in order for the provisions of chapter 5 of the LRA to find wider application.³¹⁹

The ensuing consequences from such a high threshold presently regulating the establishment of workplace forums is best articulated in the following statement:

“Actually, this threshold defeats the purpose of introducing workplace forums and instead benefits only the privileged employees of large employers.”³²⁰

In my view, this number should be reduced to cater for workplaces where 15 people are employed in enhancing the wider application of chapter 5 of the LRA. This in the words of Du Toit will see the establishment of workplace forums in industries and businesses where they will be most required.³²¹

Further, when employees have the requisite threshold of persons employed in a workplace as mentioned above, those employees, should be able to apply for the establishment of a workplace forum, whether unionised or not.³²² The LRA presently only caters for sufficiently

³¹⁵ See Du Toit *et al* (2015) 403, whom argue that in Germany, works councils and the employer enjoy equal rights in terms of addressing issues falling within consultation and joint decision-making in terms of the WCA.

³¹⁶ S87 of the WCA. See also Du Toit *et al* (2015) 406.

³¹⁷ In the instance of South Africa, this could be done through an independent committee established between employer and the workplace forum, consisting of both representatives from the workplace forum and the employer. Another solution may be to adopt the approach to advisory arbitration.

³¹⁸ See chapter 4 above for a brief description of the composition of the Conciliation Committee.

³¹⁹ See <https://tradingeconomics.com/south-africa/employed-persons> accessed 13.07.2019.

³²⁰ Manamela 2002 *SA Merc LJ* 734.

³²¹ Du Toit 1995 *ILJ* 803.

³²² Botha 2015 *PER* 1828.

representative trade unions to initiate the process of establishing workplace forums,³²³ which does not take into account the interests of the employees, or that of the employer. Employers should be entitled to initiate the process of establishment of workplace forums, which will further seek to achieve workplace democracy for employer, employee and trade union alike.³²⁴ To charge a majority union with the responsibility of establishing a workplace forum in the face of union membership declining in South Africa may be inefficient in facilitating the establishment of workplace forums solely through majority unions.³²⁵

Provision should be made to provide for workplace forum agreements to be independent of trade union activities, and these agreements should be legally binding and enforceable documents.³²⁶ This will further mean that workplace forums can enhance its effectiveness and efficiency in dealing with the matters falling within its ambit to determine, independent of trade unions.³²⁷

The exclusion of the right to strike will ensure that parties utilise alternative methods as a deadlock breaking mechanism in terms of S84 of the LRA. Where deadlocks cannot be agreed upon, I am of the view that the LRA must make provision for an independent committee consisting of representatives of both the employer and the workplace forum, which will determine the manner in which to proceed on issues where consensus cannot be obtained.³²⁸ The decision of the committee will be binding on employer and workplace forum alike which will exclude utilising the right to strike as a deadlock breaking mechanism.³²⁹

S84(1) and S86(1) only provides that a workplace forum is entitled to be consulted or to jointly decide on issues falling within these sections. These sections must be amended to allow a workplace forum to initiate the dialogue in terms of issues falling within these sections to ensure the proactive efficiency of the operation of a workplace forum.³³⁰ If a workplace forum is empowered to initiate the process of consultation and joint decision-making, the time of engagement and the employer's consideration to proposals forwarded by the

³²³ S80(2) of the LRA. See also Olivier 1996 *ILJ* 810.

³²⁴ Olivier 1996 *ILJ* 811.

³²⁵ Olivier 1996 *ILJ* 809.

³²⁶ Botha 2015 *PER* 1834.

³²⁷ Steadman 2004 *ILJ* 1190.

³²⁸ This approach is adopted from the Conciliation Committee which is established in terms of the German works council system.

³²⁹ Steadman 2004 *ILJ* 1199.

