Collective Bargaining in a Collective Enterprise

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Abstract (Theme 1) (Full Paper)

This paper deals with two focus areas, namely (i) the extension of collective agreements to non-parties and (ii) should there be multi-union bargaining or majority union recognition only?

First, it will be shown that South African Labour Law was designed for collective bargaining in respect of particular collective enterprises and that such collective enterprises are constituted by some or all the employers who are members of registered employers' organisations together with some or all their employees who are members of various registered trade unions. These registered organisations and unions constitute the parties to industrial (bargaining) councils - being the forum where agreements are negotiated in respect of their collective enterprise. The extension of agreements reached in this forum binds all other employers and employees who are engaged or employed in such collective enterprise.

This view is contrary to the current opinion of members of the South African legal fraternity who are made to believe by members of big business and certain authorities that a collective enterprise is an industry (an activity) and that extension of an agreement concerns all persons who may be identified as being engaged in such industries (activities). Such latter view is supported by various (unlawful) changes of the wording of several statutes which were subsequently misinterpreted. It will be shown how this was effected and what negative impact was experienced by employers and their employees.

Second, the notions of "freedom to associate" and "freedom not to associate" will be discussed. This in turn will answer the question as to multi-union bargaining as opposed to majority-union bargaining.

It will be shown among other, that majority-union bargaining added to the confusion leading to the tragic events at Marikana and, seen in international comparison, to the unresolved disputes between two trade unions of the Deutsche Bahn, concerning their individual claims to negotiate on behalf of identical classes of employees - their respective members. The so-called majority principle as applied in current South African labour law is shown to be controversial, since not distinguishing between employees of different classes.

Finally, a new focus will be introduced regarding the questionable wording of the declaration by the Minister of Labour in the Gazette of agreements reached by bargaining councils and their extension to non-parties – being a vestige of the British Colonial and the Apartheid Governments and its impact on employers and employees.

The Industrial Conciliation Act No. 11 of 1924

Introduction

The collocation of nouns "**undertaking, industry, trade or occupation**" has been used by the legislator extensively in all significant sections of our IC Act of 1924 (19 times), in our 1937 IC Act (49 times) and in our 1956 IC / LR Act (85 times, depending on which of the latest amendments of the Act one considers).

It is submitted that without a correct understanding of the precise meaning and significance of such collocation of nouns, it is impossible to comprehend the tenet and the correct functioning of our labour relations system.

Therefore it is clear that one has to go back to its origins, the Industrial Conciliation Act No.11 of 1924, which in its section 1, read with other definitions in section 24, introduced this *sui generis* collocation of nouns.

From the provisions of section 2(4) of the 1956 LRA we find: *"Any trade union, employers' organisation or industrial council which at the commencement of this Act is registered or deemed to be registered under the Industrial Conciliation Act, 1937 (Act No. 36 of 1937), shall be deemed to be registered under this Act; and its constitution as altered from time to time (*containing uito*) under the provisions of that Act or of the industrial conciliation Act, 1924 (Act No. 11 of 1924) shall, subject to … continue to have effect as its constitution approved under this Act until altered under this Act: Provided … "*

Going back to the provisions of section 2(4) of the 1937 Act we find the respective reference to the 1924 Act.

It is clear that the legal framework regarding the limits of jurisdiction of these registered trade unions, employers' organisations and industrial councils must remain the same throughout all three Acts.

In fact an industrial council registered under the previous Acts of 1924, 1937 and 1956 is still validly registered under the 1995 LRA.

The link from the 1956 LRA into the 1995 LRA is as follows: ***"Schedule 7 section 7(1)":*** *An industrial council registered or deemed to be registered in terms of the Labour Relations Act immediately before the commencement of this Act will be deemed to be a bargaining council under this Act and continues to be a body corporate."*

The fact that the "sector", referred to in the 1995 LRA is identical to the industry in our collocation of four nouns, is easily derived from the definitions in section 213 of "sector" and "registered scope" read together with the definition of "this Act", and the provisions in Schedule 7 of section 5(1) and 7(1) read together with the definitions of "labour relations laws" and "Labour Relations Act" in Schedule 7 of the 1995 LRA.

An industrial council registered under the provisions of the 1924 Act is validly registered under the 1937 Act and the 1956 Act and renamed a bargaining council under the 1995 Act.

Technical Background

In the wake of the 1922 Rand Revolt the Union Government in 1924 introduced the Industrial Conciliation Act No. 11 of 1924. The Act was assented to 26th March, 1924 and signed by the Governor-General in English. The date of commencement – 8th April 1924**.**

The Act was titled: "*To make provision for the prevention and settlement of disputes between employers and employees by conciliation; for the registration and regulation of trade unions and private registry offices and other incidental purposes*."

In terms of the definitions in section 24 of the Act *"Minister" means the Minister of Mines and Industries or any other Minister to whom the Governor-General may from time to time assign the administration of this Act*."

The Minister of Mines and Industries at the time was **Mr F.S. Malan** who had been elected chairman of the nine member Select Committee which was appointed by Order of the House of Assembly to consider and report on the Industrial Conciliation Bill.

Minister Malan also addressed the Senate of South Africa on the contents and proposed functioning of the Industrial Conciliation Bill.

Several amendments were proposed and many questions were raised – some were accepted others were negated by the Committee and/or by the Senate.

Several improvements and changes were proposed and considered by the members - such as registration of employers' organisations and trade unions, freedom to associate or not to associate, jurisdiction of industrial councils, sufficient representativeness, extension of agreements and closed shop provisions and also the possible impact of the Bill on members of the public.

The legislature, eventually introduced a refined Act which did not contravene any other existing laws and which accommodated reasonably all queries and wishes of the members of the Select Committee and the Senate.

On 6 August 1924 the Governor-General in terms of section 14 of the South Africa Act, 1909, established the Department of Labour and appointed *Colonel **F.H.P. Creswell** "to administer said Department as Minister of Labour in addition to the portfolio of Minister of Defence*."

The Governor-General further was, "*under the powers vested in him by ….. section 24 of the Industrial Conciliation Act No. 11 of 1924, to assign the administration of such Acts to the Minister of Labour."*

In addition, Mr **CW Cousins** was appointed Secretary of Labour on that day and it was notified "*that from the 1 August 1924 the following matters will be dealt with by the Department of Labour and correspondence in regard thereto should be addressed to the Secretary of Labour: -*

(1) Employment generally, including Government and Relief Works;

(2) Conciliation Boards, Industrial Councils, Registration of Trade Unions and Employers' Organisations, Private Registry Offices, etc.;

(3) Juvenile Affairs;

(4) Apprenticeship;

(5) Wages Board;

(6) International Labour Office affairs;

(7) Factories;"

With the above information at hand we are now set to deal with the functioning of the Act itself.

The Basic Principle underlying the Industrial Conciliation Act No.11 of 1924

Explanatory Note: The reason why labour authorities operating in South Africa have not specifically been consulted or their opinions quoted at this point is due to the fact that virtually all of them have published in some way or another their own interpretations of our labour statutes and have assisted in, helped with or even engineered themselves some of the unlawful manipulations of certain definitions and sections of the Act, giving it an entirely different tenet than originally intended by the legislator. It is submitted that the provisions of the Act thereby were rendered impossible to be administered smoothly without impinging on the rights of members of the Public.

Definition to know and to understand

Section one of the Act of 1924 states**:**

"This Act shall apply to every industrial and public utility undertaking, to every industry, trade and occupation, and to every employer and employee engaged in or at any such undertaking, industry, trade or occupation, but shall not apply to any employment in agriculture or in any farming industry nor, subject to …… ."

It is submitted that the industrial undertaking and the public utility undertaking mentioned above is an (industrial) enterprise, a company, namely an employer of employees engaged in a particular industry and it is not just an activity or industry or pursuit of some sort.

The "industry" mentioned in section one is the business activity in which the employer is engaged.

It thus follows that the "trade and occupation" mentioned in section 1 must concern the activities for which the employees are employed by their employer.

Such "**undertaking, industry, trade or occupation"**, in other words, represents one or more employers engaged in their industry and their employees employed on their trades or occupations.

A particular undertaking, industry, trade or occupation therefore is one in which the four variable nouns are or deemed to be specified, as for instance in the ***sui generis*** collocation: "Barlow, paint manufacturer, paint mixers and packers" or the "Clicks car park attendant and car cleaner."

It is clear that the four nouns are ***mutually inclusive*** and need to be placed in the sequence the legislator has determined, namely ***undertaking, industry, trade or occupation*** (uito) and not in any other sequential configuration.

The nouns may not be placed in a different sequence like industry, undertaking, trade or occupation or in any other combination of these four nouns.

They may also not be changed with capital first letters like "*Undertaking, Industry, Trade or Occupation"* or with separating inverted commas like *"undertaking", "industry", "trade" or "occupation"*, or with incomplete abbreviations like "*undertaking etc*" or like "*undertaking and the rest of it"*, or completely replaced by the words "the scope of registration" - all of which manipulations unlawfully try to indicate the incorrect mutual exclusiveness of the nouns – thereby giving the collocation a completely different meaning than the legislator had intended.

To support this notion and to eliminate any doubts as to the correctness of it one has to turn to the definitions and to those of the sections in the Act which utilise the collocation.

Establishment and Registration of industrial council under Act No.11 of 1924

The definition of terms are contained in section 24 of the Act, where we find:

a*) "employee" means any person engaged by an employer to perform*, for hire or *reward, manual, clerical or supervision work in any undertaking, industry, trade or occupation to which this Act applies, but … ;"* (Note: The exclusion in the definition of certain persons subject to laws applicable mainly to Africans will be dealt with later on).

b) "employer" means any person or body of persons (including a local authority), whether corporate or unincorporate, employing two or more employees (as herein defined), upon any undertaking, industry, trade or occupation to which this Act applies;"

c) "employers' organization" means any number of persons associated together either temporarily or permanently for the purpose of regulating relations between themselves and ***their*** *employees or for protecting or furthering the interests of employers in any particular undertaking, industry, trade or occupation in relation to* ***their*** *employees;"*

d) "trade union" means any number of persons associated together either temporarily or permanently for the purpose of regulating relations between themselves and ***their*** *employers or for protecting and furthering the interests of employees in any particular undertaking, industry, trade or occupation in relation to* ***their*** *employers."*

In addition we need to understand the implications of registration of such trade unions and employers' organizations in terms of section 14 of the 1924 Act.

Every trade union and employers' organization had to register within three months after the commencement of the 1924 Act with the Registrar, whether already registered under any other law or not or whether coming newly into existence under the Act.

Together with the application for registration in terms of section 14(2) of the Act the organization or union had to supply certain information to the Registrar which enabled him to determine, to his satisfaction, amongst other requirements, "*that in the area in respect of which the union or organization is or is proposed to be operative, there exists no trade union or organization of employers already registered under this Act which is sufficiently representative of the interests concerned.*

If the Registrar is so satisfied he shall register the union or organization in respect of which the application for registration has been made and shall forward to the applicant a certificate of registration in such form (IC3) as may be prescribed by Regulation.

The significant aspect of this process is the fact that upon registration a union or organization is aware that in the area in which it operates there is no other union or organization also registered for the identical interests – namely the trades or occupations of the members of the trade union and the industries of the members of the employers' organization.

Competition between trade unions and between employers' organizations is thereby to a large extent eliminated – and why not?

Unions and organizations are not political parties which vie for the vote of any person entitled to vote, but they are bodies which accumulate members of particular trades or occupations in the case of unions and members of particular industries (activities) in the case of organizations and not just any persons without any specific qualifications of professional interests whatsoever.

Unions and organisations may naturally admit persons or companies whose interests are falling outside the registered interests, but this has no immediate direct effect unless it can be shown to the registrar that the interests of the union or organisation have changed, whereupon he will adjust the registration of the interests.

Registration of industrial councils

These registered unions and organisations may now establish and register particular industrial councils.

In terms of section 2 of the Act "*any employer, or employers' organisation may agree with a registered trade union or group of registered trade unions for the establishment of an industrial council for the consideration and regulation, in accordance with the provisions of this Act, of matters of mutual interest to them and the prevention and settlement of disputes between them."*

It is important to note that the agreement between the parties to establish such industrial council also had the effect of the establishment of the particular undertaking, industry, trade or occupation in respect of which it is desired that the council shall be registered.

This undertaking, industry, trade or occupation contains employers who are members of the registered employers' organisation and their employees some or all of whom are members of the trade unions.

This results by combining the aspects of the definitions of trade union and employers' organisation.

It therefore follows that the members of the parties to the council represent a lesser number of employers and their employees in that undertaking, industry, trade or occupation than are really in that industrial undertaking – hence the requirement for the Minister to establish "*that the industrial council would be sufficiently representative*

within any area of the particular undertaking, industry, trade or occupation," thereafter "*he shall register the **constitution and rules** for the particular area mentioned in the certificate.*

Character and sufficient representativeness

Following are some explanations regarding the mechanism used for the Minister to establish the sufficient representativeness of the council.

The unions and organisation which by their agreement had established an industrial council were obliged to apply for the registration of the council in terms of the provisions of section 2(2) of the Act.

This required the parties to lodge in writing with the Minister an application for the registration of an industrial council which in turn had to contain, amongst other, "*information as to the **character** of the undertaking, industry, trade or occupation in respect of which it is desired that the industrial council shall be registered, and together with a copy of the constitution and rules of the industrial council and any agreement between the parties."*

The question might arise why would the Minister require information as to the "character" of the particular undertaking, industry, trade or occupation? Well, the Act does not define the word "character" and it is also silent as to the meaning of "sufficiently representative".

First, the **character** of the undertaking, industry, trade or occupation concerned is the type of industry constituted by the activities of the member employers in addition to the type of trades or occupations of the member employees because there is nothing else that the Act ascribes to an industrial or public utility undertaking.

In fact there are no other attributes of the undertaking concerned necessary to identify exactly the employers and their employees who are concerned and who constitute the undertaking, industry, trade or occupation.

The Minister requires information of the particular type of industry and the number of member employers in it, in addition to the total number of employers engaged in that industry in the particular undertaking, industry, trade or occupation to enable him to determine the ratio of the number of member employers to the total number of employers who are engaged in that undertaking, industry, trade or occupation.

And similarly he requires information as to the particular class of trades or occupations and the number of employees employed on those trades or occupations to determine

the ratio of member employees to total employees employed in that undertaking, industry, trade or occupation.

Hence, there must be at least two such applications, one for the employers' organisation (I.C.3) and one each for the trade union(s) (I.C.8), which is clearly stipulated in the regulations published under Act No.24 of 1930. These two application signify the agreement of the parties to form an industrial council.

Second, the notion of the parties being **sufficiently representative** within any area of the particular undertaking, industry, trade or occupation is based on the fact that the parties to the council in all instances are differently representative (different % ratio) from area to area and that therefore an absolute determination for the whole of the area in particular in respect of the specified occupations is not possible – therefore the notion of sufficiently representative, which is a "fair" assessment of the membership situation within the whole of the undertaking, industry, trade or occupation.

Therefore any number of such employees who are members of a trade union may be considered sufficiently representative of those particular trades or occupations, provided there is not a competing union in that area which claims more such employees as members.

The total number of employees employed on the same trades or occupations in an area is simply not known to the Minister and therefore any precise ratio regarding the employees who are union members to the total number of employees employed on these trades or occupations can also not be known – hence the notion of sufficient representative (for all intended purposes) applied by the Minister/Registrar to trade union or employers' organization membership.

In addition to this determination, prior to registration, that a union or organization is sufficiently representative of its stated interests (trades or occupations and industries respectively) in a particular area, the Minister also has to consider that the parties to an industrial council, prior to registration, are sufficiently representative of the undertaking, industry, trade or occupation in a specific area – this second leg being a different kind of determination compared to the first.

Registration of Council in respect of undertaking, industry, trade or occupation

Registration of the council in terms of section 2 of the 1924 Act in fact concerns the registration of the council's rules and constitution.

It is submitted that the registered constitution of the industrial council has to contain the names of its constituent parties, namely the names of the trade union(s) and employers' organisation which established the council.

In addition it must contain information as to precisely which class or classes of members of the parties authorised and agreed to the establishment of the council and with that to the establishment of the particular undertaking, industry, trade or occupation.

This is required since not necessarily all the members of the trade union(s) and not all the members of the employers' organization are engaged or employed in the particular undertaking, industry, trade or occupation concerned with the registration.

This additional and necessary information must be embedded in the constitution and concerns the description of the combined individual activities (industries) of the member employers and the description of the combined individual trades or occupations of the member employees.

The description of these combined industries and trades or occupations constitute the character of the particular undertaking, industry, trade or occupation in respect of which the Minister has determined that the council is sufficiently representative in terms of the provisions of section 2(2)(c) of the Act.

The Minister thereafter registers the undertaking, industry, trade or occupation and not the character (or the industry) of it.

It follows that the council thus registered under the 1924 Act may only operate within the constraints of its constitution and thereby only within the constraints of the undertaking, industry, trade or occupation in respect of which the Minister has determined that the industrial council is sufficiently representative – being the limitation of its jurisdiction.

Accordingly, any employer who is not a member of the employers' organisation which is a party to the council and who is not engaged in the undertaking, industry, trade or occupation in respect of which the council has been registered is not effected by the jurisdiction of the council or by any of its agreements.

Agreements of Councils and Extensions published in the Gazette

Section 9(1) of the Act of 1924 states: *"When in any matter relating to any undertaking, industry, trade or occupation which has been under the consideration of an industrial council or conciliation board, the parties make application to the Minister for a declaration by him that any agreement arrived at shall be binding upon the parties thereto, or shall be extended to other employers and employees within any area in that undertaking, industry, trade or occupation, the Minister may if he deems it expedient –*

(a) publish by notice in the Gazette the agreement arrived at, and therein notify that from a date and for such period as may be specified by him in the said notice, the terms of the agreement shall be binding upon the parties to the agreement and upon the employers and employees represented upon the said council or board; ***or***

(b) if he is satisfied that the applicants are sufficiently representative of the undertaking, industry, trade or occupation concerned, publish by notice in the Gazette the agreement arrived at and therein notify that from the date and for such period as may be specified by him in such notice, such terms of the said agreement as he may specially indicate shall within the area defined by him become binding upon all employers and employees in that undertaking, industry, trade or occupation,

and from and after the date so notified such terms shall become binding upon the employers and employees indicated in that notice in that area."

From these provisions it is absolutely clear that the Minister may only extent any agreement of an industrial council, at most, to all employers and employees in the undertaking, industry, trade or occupation to which the agreement relates.

Summary of Functioning of Industrial Councils under the Act of 1924.

a) There cannot operate in the same area more than one registered employers' organizations which is sufficiently representative of identical interests, namely the particular industries of employers.

b) There can also not operate in the same area more than one registered trade union which is sufficiently representative of identical interests, namely the trades or occupations of employees.

c) Only registered organizations and trade unions may form and register industrial councils. In certain instances a single employer who is not eligible to membership of an existing organization in the area may also form, together with trade unions an industrial council and may register it in respect of the undertaking, industry, trade or occupation established by agreement between them.

d) An industrial council may only be registered in respect of a particular undertaking, industry, trade or occupation, its jurisdictional limitation, and not in respect of an industry, the latter a function of the activities of participating employers who are members.

e) The character of the undertaking, industry, trade or occupation consists of the combined interests of the participating organizations and unions – namely their industries, trades and occupations as specified in their respective registration certificates.

f) An industrial council agreement may only be made binding and extended to all those employers and their employees who are engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates.

g) The detailed information as to the original composition of the undertaking, industry, trade or occupation referred to under f) is contained in the agreement itself and concerns the employers who are members of the employer party engaged in their industries and their employees who are members of the trade unions employed on trades or occupations specified in the schedules of the agreement.

At this point it is opportune to quote what Judge Solomon in *Rex vs Sidersky, 1927,* on page 111 had to say about an industrial council and the extension of its agreement.

"One purpose of the Act is to prevent and settle disputes between employers and employees by agreements such as the foregoing. These agreements must be made in matters relating to some undertaking, industry, trade or occupation, and the parties to them must be employers on the one side and employees on the other. An industrial council is not a miniature parliament which passes laws binding on any class it may select in the industrial, trading or working world. It is a body which brings about agreements between employers and employees in some particular undertaking, industry, trade or occupation.

The agreement dealt with in Government Notice No.1909 relates to the ***building industry*** *and to no other; and to employers and employees in that* ***industry*** *and to no others."*

I submit that the problem judge Solomon experienced in this matter related to the fact that the agreement, published under Notice No.1909, was made binding by the Minister, not as prescribed by section 9(1)(b) *"upon all employers and employees in that undertaking, industry, trade or occupation,"* but it was incorrectly made binding "*upon all employers and employees in the* ***building industry*** *in the area defined in rule 1 of the schedule hereto."*

Judge Solomon therefore had to attempt to reconcile the Minister's incorrect Notice No 1909 with the correct provisions of section 9(1)(b), resulting in the fact that the reasons for his otherwise correct judgment were only half correct – a crucial oversight which allowed the Minister's false Notice to become an accepted standardised notice for other industrial agreements.