³³⁰ See Du Toit *et al* (2015) 404, the author is of the view that the adoption of providing workplace forums with equal status in terms of engaging employees on matters to be consulted or decided upon must be implemented to drive the operational efficiencies as workplace forums.

workplace forum will be more purposive, as opposed to the employer merely conducting these tasks as a tick box exercise.³³¹

To give effect to the provisions of chapter 5 of the LRA, the demarcation of duties and responsibilities of trade unions and workplace forums must be made clear with sufficient certainty.³³² If the structural separation of trade unions and workplace forums is conclusively clear, trade unions will not concern themselves with the fear of losing membership influence at plant level.³³³

In view of the above, the role of shops stewards becomes more important. I am of the view that a shop steward should not be an elected member of the workplace forum, but may act in an advisory capacity to the workplace forum in assisting workplace forum members with informed opinions.³³⁴ The reasoning for this approach is that the skill and knowledge of shop stewards will be transferred to workplace forums by means of shop stewards acting in an advisory capacity to the operation and functions of a workplace forum.³³⁵

The manner in which the relationship between shop stewards and workplace forum members is to be facilitated must be contained in a code of good practice which will entail the duties, scope and engagements between shop stewards and the workplace forum.³³⁶ S81 of the LRA should be removed in its entirety to ensure the independence and objectivity of workplace forums pertaining to production issues.³³⁷ The reasoning for this proposed amendment is enjoined to the fact that distributive issues in the employment relationship is to be dealt within the collective bargaining. Issues which are not distributive but rather production related should be dealt with in the scope of the workplace forum.³³⁸

S81(5)(b) should further be amended to drive the institutional independence of workplace forums and trade unions.³³⁹ Workplace forums must remain in operation where established until such time that all the employees in that workplace voted for the dissolution of a

³³¹ Botha 2015 *PER* 1837.

³³² Olivier 1996 *ILJ* 806.

³³³ See Olivier 1996 *ILJ* 813, if trade unions concern themselves with issues such as conditions of employment, workplace forums will be able to focus on the production related issues of an organization. This will as a result feed back into collective bargaining at sectoral level, similar to the adoption of employee participation in Germany.

³³⁴ Summers 1995 *ILJ* 812. See also Du Toit 1995 *ILJ* 796.

³³⁵ See Du Toit 1995 *ILJ* 796, it is argued that direct assistance in the through accredited training schemes will further drive efficiencies of workplace forum candidates to extinguish their duties.

³³⁶ Bolsmann 2010 *Labour Studies Journal* 527.

³³⁷ Botha 2015 *PER* 1837.

³³⁸ Du Toit 1995 *ILJ* 789-790.

³³⁹ Olivier 1996 *ILJ* 810-812.

workplace forum.³⁴⁰ In the current framework, if a representative trade union is no longer representative for purposes of chapter 5 of the LRA, the newly representative trade union at the workplace concerned can call for a ballot for the dissolution of a workplace forum.

All the employees in a workplace should be entitled to call for the dissolution of a workplace forum, even if a representative trade union is no longer representative for purposes of chapter 5 of the LRA. The amendment to S93(1) of the LRA will put the control of a workplace forum back in the hands of the employees, and will further drive the institutional independence of workplace forums and trade unions.³⁴¹ The amendment to this provision will ensure that a trade union cannot call for the dissolution of a workplace forum. This is in accordance with the objective of achieving the institutionalised independence of workplace forums and trade unions.

The constitution of a workplace forum is crucial to its very existence. Enabling a representative trade union to change the contents of a workplace forum's constitution without consulting all of the employees involved is contrary to the principles of accountability and legitimacy.³⁴² S82(1)(v) of the LRA should be amended to cater for a ballot vote of all employees concerned to amending the constitution of a workplace forum. The agreement between employer and trade union to amend the contents of a workplace forum cannot be deemed legitimate as a workplace forum services all employees, not simply trade union members.³⁴³

5.2 Conclusion

The second channel of employee participation has mutually beneficial objectives that can be realised by both organised labour and employers alike. The move away from adversarialism to corporatism is a move away from conflictual labour relations,³⁴⁴ to an employment relationship based on mutual trust and mutually sought after goals.

Du Toit summarises the complexity of the employment relationship in vying for a move away from adversarialism as follows:

³⁴⁰ Trade unions should not be empowered to call for the dissolution of workplace forums when they see fit to do so.