In his attempt to reconcile the two different issues judge Solomon established as follows: *""Industry" is not defined in the Act; but is must signify something different from the words "trade" and "occupation" with which it is collocated; and I think should receive its accepted sense of a class of productive work or manufacture."*

Judge Tindall in the same judgment on page 114 pointed out that: *"It is clear I think that in relation to the employer an "undertaking, industry, trade or occupation" means, not a personal vocation but a* ***collective enterprise*** *in which employers and employees are associated." The argument on behalf of the crown involves giving a different meaning to those words in relation to the employee and holding that in relation to employees an undertaking, industry, trade or occupation means an industrial vocation. That is, the words "shall become binding upon all employers and employees in that undertaking, industry, trade or occupation," read in conjunction with the definition of "employer", mean that the agreement shall become binding on every employer who employs two or more artisans who do a certain kind of work. This would involve giving the words undertaking, industry, trade or occupation, as the case may be, a different meaning in the same sentence, a construction I see no justification for adopting.*

Judge Tindall also could not reconcile the problem created by the Minister's incorrect Notice and like Judge Solomon he compromises accordingly by separating between a general Building Industry (capital first letters) and the building industry mentioned by the Minister, the latter of which is a function of the combined activities (industries) of the employers engaged in the undertaking, industry, trade or occupation to which the agreement relates.

Scrutinising the agreement dealt with in Notice No.1909 dated 19 October 1926 one realises that the Minister already in 1926 unlawfully applied section 9(1)(b) of the Act to incorrect sets of uninvolved persons.

What actually happened before that date regarding the registration of industrial councils under section 2 and the publication of industrial council agreements in terms of section 9(1) of the new 1924 Act?

Unlawful Manipulations of Statutes and their subsequent Misinterpretations in our Courts. How was this achieved ?

One of the earliest agreement arrived at by a conciliation board (CB) established under the 1924 Act was published on 21 October 1924 by the Minister in the Gazette and was framed as follows:

"CONCILIATION BOARD AGREEMENT - BUILDING INDUSTRY, CAPE PENINSULAR

*In terms of section nine of the Industrial Conciliation Act (Act No.11 of 1924), the Minister of Labour hereby publishes the terms of agreement arrived at by the Conciliation Board appointed to deal with the dispute between building trade employees members of the Cape Province Federation of Labour Unions, and **their** employers, members of the Cape Peninsular Building and Allied Trades Association.*

1. That ….

2. *That the employees return to work forthwith and that the present rates of wages and working conditions be legalized at once and extended to the whole of the **building area** of the Cape Peninsular as defined by the Board. For the purposes of this Act the Board agrees that the area of the Cape Peninsular shall be that portion of the Cape Province lying west of and bounded by a straight line drawn from Tygerberg to Bellville and from Bellville to Muisenberg, with the three towns included.*

3. That … 4. That …

Signed: MJ Adams, Chairman, Building Trades Conciliation Board

Signed: R Stuard, Secretary, Federation of Labour Unions

Signed: F Bakker, President, Master Builders Association"

The above request of the members of the CB is obviously unlawful since the Act allows the binding of all employers and employees in the undertaking, industry, trade or occupation and in the area concerned and not in the **industry** and area concerned.

To this demand of the CB the Minister replies and stipulates at the end of the agreement as follows:

"The Minister, being satisfied that the applicants are sufficiently representative of the building industry within the area of the Cape Peninsular, as defined in this notice, hereby notifies that … … the rates of wages and working conditions specified herein shall become binding upon all employers and employees in the ***building industry****."*

It is submitted that the Minister's declaration is incorrect and not in terms of the provisions of section 9(1)(b) of the Act, since he unlawfully exchanges the undertaking, industry, trade or occupation (being a particular set of employers and their employees) with the building industry (being an activity or endeavour).

This agreement gave rise to a matter tested before a full bench of the Supreme Court of South Africa.

In ***Rex vs Sawkins,*** 1925, Judge Gardiner did not specifically enquire about the legal standing of the parties to the dispute but referred to section 9(1)(b) and concluded that *"it is not disputed that thereafter* (the publication of the agreement) *it became an offence for an employer, coming within the terms of the agreement, to pay an employee, similarly coming thereunder, a wage less than that set forth in the agreement."*

The judge now makes an assumption regarding section 9(1)(b) by stating that: *"It seems to me that it is this: that when an agreement has been arrived at by representative bodies in a particular* ***industry, etc.,*** *persons outside those bodies may undercut and prejudice the parties to the agreement by engaging or offering services at a lower rate of wages than that provided for in the agreement."*

This assumption of the judge is not correct for several reasons, first and most of all the employer (Sawkins) was not engaged in the undertaking, industry, trade or occupation to which the agreement related, since he was not a member of the employers' organization which was a party to the council. The agreement therefore did not apply to him or to his employees.

Second, as a general consideration regarding the argument it is pointed out that the employers who are members of the parties to the agreement have other advantages compared to those who are not members, since they may regulate relations between themselves regarding trade information not accessible to non-members. (See the definition of employers' organization) Thus a certain fairness is maintained by

balancing the possible lower rate of wages of non-members against better trade information available to financially stronger established members.

In addition lower tenders do not depend on lower rates of wages alone.

Does the judge suggest that competition should be eliminated by having common pre-stipulated equal wages?

Certainly, such wage uniformity is only to the advantage of the organised, well established, better off and more prosperous employers - thereby maintaining their oligarchic position by imposing their conditions of work on the mostly smaller competitors. After all they are the employers who can effort the membership fees of the organizations.

Further, it follows from the privileged position of member employers that they are likely to create monopolies within their organisation concerning separate co-operation agreements or understandings regarding the outcome of tenders for lucrative work and jobs to the detriment of the non-member employers and most of all their employees.

As said before these considerations do not even enter the ambit of the provisions of section 9(1)(b) of the Act since non-member employers are not effected by its provisions.

Back to the Sawkins matter: It is submitted that Judge Gardiner, due to the false notice published by the Minister in the Gazette, regarding industry as opposed to undertaking, industry, trade or occupation, sided after all with the Minister's forged notice and ruled against the provisions of the statute which are clearly stated in section 9(1)(b) of the 1924 Act.

This, I submit, was the first unlawful collusion of the Judiciary with the Executive / Administrative under the Act, not to mention the sleight of hand of the Judge when he used the expression "*undertaking, etc."* (see page 343) instead of the correct "undertaking, industry, trade or occupation", thereby trying in indicate the mutual exclusiveness of our collocation.

The incorrect outcome in the Sawkins matter should have been of great concern for every employer and employee in this Country.

But it was the year 1925 in an economically depressed climate and nobody, except for Mr Adams and his cohorts in the building industry in the Cape Peninsular and the

Minister of Labour really were concerned about the correct workings of the recently introduced 1924 Act and it would appear nobody complained about the implication of such false judgment – communications were obviously still very limited.

But the wrong direction of the workings of the Act was given.

Some 60 years later on 24 November 1983 we are told by the then Director General: Manpower Dr P J van der Merwe in Pretoria during his keynote address at a conference with Industrial Councils that, amongst other discrepancies expressed in his address, "*the first industrial council was established on 19 November 1919, when the South African Typographical Union entered into an agreement with the Federation of Master Printers and the Newspaper Press Union for the* ***establishment*** *of a National Industrial Council for the Printing and Newspaper Industry."*

We have meanwhile established that that industrial council was registered under the 1924 Act on 12 February 1925, five years after its "so-called establishment" on 19 November 1919. Now, it is important to realise that in 1919 the provisions of section 14 of the 1924 Act concerning the registration of trade unions and employers organisations did not exist and the parties of that council could not have been subjected to the registration procedure laid down in that section - in particular the establishment of the sufficient representativeness of the parties to the council.

Nevertheless, the result of the registration of this industrial council on 12 February 1925 indicates the twisted mind of even our first Minister of Labour in that he forges the Certificate of Registration, issued on form IC1 and prescribed by Regulation Notice No.1214 of 20 July 1924 in that he changes the pre-printed nouns of our collocation undertaking, industry, trade or occupation with first **capital** letters thereby intimating that the nouns in our collocation are mutually exclusive. To put a fine point on his forgeries he even changed the first letters to capital first letters of the pre-printed words "industrial council".

According to his manipulations of form IC1 Minister F.H.P Creswell under his hand now certifies that "*the Minister of Labour*, *being satisfied that the agreement is in accordance with the terms of section 2 of the above Act* (Industrial Conciliation Act 1924), *that the constitution and rules are satisfactory, that all conditions prescribed in the Act have been complied with, and that this* ***Industrial Council*** *in sufficiently representative of the* ***Printing and Newspaper Industry*** *(Undertaking, Industry, Trade or Occupation) within the area of the Union of South Africa (****Name*** *and place and area effected) hereby certifies that the constitution and rules of the National Industrial Council of the Printing and Newspaper Industry*

*of South Africa (**Name of Industrial Council**) have been registered in accordance with section 2 of the above Act on the 12th day of February 1925, signed FHP Creswell (**Minister of Labour**).*

It is submitted that the Act commenced on 5 April 1924, that the Minister of Labour was appointed on 6 August 1924 and the Regulation were published on 20 July 1924 in Government Notice No 1244. It is pointed out that in the form IC1 one justifiable change had to be effected, namely the fact that now the Minister of Labour, Colonel FHP Creswell would have to sign the Registration certificates of industrial councils and not Mr FS Malan, the Minister of Mines and Industries, under whose auspices the Regulations and form IC1 were originally framed.

The Regulations were amended under Government Notice 1399 of 1930 with the publication of the amendment of 1930 to the 1924 Act, and from those new regulations it becomes clear that the manipulated form IC1 signed by Minister Creswell is indeed false with all its unlawful ramifications. It is clear that the result of these irregularities is aimed at the possibility of the unlawful imposition of the member employers with their agreements upon the non-member employers for the purpose to extract money contributions for the money funds of the councils.

False entries in certificates of registration, as late as 1998

Already at this point I should mention the result of pieces of false information contained in the registration certificate of the Industrial Council for the Building Industry (Cape Peninsular) which was entered in that certificate as late as 11 November 1996 (after the introduction of the new 1995 LRA).

This false information entered was the following: *"The abovementioned **interest** shall not include the undertakings, industries, trades or occupations in respect of which the Transnet Industrial Council has been registered on 2 October 1991. The latter Council has been registered in respect of the undertakings, industries, trades or occupations of Transnet Limited known as Spoornet, South African Airways, Automat, Portnet, Transtel, Transwerk, Promat, Protokon or any other business, undertaking, industry, trade, occupation, unit, department or section of Transnet Limited in the Republic of South Africa.*

In the first portion of the above statement, I submit, the registrar on purpose mixes the incorrect notion of "interests" concerning the registration of industrial councils with the

correct notion of “undertaking, industry, trade or occupation” by unlawfully equating these two different notions. The Registrar name was a certain Mr Deon Koen.

In the second portion the registrar went so far as to add more nouns to the collocation which now incorrectly reads *“business, undertaking, industry, trade, occupation, unit, department or section of Transnet …”*

This was how judge Vivier expressed it on 8 August 1998 in the Supreme Court of Appeal matter of *The Industrial Council for the Building Industry (Western Province) and seven Other Councils vs Transnet Industrial Council: ”… I am not unmindful of the decisions of our courts which have interpreted the words “undertaking, industry, trade or occupation” as referring to some form of activity or pursuit rather than to the persons who engage in them”.*

The registrar, by applying the judge’s above contention regarding registration of councils added a confusing but false entry into that registration certificate – the nature of the forgeries of statutes to come.

Judge Gardiner, 1931

One grave inconsistency should now be mentioned, namely the incomplete quotations of the provisions of section 4(1) of the 1924 Act as amended by Act 24 of 1930 effected by Judge Gardiner in the 1931 matter of *City Council of Cape Town vs Union Government*.

The judge at page 376 incompletely quotes section 4(1) of the amended Act as follows*:” If in any area no Industrial Council exists under sec. 2 of this Act in respect of a particular undertaking, industry, trade or occupation, any registered Trade Union or registered employers’ organization, or any number of employees or employers considered by the Minister to be sufficiently representative in that area of that undertaking, industry, trade or occupation may apply to the Minister for the appointment of a Conciliation Board for the consideration and determination of any dispute.”* (Full stop)

The provisions of section 4(1) do not end where the judge ended it, but carry on with its most important portion: *“ … in that area between any employer and any of* ***his*** *employees in that undertaking, industry, trade or occupation, … “*

By neglecting the missing portion of section 4(1) the judge here once again supports his unlawful siding with the false Notice gazetted by the Minister as he did in the *1925, Rex v Sawkins* matter, instead of complying with the correct statutes.

It is clear that, with the missing words of section 4(1) back in place, the particular undertaking, industry, trade or occupation is identified as consisting of particular employers and **their** particular employees.

Judge Gardiner now gets himself entangled with the two different notions (1) of a registered trade union or registered employers' organization being sufficiently representative of its respective interests in an area, determined in terms of section 14 of the Act, on the one hand, and (2) a registered trade union and registered employers' organization considered by the Minister in terms of section 4(1) of the Act to be sufficiently representative in an area of the undertaking, industry, trade or occupation, on the other hand.

Judge Gardiner now follows the Minister's incorrect "industry" notion and thereby entraps himself by not being able to reconcile the correct with the incorrect notion.

Whatever else the reasons were for Judge Gardener's strange misquotations of statutes in that matter, the fact remains that both his quoted rulings established a false jurisprudence whereby the tenet of our Act was unlawfully shifted by interpreting the collocation "undertaking, industry, trade or occupation" as referring to some form of activities or pursuits rather than to persons who engage in them, as so eloquently expressed by Judge Vivier in 1998 in the matter of eight industrial councils v the Transnet industrial council referred to above.

In the result many judgments were delivered regarding the meaning of undertaking, industry, trade, or occupation and all but one, the *Sidersky* matter, were decided in favour of the "industry" aspect, thereby contravening the definition of "*employers' organisation"* in that, as a result of changing the meaning of the embedded collocation in that definition from "undertaking, industry, trade or occupation" to "industry" (an activity) the lawful relationship, expressed in the definition, as *"employers in any particular undertaking, industry, trade or occupation in relation to* ***their*** *employees*" was, by implication, unlawfully changed to "*employers in any particular undertaking, industry, trade or occupation in relation to* ***the*** *employees".*

Similar changes are applicable to the definition of trade union.

This consequential and catalytic unlawful change of definitions brings them in conflict with the basic principle of freedom to associate or not to associate.

In addition, it is clear that such changed definitions disqualify the registered trade unions and registered employers' organisations from being parties to any industrial council and because of having changed their legal standing rendering their existing industrial councils nil and void – a situation reduced *ad absurdum* and therefore not valid.

I will return further to this aspect of freedom to associate and freedom not to associate.

Summary:

We were in year 1931 and have established that the Minister and his registrar unlawfully registered industrial councils in respect of "industries", which are in fact the activities recorded in the registration certificates of employers' organizations.

We have further established that the Minister publishes his notices in the Gazette by unlawfully referring to the single word "Industries" instead of to the particular undertaking, industry, trade or occupation.

We have established that by changing the meaning of undertaking, industry, trade or occupation (a collective enterprise) to merely the meaning of an "industry" (an activity) the definitions of trade union and employers' organisation have by implication changed their relationship from employers and **their** employees to employers and **the** employees.

We have also learned that there is a vast difference between the status of a registered trade union or employers' organisation of being sufficiently representative in respect of their interests in an area as opposed to in respect of a particular undertaking, industry, trade or occupation in an area.

We also have realised that the jurisdiction of the industrial council under the 1924 Act is limited to the ambit of its constitution and with that to the limits of the undertaking, industry, trade or occupation in respect of which the parties to the council are sufficiently representative, which as such is recorded in that constitution.

We learned that a particular undertaking, industry, trade or occupation consists of some or all the employers who are members of the organizations which are parties to a council and who are engaged in particular industries and some or all **their** employees who are members of the trade unions which are parties to the council and who are employed on particular trades or occupations.

We have also become aware that the change of the collocation undertaking, industry, trade or occupation to the single word industry in the definition of employers' organisation changes the relationship between employers and **their** employees to a new unlawful relationship of employers and **the** employees**,** thereby disqualifying the existing parties from being parties to the industrial councils, rendering the latter nil and void.

The 1937 Industrial Conciliation Act No. 36 of 1937

The successor of the 1924 Act, amended in 1930 and 1933, was introduced as Act No 36 of 1937.

Prior to its publication the Governor General of the Union of South Africa Earl of Clarendon on 20 July 1934 appointed the Industrial Legislation Commission (ILC) to advise and report, amongst other, on: *(1) "The effect upon employment of the operation of – (b) the Industrial Conciliation Act No.11 of 1924, as amended."*

Invitations for evidence were especially extended by the Commission to the Department of Labour. The final report was published in 1935.

Due to the many cases regarding the unbeknown incorrect interpretations of our collocation and the resulting unfavourable outcomes in cases for all to see, the Commission (backgrounded by the Department of Labour), apparently felt it had to contribute its own take of the controversial issue.

In the opening clause 292 of its report on the Industrial Conciliation Act, 1924 as amended, the commission reported:

"292. The principle underlying the Act is self-government in industrial and public utility undertakings, industries, trades and occupations. Government employment (with certain exceptions) and employment in agriculture only are excluded from its scope. "Industry" is used throughout this Chapter to connote not only manufacturing industry but also undertakings, trades and occupations, all of which are ***mutually exclusive****."*

This statement of clause 292 published by the Commission must so far be the most blatant and twisted misrepresentation and forgery of the correct Scope of Application of the 1924 Act, which in turn is quoted here again: *"This Act shall apply to every industrial and public utility undertaking, to every industry, trade and occupation, and to every employer and employee engaged in or at any such undertaking, industry, trade or occupation,*

but shall not apply to any employment in agriculture or in any farming industry nor, subject to …….”

The wording of the opening sentence of clause 292 is very cleverly constructed so as to give it the false meaning attributed to the notion of “industry” as used by the Minister of Labour, by Judge Gardiner and by Mr Adams already since 1925.

I submit that the correct principle underlying the Act is self-regulation between employers and their employees engaged or employed in particular undertakings, industries, trades or occupations.

A consultation of the definitions of “trade union” and “employers’ organisation” under any of the Acts and the combination of both definitions reveal this fact.

All other falsification of statutes already described above are contained in other paragraphs of chapter VII of this hideous and false report relating to the provisions of the Act of 1924, as amended.

The irony of the last section of the statement of paragraph 292 is that it was contradicted by the legislature, by return mail, so-to-say, when the definition of “undertaking, industry, trade or occupation” was introduced into the definition section 1 of the new Act 36 of 1937, identifying the collocation as being “**mutually inclusive**”.

The definition of our collocation in section 1 of the 1937 Act reads as follows:” *“undertaking, industry, trade or occupation” includes a section or a portion of an undertaking, industry, trade or occupation”.*

Thereby the collocation is definitely identified and defined as being mutually inclusive and in fact as being a *sui generis* expression, meaning in other words a set of companies, its activities, the trades or occupations of its employees – a collective enterprise as per Judge Tindall in *Rex vs Sidersky, 1927*

In addition, certain new provisions were introduced in this 1937 Act. They concerned more detailed improvements regarding more diverse parties to industrial councils. Further, more additions were made to the sections concerning the registration of unions, organisations and councils and the extension of agreements to all employers and employees who *“are engaged or employed in the undertaking, industry, trade or occupation to which an agreement relates”* – all improvements by the legislator, it would appear, to make interested employers’ organisations and trade unions better understand the functioning of the Act.

But the previous irregularities could not easily be reversed, since the vested interests, in the form of financial contributions unlawfully extracted from so-called non-parties, for the funds of the parties to industrial councils had exceeded all their expectations.

Fourteen years later the Industrial Legislation Commission of Enquiry appointed in October 1948 (Botha Commission) remarked in its report of 1951 in clause 651*: " An examination of the accounts of industrial councils revealed that the general funds collected under the powers by section 24(1)(p) of the Act were used for such purposes as making donations , presentations and grants to benefit funds established in terms of section 24(1)(r). The Commission has no reason to criticise unduly the actions of industrial councils in the past in this respect but, bearing in mind that a considerable amount is sometimes collected from non-parties, it is considered justified to recommend that some control should be exercised."*

Note: section 24(1)(p) of the Act concern contributions to be paid by employers and employees towards the expenses of the council and section 24(1)(r) concern contributions to be paid by employers and employees towards pension, sick, medical, unemployment, holiday, provident and other insurance funds, all established in terms of an agreement which may be made binding in terms of the Act and controlled by the council.

Industrial Council for the Iron, Steel, Engineering and Metallurgical Industries (Nicisemi)

In 1944 the industrial council for the iron steel engineering and metallurgical industry NICISEMI is unlawfully registered in respect of "industries" by the Minister of Labour. This council will turn out to be one of the most violent councils regarding the extortion of money contributions from the so-called non-parties.

On 12 March 1948 the industrial council for the Building Industry (Transvaal) is also unlawfully registered in respect of "industries" by the Industrial Registrar, and it appears that all councils registered under the 1937 Act are unlawfully registered, which in turn warrants an investigation of the registration certificates issued on form IC8.

We are dismayed to find that form IC8, issued in terms of regulation 4.2, has been issued correctly with regard to the Minister's approval of the registration of the council in respect of the area and the undertaking, industry, trade or occupation but in the following sentence printed on the certificate it incorrectly states that*:*

"I hereby certify that I have in terms of section nineteen (3) of the Act registered the said Industrial Council for such undertaking / industry / trade / occupation and such area with effect from the date of the Minister's approval. (signed) Industrial Registrar.