³⁴¹ The German works council system provides for the secret ballot adoption pertaining to the dissolution of works councils. In terms of S93(1) of the LRA, only a representative trade union can call for the dissolution of a workplace forum. The power of establishing and dissolving workplace forums should be borne by the employees and not a trade union.

³⁴² S82(1)(v) of the LRA.

³⁴³ See Vettori 2005 *SA Merc LJ*, the author views the provisions of chapter 5 of the LRA as going too far in allaying trade union fears at the expense of meaningful worker participation that could result in increased productivity.

³⁴⁴ Summers 1995 *ILJ* 806.

“Labour law is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organised labour - a very powerful socio-economic force - on the one hand, and the employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate and the public-at-large depends for its security and welfare upon the maintenance of that balance.

If the law plays an enabling role in the evolution of collective bargaining, it is the interaction of employers and organised labour that will ultimately determine its content and effect.”³⁴⁵

The legislature envisioned workplace forums to act as a buffer between employers and trade unions. The intended objective of chapter 5 of the LRA was to move certain tasks away from the ambit of collective bargaining, as these tasks require a more subtle and intimate approach to obtain the intended value from engagement on such issues.³⁴⁶ This dissertation evaluated the current violent and conflictual manner in which parties to the employment relationship engage one another. Scenes of violence and destruction are common in achieving the objectives which organised labour seeks to achieve.³⁴⁷

This dissertation further analysed the German model of employee participation at plant level, showing a stark contrast to employee participation at plant level when compared to the current South African system of workplace forums. The legislature’s objective to transplanting ideologies pertaining to employee participation at plant level is subject to criticism, as this method of “transplanting laws” has proven to be a fruitless exercise over the last 24 years that the LRA has regulated the employment relationship in South Africa.³⁴⁸

This dissertation has proposed various amendments to the current statutory framework of workplace forums contained in the LRA. With the rate of unemployment currently at 29%,³⁴⁹ it becomes all the more important that the proper facilitation of employee participation

³⁴⁵ Du Toit 2007 *ILJ* 1411.

³⁴⁶ Explanatory Memorandum 1995 *ILJ* 314. See also Olivier 1996 *ILJ* 806.

³⁴⁷ Van Eck and Kujinga 2017 *PER* 3. See also Ngcukaitobi 2013 *ILJ* 851, who argues that a fragmented bargaining system has contributed to this state of affairs. Uncertainty pertaining to the interpretation of legislative provisions have further compounded this problem.

³⁴⁸ See Weiss 2011 *Comparative and Labour Law and Policy* 511-513, for further explanation on the issue of transplanting legal systems from one region to another and the complexities thereof. See also chapter 4 above. This issue is further exacerbated when the minimal number of workplace forums currently in operation in South Africa is considered.

³⁴⁹ <http://statssa.gov.za> accessed 18.08.2019.

through workplace forums is aligned to the legislature's intention and the objectives of the LRA.³⁵⁰

I believe that with the amendments proposed in this dissertation, a move from adversarialism to corporatism in facilitating a dual system of employee participation will lead to two important developments in the labour relations system in South Africa, namely:

1. Employees, due to their knowledge of the workplace, processes, procedures and efficiency drivers, will enhance the profit making capability of an organisation in providing efficiencies and effective solutions to production or plant level issues; and
2. Employees will deem the rules, regulations and implemented proposals as legitimate as they are in agreement to the employer's vision, which they have themselves contributed towards.³⁵¹

Since the enactment of the LRA 24 years ago, chapter 5 of the LRA has not been utilised to its full potential.³⁵² To yield the full potential of the contents of chapter 5 of the LRA, employer and employee alike need to concede on certain issues, as proposed in the amendments above, to effectually benefit from the adoption of this second channel of employee participation in promoting operational and institutional efficiencies.

³⁵⁰ See Summers 1995 *ILJ* 809, who is of the opinion that management and employees in the workplace share a common interest, namely increasing the profits within an organisation, which will result in prosperity for management and employees alike.

³⁵¹ Davis and Le Roux 2012 *Acta Juridica* 310-311. See also McGaughey *LSE Law, Society and Economy Working Papers* 10/2015 2-4.

³⁵² Du Toit *et al* *Labour Relations Law* (2015) 387.

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