On the registration certificate of the industrial council for the Building Industry (Transvaal), issued on form IC8 the Industrial Registrar had been given a choice to mark out any three nouns of the four nouns printed thus: undertaking / industry / trade / occupation. In this case the Registrar chose "industries", which is now unlawfully reflected in that space with the other three words deleted. As we know by now, no council may be registered in respect of industries but only in respect of a collective enterprise. The Department of Manpower thus invented a form IC8 which offers an unlawful choice.

Schreiner JA, Transvaal Manufacturers v Bespoke Tailoring Association, 1952

Finally, in 1952 came "relief" for the Department of Manpower from the constant possibility of discovery of the irregularities engineered by the Minister of Labour and his officials in that Department.

In his judgment in the matter of *Transvaal Manufacturers' Association v Bespoke Tailoring Employers' Association* in the Appellate Division of the Supreme Court, Schreiner JA, falsified the definition of "undertaking, industry, trade or occupation" by exchanging the word "**includes**" in that definition with the word "**or**".

With this manipulation the judge unlawfully enabled himself to interpret the four nouns in the collocation as being mutually exclusive and relating now all four of them to some activity or pursuit rather than to persons who engage in them.

The detailed analysis of the forgery is as follows:

Now, the correct definition in section 1 of the 1937 Act is: *"undertaking, industry, trade or occupation"* ***includes*** *a section or a portion of an undertaking, industry, trade or occupation.*

Judge Schreiner's quote in his judgment at page 56 A-B of that definition is: *"...of the industry (i.e. the undertaking, industry, trade or occupation* ***or*** *a section or portion thereof - sec. 1)"*

Comparing the correct definition with the definition as quoted by judge Schreiner on page 56 at A-B of the matter referred to above, we can identify the following differences:

1) The word "**includes"** has been exchanged with the word **"or".**

2) The indefinite article **"a"** before the word portion has been deleted.

3) The collocation undertaking, industry, trade or occupation has been replaced by the word "**thereof**" the second time it appears in the definition and the words "**of an**" before that second collocation have been deleted.

4) The article **"the**" has been added at the beginning of his altered definition.

I submit that judge Schreiner thereby (incorrectly) determined beforehand that the Minister would satisfy himself *"that the council would be sufficiently representative of the **industry**... "* - instead of the undertaking, industry, trade or occupation in respect of which it is desired that the council shall be registered. (section 19(1) and (2)).

He then, in the same sentence, alters the definition in such a way as to enable him to interpret the collocation as single nouns having their normal grammatical meaning of an undertaking **or** an industry **or** a trade **or** an occupation - all activities or some kind of pursuit. (see 1) above). Judge Schreiner in this instance chose "industry".

The deletion of the indefinite article "**a**" has a very particular effect in that the words "section" and "portion" are now only separated by the word "or", indicating that they have essentially the same meaning, when in fact "a section" is very different from "a portion" of an undertaking, industry, trade or occupation.

The correct meaning of the definition clearly is that a section or a portion of an undertaking, industry, trade or occupation is still an undertaking, industry, trade or occupation.

A section, as opposed to a portion, of an undertaking, industry, trade or occupation consists of some or all the members of **one** employers' organisation and their or some of their employees who are members of **one** trade union party - whereas a portion consists of some or all the members of that employers' organisation and some or all their employees part of whom are members of **one** particular trade union and the other part are members of **another** particular trade union.

Hence, a section may be completely separated or sectioned from the original undertaking, industry, trade or occupation, whereas if a portion is separated from it another portion is left behind and is still part of it.

I submit that with this unlawful alteration of the definition of our *sui generis* collocation the judge changed the entire tenet of the Act, relating to industrial councils or conciliation boards, to make it fall in line with the incorrect registration of the industrial council in respect of an **industry** and the incorrect notice of the Minister to bind employers and employees in an **industry**.

I respectfully submit that the changing of statutes is the prerogative of the legislature and not the judiciary.

The problem in the case was that Judge Schreiner had great difficulties reconciling the correct stipulations of our definition of undertaking, industry, trade or occupation with the two false notices to the two agreements published by the Minister in the Gazette, which binds employers and employees who are in the industries which inter-related the two agreements of the respective opposing employers' organizations, specifically so since the relevant industrial councils which negotiated the two agreements also had been incorrectly registered in respect of industries.

As we know by now, the Judge simply forged the definition of our collocation (statute) to make its meaning fit the meaning of the false notion of "industry", as applied in both the Notices the Minister had published in the Gazette under Notices No 2097 and 2041 of 39.9.1949 and 3.8.1951 respectively and as applied in the two Registration Certificates of the respective industrial councils issued in terms of the Regulations of the Acts of 1924 or 1937.

The implications of the irregular result in the Schreiner case were quoted as legal reference for the outcome of other cases. One particular case was the 1973 matter of *S v Prefabricated Housing Corporation (Pty) Ltd & Another* delivered by Trollip, JA in the Appellate Division of the Supreme Court. With that decision the irregular bandwagon seemed unstoppable.

MR R Savage

There was a minor attempt, during a brief spell of enlightening sanity, when a Mr Savage of the South African Federated Chamber of Industries appeared on 1 February 1955 as witness before the Select Committee on the Industrial Conciliation Bill 1955.

At question before the Committee was clause 48(1)(c) of the Bill, when Mr Savage explained:

"The underlying principle of the industrial council system is that there should be a spontaneous desire on the part of employers and ***their*** *employees to resolve all wage issues through the process of round-table bargaining and to bind themselves to whatever conditions might be agreed upon. The present procedure whereby agreements arrived at by an industrial council may be extended by the Minister also to bind* ***non-members*** *in the area for which a council is registered is in theory contrary to the underlying principle.*

That procedure could, however be justified on the score that within a particular area the majority decision should prevail.

The new clause 48(1)(c) introduces yet a further departure from the underlying principle since it injects the concept that an industrial council agreement may be extended to firms established in areas outside the area of jurisdiction for which the council is registered if the Minister considers that necessary to prevent unfair competition. The obvious purpose of this provision is to prevent employers from establishing themselves just outside the boundary of an industrial council in order to escape the provisions of an agreement. Whilst the apparent aim of this proposal is appreciated, it could be argued that a Bill dealing with labour relations is not the proper medium to deal with competition between employers in one area or another. The proposal will place a most onerous and unenviable duty on the Minister of Labour to assess a variety of factors in determining whether or not unfair competition in the real sense of the word exists.

Mr Savage continues:

*"In its evidence presented to the Industrial Legislation Commission of Enquiry, the Chamber (*South African Federated Chamber of Industries*) repeatedly referred to the acquisitiveness displayed by certain industrial councils to extend their spheres of influence. The Chamber is satisfied that considerable pressure will be brought to bear on the Minister by some councils to grant them extended authority on the professed score that employers outside their area of jurisdiction enjoy "unfair" labour advantages. In this regard it should be pointed out that conditions of employment in "outside" areas could be regulated either through the machinery of the Wage Board or, if the employees so demand, by the appointment of a conciliation board.*

In other words it is hardly possible for any employer to exploit his workers by establishing his factory outside the area of jurisdiction of an industrial council."

Mr Savage gives a remarkable and fair account regarding the underlying principle of the industrial council system and the connected legal standing of non-members,

pointing out the most important relationship between the employers and **their** employees.

Mr Savage did not point out that that relationship in turn defines in the industrial council system the particular undertaking, industry, trade or occupation as consisting of the very employers who are members and **their** employees and not **"the**" employees.

Unfortunately he also cuts short his contentions in that he resigns to the excuse of: *"That procedure could, however, be justified on the score that within a particular area the majority decision should prevail."*

The fact is, as will be shown later, that the underlying principle cannot be breached unless the definitions of trade union and employers' organisation are forged by exchanging **their** employees with **the** employees and **their** employers with **the** employers respectively, and then subsequently misinterpreted.

Mr Savage unfortunately did not understand this correct concept at the time which fact he demonstrates in his misunderstanding of the provisions of section 19(4)(b) of the 1956 Bill.

His problem is that he has not recognised or understood the concept of his own underlying principle, namely the establishment of an undertaking, industry, trade or occupation constituted by the employers who are members and their employees.

The undertaking, industry, trade or occupation mentioned in section 19(4)(b) exists already except that a party has no members in one particular part of the area. Despite this shortcoming, the Minister may then consider, under specified conditions, the parties to the council to be sufficiently representative in the whole of the area.

The 1956 LRA

The decision of Judge Schreiner in 1952 in the *Bespoke Tailoring* case, based on his own manipulation of the definition of undertaking, industry, trade or occupation left a profound impact on the political considerations for the construction of amended or new provisions of the new 1956 Act, which otherwise were mainly based on the provisions of its predecessor, the 1937 Act.

The big issue was the introduction of more considerations based on politics and race, namely the distinction between coloured as opposed to white persons.

Reference to the consideration of these different race groups could be found in the definitions in section 1 and sections 4,6,7,8, and 77. The first five sections mainly dealt with the registration of trade unions and section 77 dealt with the "*safeguard against interracial competition*" (job reservation).

Schreiner's 1952 judgment in regard to his forged definition had reduced the collocation of undertaking, industry, trade or occupation (which governed the previous 1924 and 1937 Acts) to a set of nouns depicting the activities or industries (interests) of employers only.

There was therefore no noun left in the collocation to which could be ascribed the specific interests of employees, namely their trades or occupation.

This opened the doors for the legislature (Parliament) in 1956 to introduce race or possibly any other distinction like religion, sex or language as an interest into the registration certificates of trade unions. The legislature chose race for obvious political reasons – and I submit race had nothing to do whatsoever with the trade or occupation of a person or the ability to perform as employee for his employer.

Without Schreiner's forgery the meaning of the collocation would have stayed intact and would have left no room for such absurd grammatical constructions. Any additional alteration as to the trade or occupation of the collocation would have been contrary to the provision of the 1956 Act and indeed contrary to the definition of the collocation itself.

In short, forgery of statutes in labour legislation engineered by members of the judiciary officially helped the apartheid Government to introduce the elimination of the coloured population in the Cape from the general voters' roll in 1955/56 without getting into conflict with the (correct) stipulations of the 1956 Act.

Other aspects of the 1956 Act regarding registration

It should be pointed out that all other basic requirements regarding the registration of trade unions, employers' organisations and industrial councils remained intact as they had been introduced under the 1937 Act, as far as the limitation of the industrial council's jurisdiction within the undertaking, industry, trade or occupation is concerned.

Except naturally that these correct statutes now had been forged and misinterpreted in judgments of our highest courts – a jurisprudence referred to by all other courts.

The information to be submitted to the Registrar also did not change and the requirement to submit information as to the character of the undertaking, industry, trade or occupation in respect of which it is desired that the council should be registered also was kept in place – although deleted from the direct visible provisions of the Act but hidden away from public view and packaged into the terms of section 19(1).

This sub-section reads: *"The employers, employers' organizations and trade unions intending to form an industrial council shall transmit to the registrar in the manner subscribed –*

(a) the constitution of the council, signed by or on behalf of them, together with thre copies thereof; and

(b) applications for the registration of the council in the ***prescribed form*** *containing the prescribed information;*

and shall furnish to the registrar such further information as he may require."

The definition in section 1 of the word "prescribed" leads us to the definition of "this Act" which leads us to the definition of "regulations", which in turn leads us to the provisions of section 81 of the Act, which establishes these regulations and which in turn were published under Government Notice 2322 of 14 December 1956.

Clause 5(1) of these regulations prescribes the requirements for the application for the registration of an industrial council, which in short concerns the completion of Annexure I.C.10 for employers (if the registrar approves) or employers' organisations and Annexure I.C.11 for trade unions.

After the renaming of the 1956 Act from "Industrial Conciliation Act" No 28 of 1956 to "Labour Relations Act" No 28 of 1956 the Annexures were accordingly renamed to L.R.10 and L.R.11.

Par 1 in Annexure L.R.10 reads: *"We hereby in pursuance of an agreement reached with other interested bodies, apply in terms of section nineteen of the Labour Relations Act, 1956, on behalf of the employers' organization for the registration of an industrial council for the …… (insert character of undertaking, industry, trade or occupation) in the area(s) mentioned in the annexed table."*

Par 1 in Annexure L.R.11 uses identical words but making reference to the relevant trade union instead.

As an aside, I should mention that the original issue of I.C.10 and I.C.11, published on 14 December 1956, contained still other unlawful manipulations of our collocation in that its four nouns appear in capital first letters in the annexed tables, effectively trying to mislead the trade unions and employers' organisations to complete the forms with incorrect numbers of persons in respect of an industry or other type of activity or pursuit instead of the required number of persons in the undertaking, industry, trade or occupation concerned.

It is no surprise that the resulting registration certificate of an industrial council, issued in terms of annexure I.C.12 of the regulations also contained a manipulated version of our collocation in that it was quoted with the first noun now sporting a capital first letter thus: *"Undertaking, industry, trade or occupation".* Annexures I.C.13, 14, 15, 18, and 20 were manipulated in an identical fashion and I.C.16 and 17 had the nouns of their collocation displayed with first capital letters – where I.C.13 concerned the Certificate of Registration of an Industrial Council regarding the Change of Name, I.C.14 concerned the Variation of Scope of Registration of an Industrial Council, I.C.15 concerned the Application for Publication of an Agreement, Annexures I.C.16 and 17 concerned the tables annexed to I.C.15.

All these manipulated forms were replaced some 8 years later with the corrected forms in terms of the Regulations published under the renamed LRA of 1956.

In the result all annexures of the regulations had been cleared of the attempted further irregularities done to the embedded collocation.

The LRA of 1956 itself could now be operated as if properly understood by all persons involved - were it not for the unlawful jurisprudence engineered by the Minister of Labour / Manpower and the judiciary both from as early as 1924.

S v Prefabricated Housing Corporation (Pty) Ltd & Another

Various judgments were delivered to further cement the jurisprudence based on the forged definition in the Bespoke Tailoring matter in favour of the notion of "industry" instead of the notion of undertaking, industry, trade or occupation.

One of these judgments, run as a test case in 1973, needs mentioning since, in my opinion, it is all wrong and its reasoning is false and based on previous forgeries of statutes.

It concerns the matter of *S v Prefabricated Housing Corporation (Pty) Ltd & Another,* in which Trollip, JA, displays a remarkable ignorance as to the functioning of the 1956 LRA.

The list of incorrect quotations of the Act the judge refers to is indeed long. I shall only supply short extracts which will instantly make us realise the mistakes in his judgment:

1) "An industrial agreement has been promulgated by the Minister for the building industry" - this is incorrect since in terms of section 48(1) the Minister may bind, at most, all employers and employees in the undertaking, industry, trade or occupation to which the agreement relates and not to which the building industry relates.

2) "The Council is registered in respect of the "Building Industry" – this is false since in terms of section 19(3)(d) a council can only be registered in respect of the undertaking, industry, trade or occupation concerned and not in respect of an industry.

3) "The parties to the council are certain trade unions and an employers' organization who are representative of that industry" – this is false since they are not representative of the industry but of the undertaking, industry, trade or occupation concerned.

4) Referring to section 23(1), the judge quotes*: "shall within the* ***… industry …*** *and in the area, in respect of which it has been registered, endeavour by the negotiation of agreements" …* - again this is false since section 23(1) refers to the undertaking, industry, trade or occupation in respect of which the council has been registered.

5) An industrial agreement is not made under section 23(1) but under the provisions of section 21(1)(f) in terms of the constitutional dispute settlement procedure in respect of all disputes in the undertaking, industry, trade or occupation concerned.

The mistakes in the judgment are too many to contemplate, in particular when seen in light of the fact that the judge's major reliance for his judgment is his reference to the reasons in the *Bespoke Tailoring* matter – whereby our collocation has been reduced to the activities of the participating employers.

What happened meanwhile from 1956 to 1995 in our law courts and with the opinions of our legal fraternity?

Since the forgery engineered by judge Schreiner in 1952 and the follow-up irregularities of judge Trollip the floodgates opened for further forgeries and misrepresentations of our labour law statutes.

Ehlers, DP 1983, Matshoba v Fry's Metals,

On page 113 at A-B Ehlers, DP, attaches in brackets the word (interests) following the words of our collocation, thereby indicating that the interests are equal the undertaking, industry, trade or occupation.

Trying to follow his elaborating on the provisions of section 23(1) it becomes clear that he either has no concept of what the meaning of our collocation might be or he pretends not to know, seen in light of the fact that he was, by his own admission, many years involved with trade unions and industrial councils and even acted as the General Secretary of the Building Industrial Council.

His inadequacy may be understandable but his active manipulations of the statutes are inexcusable and cannot be forgiven, since they are unlawful.

On page 114 at G-H, considering the registration of an industrial council in terms of section 19(3) of the Act, he states: *"The industrial registrar having considered an application for registration of an industrial council as well as other matters and being satisfied inter alia that the parties to the council are sufficiently representative within any area of the* ***interests*** *concerned, may in terms of section 19(3) register the council accordingly."*

The above presentations of Ehlers are false since, as we know, the registrar may register the council in terms of section 19(3) in respect of the area and undertaking, industry, trade or occupation in respect of which the parties to the council are sufficiently representative.

Interests in terms of the Act are referred to as "industry" in respect of employers and "trade or occupation" in respect of employees and as reflected in the registration certificates of employers' organizations and trade unions issued by the registrar.

Wiehahn Commission Report, 1981-2

With regard to issues concerning the jurisdictional limitation of industrial councils the role of the meaning of our collocation undertaking, industry, trade or occupation features centrally.

The Wiehahn Commission dealt with it on pages 520 and 521 of its report of 1981-2, where the Commission incorrectly suggests to us that *"the Act applies, subject to the exclusion of persons in certain categories of employment, to every "undertaking", "industry", "trade" or "occupation",* each noun of the collocation separately stated in inverted commas.

This statement of the Commission is naturally false seen in light of Schreiner's forgery of it in 1952 and the fact that the Act in terms of section 2(1) applies *"to every undertaking, industry, trade or occupation …."*

Note: It appears that the Department of Manpower had not anticipated that Schreiner's forgery of our collocation would be found out and acted as if the definition was interpreted by the judge as if it were intact and not manipulated.

The reference of the Commission to the alleged statement attributed to judges Solomon and Tindall in the matter of Rex v Siderski, namely that *"the four terms refer **severally** to "a collective enterprise in which employers and employees are associated",* is also false.

In fact Judge Tindall was very specific when he pronounced on page 114 of the Sidersky matter: "*It is clear I think that in relation to the employer an "undertaking, industry, trade or occupation" means, **not a personal vocation** but a collective enterprise in which employers and employees are associated."*

In its findings in clause 4.63.1 of its 1982 report the Commission further pronounced that:*"It is difficult to define the terms undertaking, industry, trade or occupation in view of rapid technological developments and that the definition of these terms should continuously be researched by the National Manpower Commission." (NMC).* This statement is very misleading since a) the collocation is already defined in section 1 of the Act, and b) its terms do not need any adjustments due to rapid developments, since the four nouns constitute a legal framework, consisting of four variables which will be determined at any time by the registrar in the registration certificates of the parties to a council or conciliation board.

The author of this paper enquired telephonically (Tel: 024 37756), during 1990 from one of the commissioners, Mr NJ Hechter, about the meaning of undertaking, industry,

trade or occupation and was immediately referred by Mr Hechter to Mr Dennis van der Walt, the Secretary of the Commission who, according to Hechter, was the only person on the commission with knowledge on that subject, I could talk to.

Repeated attempts to speak to Mr v d Walt failed – in addition, I submit, the complex situation regarding these issues was not yet well enough understood. But we kept in mind that Mr D v d Walt, the Director of Labour Relations in the Department of Manpower had the knowledge regarding the meaning of the collocation.

Erasmus, AM, Manquasela v Rheem SA, 1985

Judge Erasmus in this case quotes extensively from Schreiner's judgment in the *Bespoke Tailoring* case of 1952, inclusive of the manipulated definition of our collocation and thereby simply shifts the responsibility of assessing the jurisdictional limitation of the relevant industrial council (NICISEMI) to the false outcome of the interpretation of it in the *Bespoke Tailoring* case.

The industrial council in this matter had claimed no jurisdiction over the respondent, Rheem SA, being not a member of one of the employers' organisations which are parties to the council – a so-called non-party.

Despite this fact the court was persuaded by the forged *Bespoke Tailoring* case, by the forged *Fry's Metals* Case and by a Mr Brassey, on behalf of the Applicant, arguing that the council's constitution nevertheless provides for disputes between non-parties.

The fact is that the dispute settlement procedure is embedded, in terms of section 21(1)(f), in the constitution of the council and shall deal *"with all disputes in the undertaking, industry, trade or occupation concerned within the area in respect of which the council is registered, as varied from time to time;"*

The fact is that a so-called non-party is not a member of a party to the council and is therefore not in the collective enterprise (uito) in respect of which the council has been registered.

For all the above reasons Rheem does not fall under the jurisdiction of the council and the judgment is incorrect and based on forged statutes, subsequently misinterpreted.

There is an additional twist to this case, in that the Department of Manpower had to get involved. This alerted its Minister and his officials, since under scrutiny of the

courts their unlawful operations as to the false Notices in the Gazette might well be exposed.

National Manpower Commission

The Commission was established by Act 94 of 1979 which was inserted as section 2A into the 1956 LRA.

In its report of 3/1984 the Commission in clause 4.3.9 expressed its opinion regarding what it called multi-unionism.

This meant "… *the removal of the objection procedure of the present registration process….",* dealt with in terms of section 4 of the LRA. The Commission stated that: *"It is considered unlikely that the removal of the objection procedure would lead to inter-union rivalry that could harm labour peace in the long run."*

As we know by now this removal of the "objection procedure" (the determination of the sufficient representativeness of a trade union's interests it wants to claim) was effected much later in the provisions of the 1995 LRA and became one of the major contributing factors that led to the tragic events at Marikana and to the disruption of the harmony within COSATU – more about this later in this paper.

All other matters relating to industrial councils dealt with in the report were of a trivial nature, like the following*: "As autonomous bodies, the industrial councils should thoroughly review their present procedures and methods of operation in an attempt to adapt to current demands and circumstances without state intervention."* And this one*: "Industrial councils should make a greater effort to publicise their nature, functions and powers."*

Some of the real issues as for instance the incorrect application of section 48(1)(b) to the so-called non-parties and the unlawful registration of Industrial Councils in respect of industries instead of, as required by the LRA, in respect of a particular undertaking, industry, trade or occupation, the closed shop provision and the adequacy of the general dispute settlement mechanism, are not dealt with in the report.
According to clause 5.2 of the NMC report some of these aspects were held over as *"Areas for further investigation".*

Letters from Minister of Manpower and Director General to Industrial Councils

These further investigations took the form of a Working Document of April 1984 sent to industrial councils for comments under cover of a letter from the chairman, Mr Reynders of the NMC of 7 August 1984.

Regarding the contents of **Par 3.1** of the working document, it needs to be pointed out that the delegated legislation (meaning published agreements) through publication in the Government Gazette only affects some or all the employers and their employees who are engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates and nobody else. It can therefore hardly be described as "delegated legislation".

In fact, it could possibly be named self-imposed legislation onto the members of the employer parties and some or all their employees. The reason why the members of the parties to the agreement would want such criminal sanctions imposed upon themselves is simply because of their mistrust towards their member competitors and the realisation that otherwise the agreements will be defeated or will not be enforceable.

It is therefore hideous and unlawful to impose these criminal sanctions also on the so-called non-parties who are members of the public in relation to any industrial agreement.

Par 3.2(a) of the working document contains a remarkable revelation of the Department of Manpower about the incorrect functioning of our collocation as promoted by it, but at the same time also discloses a valid point about it, regarding what it terms the "specific bargaining unit", which is nothing else but the character of the undertaking, industry, trade or occupation and consists of the combined activities of the employers and their employees – the industries and trades or occupations.

The first section of Par 3.2(a) states: *"The statutory system is used mainly for collective bargaining at the central level, that is to say, the parties at this level are usually representative of employers and employees in an* ***industry, trade or occupation****, either country-wide or regionally, and conclude agreements in this context."*

This statement again is false, since the parties at the central level or any other level, for that matter, for collective bargaining are usually the representative of employers and employees in a particular undertaking industry, trade or occupation and not the activities of employers and employees.

Specific Bargaining Unit: "industry, trade or occupation"

From the contents of par 3.2(f) of the Working Document it appears that the Manpower Department (DoM) even found a new name for the combination of the three nouns (instead of the required four nouns) **industry, trade or occupation**, namely a "specific bargaining unit", as for instance the "manufacture of wood furniture in association with carpenters."

To show the wilfully twisted mind of the Department of Manpower (and the NMC which in fact has no doing in it) it will be worthwhile to quote the significant portion of paragraph 3.2(f) of the working document.

It reads as follows: *"The concept of industrial democracy (self-government) is entrenched in the LRA which provides that agreements resulting from collective bargaining by parties represented in a special bargaining unit (usually in an* ***industry, trade or occupation****, country-wide or regionally), can be made binding by the Minister on all the parties in the specific bargaining unit, whether they have participated in the bargaining process or not.*

One must realise that the notion thus peddled by the DoM is false because the so-called "special bargaining unit" actually represents nothing else but the combined activities of employers and their employees and it does not represent these persons themselves. For that to happen one needs the additional noun of "undertaking", itself a collective enterprise or employers, to complement the false "special bargaining unit" to a correct particular collective enterprise, namely the particular undertaking, industry, trade or occupation concerned.

From this (false) intended notion we can glean that even the DoM has attributed "industry" to employers and "trade or occupation" to employees – a partially correct notion fitting into our collocation – but it must be understood that the industry is a function of the activities (industries) of the participating employers and that the trade or occupation is a function of the activities of the participating employees, both established respectively in terms of section 4 of the Act and in respect of which the registrar has determined the parties to be sufficiently representative in a particular area.

It also follows that this type of representativeness of interests is different from the required representativeness of employers and their employees in respect of the

undertaking, industry, trade or occupation - in which context agreements are concluded in terms of section 19 and 48 of the Act.

The statements of the Department of Manpower in paragraph 3.2(a) and 3.2(f) are therefore false and are designed to wilfully mislead the industrial councils, first in confirming to them as "correct" that what they had done wrong already for many years in relation to the non-parties and second in enticing them to do wrong in case they have not yet done so.

The new provisions of section 2D(6)(b) of the 1956 LRA should have been invoked in terms of which: *"Any person who fails to comply with any such requirements* [as listed under (a)] *or who wilfully furnishes the commission with any false information shall be guilty of an offence."*

The Department of Manpower and its responsible officer are clearly guilty of such criminal offence, in that they wilfully advised the NMC wrongly and furnished false information.

Par 4.1 of the Working Document

I should mention one more chapter of the Working Document in which, under the heading "4.1 Statutory Provisions", the Department (and the NMC) misrepresents the provisions of section 48 and section 48(2)(b) of the LRA. The vital provisions of section 48(1)(b) of the Act are again misquoted and referred to under par 4.1.1 as follows: *"Furthermore, the Minister may at the council's request declare such provision as he may specify, to be binding upon all other employers and employees who are engaged in the* ***particular industry*** *and who are not represented on the council."*

The above quoted passage is false and should have been correctly referring to all other employers and employees "*who are engaged or employed in the* ***undertaking, industry, trade or occupation to which the agreement relates,*** *in the area or any specified area in respect of which the council has been registered."*

A follow-up sentence in **par 4.1.2** from the DoM incorrectly states that *"The minister may regard the parties as sufficiently representative of the* <u>whole</u> *of an area, irrespective of whether or not* ***the parties*** *have members in any individual portion of the area."*

The working document is obviously referring to the provisions of section 48(11)(b) of the Act which states that the Minister: *" … may regard the parties as sufficiently representative in respect of the whole of such area, notwithstanding the fact that* ***a trade***

union or employers' organisation *which is a party to the agreement may have no members in part of that area."*

The statement of the DoM is therefore false, since it fails to point out that it may only be a union or organisation which may have no members in part of the area and not the parties.

This sentence is quoted out of context and is conveying the incorrect impression of the Minister's powers, since the fact that it must concern the nature of the undertaking, industry, trade or occupation under consideration is simply left out – the Minister cannot on his own increase the area of jurisdiction of the council, since he only may do so in respect of the area in respect of which the council has been registered and in respect *of which* ***a trade union or employers' organisation*** *which is a party to the agreement may have no members in part of that area."*

The next sentence in this par 4.1.2 is also quoted incomplete and out of context, since again, the fact that it concerns particular aspects of representativeness within the undertaking, industry, trade or occupation concerned, has been ignored and therefore creates the impression as if the representativeness of the parties is in respect of industries instead of in respect of a collective enterprise (uito).

Summary regarding Par 4.1 of the Working Document:

The so-called statutory provisions of section 48(1)(b) and 48)(2)(b) of the LRA as unlawfully conveyed by the Working Document and authored by the DoM to the industrial councils are false and far removed from the facts stated in the correct statutes of that Act.

For many years already the DoM / Labour desperately tries to hide from Public view the irregularities it wilfully and illegally constructed since 1924 under its first Minister of Labour Colonel Creswell. They concern the incorrect registration of industrial councils and the equally false Notice of the Minister to industrial agreements published in the Gazette, both incorrectly in respect of "industry(ies)" instead of, as required by the Act, in respect of a collective enterprise (uito).

Speeches of Minister P.T.C. du Plessis to Industrial Councils

On 4 June and on 24 October 1985 the then Minister of Manpower, Mr PTC du Plessis embarked on a lecture tour to open meetings of industrial councils in the Western

Cape and Johannesburg, trying to peddle for instance the Department of Manpower's false ideas about dispute settlement regarding section 23(1) of the Act, which limits its application to the undertaking, industry, trade or occupation in respect of which a council has been registered and it does not limit its application to the "industry" in respect of which the council has been illegally registered.

Further, in a cynical drive the Minister tries to entice the councils present at the meeting to allow for easier exemptions from the provisions of agreements he, the Minister, has illegally made binding on non-parties.

Another immorality in this regard concerns the admission of new parties to the councils in terms of section 21A of the Act, which had to be introduced to fend-off possible new and unwanted parties to councils arising in the wake of the Wiehahn Commission's deletion of race considerations from the Act.

The fact is that any registered trade union or registered employers' organisation which has been determined by the Registrar to be sufficiently representative of employers or employees in the undertaking, industry, trade or occupation in respect of which the council has been registered will have to be admitted as a party to that council, since otherwise the collective bargaining in that collective enterprise is incomplete – because a particular section or portion of it is missing.

All points advanced by the Minister are based on the forgery of the provisions of section 48 reinforced with that of the definition of undertaking, industry, trade or occupation concerning in both cases the replacement of a "collective enterprise" (uito), being a set of employers and their employees, with an "industry", being the activities of employers.

Circular Letter from Director General: Manpower to Industrial Councils

The speeches of the Minister to Industrial Councils in 1985 were followed by circular letters dated 18.9.1987 and 14 May 1987, referred to as a Consultative Memorandum on Industrial Council Agreements and a Circular Letter on Industrial Council Agreements.

It would appear that the DoM realised that the extension of agreements to non-existing non-parties causes many problems and in the memorandum asks the councils for advice, how best to overcome the problems.

As we know, in terms of section 48(1) there are concerned only the employers and their employees who are members of the parties who formed the council and thereby established the undertaking, industry, trade or occupation to which the agreement relates in addition to the other employers and their employees who are engaged or employed in that collective enterprise (uito).

So-called non-parties to industrial agreements do not exist in the Act.

The Director General comes up with very strange suggestions regarding extension of agreements to so-called non-parties which are far removed from the correct provisions of the LRA. He in particular refers to the requirement of being sufficiently representative, but forgets to mention that that representativeness is to be considered in regard to the collective enterprise and not in regard to an industry.

Summary:

It appears that the decisions in Bespoke Tailoring (Schreiner), Fry's Metals (Ehlers) and Manquasela (Erasmus) have reinforced the resolve of the Minister to continue with his publications of false Notices, binding uninvolved non-parties to all sorts of agreements, and is now looking for any support for his irregularities from any direction, be it from the judiciary, the legal fraternity, big business and even academics and university departments.

Manipulations of Labour statutes by Authors of Labour Publications

Enter the legal fraternity and academics in collaboration with big business and officials in the DoM.

It is trivial and becomes tiresome to now describe in detail the wrongdoing of persons who thought they must parrot the information played into their hands by big business and the DoM and reduce this newly acquired knowledge and non-sense to written pages.

But for the sake of members of the Public I shall list the names of these authors with a short brief of their own wrongdoings as a warning to read their pieces with caution, since they are not in line with the statutes.

List of additional Manipulators and Forgers of Statutes

1934, M Schaeffer, Adv, The Industrial Conciliation Act No 11 of 1924*, *Juta & Co – in the annotations on page 6 of his book he states that:*" "Industry": "This term must be taken to indicate a class of productive work or manufacture; not a personal vocation, but a collective enterprise in which employers and employees are associated (R vs Sidersky, 1928 T.P.D. 109.)"*

In *Rex vs Sidersky* Judge Tindall says on page 114 that *"undertaking, industry, trade or occupation" (*and not "industry") *means not a personal vocation, but a collective enterprise in which employers and employees are associated".*
And Judge Solomon says on page 111*: ""Industry" is not defined in the Act; but it must signify something different from the words "trade" and "occupation" with which it is collocated and I think should receive its accepted sense of a class of productive work or manufacture."*

Schaeffer combines a portion of a sentence from each judge Tindall and judge Solomon – thereby achieving his remarkable result of changing the tenet of an entire Act by unlawfully twisting a collective enterprise into an industry, thereby disqualifying his entire book.

1968*, *M Schaeffer, Adv, JF Heyne Dr.Jur., Industrial Law in South Africa, van Schaik. On page 19 of his book Schaeffer, under the heading "Undertaking, Industry, Trade or Occupation" states: *"For the purpose of facilitating such organization, the Act adopts the division of industrial activity into an undertaking, industry, trade or occupation (which for brevity's sake, will be referred to as "industry"). An industry is not regarded as a personal vocation, but as a collective enterprise in which employers and employees are associated for a common purpose. Consequently an industry is recognised not for the work done by individual employees but by the common purpose for which the employers and employees who are engaged in it, are associated."*

The fact is that the Act does not divide the industrial activity at all, but states quite clearly what an undertaking, industry, trade or occupation represents, namely a collective enterprise consisting of employers and their employees.

1981, H Cheadle, P Benjamin, South African Labour Bulletin, Sep 1981. Under the heading A Guide to the Labour Relations Amendment Act (1981) Benjamin and Cheadle state as follows: *"The type of organisation that can be classified as a trade union, and therefore potentially hit by the extension of these controls, has been extended considerably. Previously a trade union was defined as an association of employees whose primary purpose was to regulate relations between employers and employees. The Act has*

extended the definition to "any association that involves itself in such activities at all." (Section 1).

Cheadles' loose quotation of the definition of "trade union" is incorrect and false in several major aspects. In fact the correct definition after the 1981 amendments reads: *"trade union" means any number of employees in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation between themselves or some of them and* ***their*** *employers or some of* ***their*** *employers."*

For easier understanding one may substitute the collocation "undertaking, industry, trade or occupation" with the expression "collective enterprise", being employers and their employees and not just collective activities.

With such false references made by Cheadle to the statutes it is no wonder that the members of trade unions became restless and unhappy with their legal standing.

1981, Cheadle, ILJ 1981(2) at 86*,* here again **Cheadle** misquotes the definition of "trade union" by deleting the word "their" between the words employees and employers and by neglecting twice the reference to the particular undertaking, industry, trade or occupation in that definition.

The effect of such manipulated definition is that the impression is created as if a trade union now may regulate relation between its members and any employer – a completely undetermined situation which can only lead to labour unrest.

1981, ILJ 1981 (1) at 111, M Brassey and J Brand under the heading *3. Registration Procedures* they confuse the two different registration procedures as per section 4 on the one hand and as per section 19 of the LRA on the other hand.

Both members of the legal fraternity could not comprehend this difference between both procedures since they relied on the false ruling of Schreiner, whereby the four nouns in our collocation depict the activities (industry) of employers only.

So, why does the legislator require the establishment of the sufficient representativeness twice for the same criteria? Because, as we know, they are not the same criteria.

The impact of the forgery and incorrect applications of our collocation would be introduced in years to come into the provisions of the new 1995 LRA. There they helped to create havoc regarding the “simplified” registration of trade unions, since several trade union tried to represent identical interests of members with their employers.

It is claimed that this discrepancy has helped to create the poisonous conditions that led to the tragic events at Marikana.

1982, ILJ 1982 at 11, Ehlers DP, In this article Ehlers explains his “false” quotation of the provisions of section 23(1) of the Act. He simply exchanges the words of the statute, *“ … within the undertaking, industry, trade or occupation, and in the area, in respect of which it has been registered … .”* with his own words *“ … within the industry and area over which the council has jurisdiction.”*

Ehlers thereby confirms his own false ruling in *Matshoba v Fry,s Metals* of 1982, in which he unlawfully replaced the words in section 19(3) of *“undertaking, industry, trade or occupation concerned”* with the words *“interests concerned”.*

1981-1986, De Kock’s Industrial Laws, C Thompson, P Benjamin, all significant sections of the LRA 1956 have been misrepresented in this publication meant for lawyers. The falsifications range from the forgery of our collocation to the misrepresentation of the registration of trade unions and industrial councils, to the incorrect suggestion of the determination of the sufficient representativeness of the parties to the council as opposed to the one in respect of the interests represented by the union.

The provisions of putting into force an agreement also upon the non-parties are manipulated and false and relate not to a collective enterprise, as required by the Act, but to an industry.

The Authors Thompson and Benjamin have it all wrong and are, it would appear, promoting the manipulated definitions and sections of the Act the way the Department of Manpower has done for many years before.

1983, Dr P J van der Merwe, Director General: Manpower, in his address of 24 November 1983 to the industrial councils at this "historic conference" Dr v d Merwe appears to be feeling reasonably secure that the irregularities promoted and exercised by the Minister and his Department had not been uncovered or noticed as yet.

Nobody – not a single soul, it would appear, had noticed or complained about Schreiner's forgery of the definition mentioned, Erasmus' use of that forgery, Ehlers' forgery of section 19(3) and most important of all the Minister's continuous forgeries of section 48(1)(b) of the Act when promulgating an industrial agreement.

The Minister and the Director could reasonably feel secure about their unlawful actions, in particular so since other private bodies (Seifsa), universities (UCT), publication houses (Juta), lawyers (P Faber et al), advocates (Brassey et al) and Judges meanwhile had parroted exactly the forged underlying principle which had been unlawfully promoted by the Ministers' of Labour since 1924.

The world of Dr v d Merwe, after the publication of the Wiehahn Commission Report, now seemed in good order and so he addressed confidently the representatives of the industrial councils, his confidantes in the fraud, and even fell into reminiscence of the first agreement of the first registered industrial council for the Printing and Newspaper Industry published under Notice No 442 on 10 March 1925 in terms section 9 of the 1924 Act.

To his shame, Dr v d Merwe conveniently forgot to mention that it was the constitution of the council that had been registered in terms of section 2(3) of the Act. This constitution had to contain the names of the founding parties, the members of which had formed the council and had formed the undertaking, industry, trade or occupation in respect of which the council should have been found by the Minister to be sufficiently representative.

It is clear that there are more employers and employees than just some or all the members of the organisation and unions (parties) in that collective enterprise. The other employers and employees in that collective enterprise are the eligible non-members of the parties.

An employer who is not a member of a party and who is also not engaged in the collective enterprise is not affected by the jurisdiction of the industrial council or any of its agreement published by the Minister in the Gazette.

Scrutinising the registration certificate of that first registered council we note that the registration Form I.C.3, issued in terms of clause 2 of the Regulations published in Notice 1244 of 26 July 1924, was unlawfully altered in that the pre-printed four nouns of undertaking, industry, trade or occupation were now printed in capital first letters.

This was obviously done to signify the (false) mutually exclusiveness of the nouns and so as to represent (completely unnecessary) various types of activities of employers only, which would fall in line with the incorrect registration procedure which led the Minister to unlawfully certify that the council was sufficiently representative of the "Printing and Newspaper Industry", being the name of the council.

To sum up, Minister of Labour Colonel F H P Creswell on 12 February 1925 signed a "Certificate of Registration, Industrial Council, in terms of section 2(3) of Act No. 11 of 1924", which had been forged and in which he unlawfully entered the name of the council instead of the undertaking, industry, trade or occupation.

Scrutinising further a copy of the first agreement of that council published under Notice 442 and dated 10 March 1925 we realise that the Minister of Labour, Colonel Creswell unlawfully bound all employers and employees in the Newspaper and Printing Industry and not as stipulated by the provisions of section 9(1)(b), all employers and employees in that undertaking, industry, trade or occupation.

Now, the Director General tells the industrial councils that "*It was this council which served as a model for the industrial council system which was embodied in the Industrial Conciliation Act, 1924, and it was therefore, also fitting that this Council was the first to be registered under that Act on 12 February 1925. A copy of this historic registration certificate is enclosed in your folder."*

Summary: As deduced already earlier industrial councils have been incorrectly registered and their agreement have similarly been made incorrectly binding on persons who are not in the undertaking, industry, trade or occupation to which the agreement relates.

Such serious discrepancies could only be explained away by assuming or by determining that the Minister actually meant that "industry" was constituted by the activities (industries) of the participating employers who are members of the party to the council and only concerns them.

But, Mr v d Merwe continues to mislead the councils by telling them that they are "*lower tier legislative bodies",* and that *"Neither the original objectives of the statutory*

industrial council system nor the principle underlying the system have changed over the years,"

These statements by v d Merwe are both false because first of all an industrial council is a private body corporate and so are its constituents the organisations and unions – it is not a miniature Parliament and second the underlying principle is the fact that relationships between employers and **their** employees are postulated within a particular collective enterprise (uito) and these relationships are not between employers and **the** employees in a particular industry.

One last objection to the many false statements of v d Merwe delivered in his address to the councils. He states: *"Today industrial councils are still established for "the consideration and regulation … of matters of mutual interests … and the settlement of disputes" between employers and employees, as was the case when the first industrial council was registered in 1925."*

From this statement there is the most important ingredient missing namely the jurisdictional limitation of such dispute settlement, the framework of the undertaking, industry, trade or occupation concerned (uito abbreviated or in other words the collective enterprise).

1985, Ehlers DP, Rhodes v SA Bias Binding, 1985 6 ILJ 106, this matter attracted my attention due to the fact that Ehlers uses Schaeffer & Heyne, Industrial Law in SA, to explain the duties of an industrial council (otherwise stipulated in section 23(1) of the Act.)

But Schaeffer, as already explained above, applies a particular devious devise to falsify the provisions of section 23 – he replaces the entire collocation with the single noun industry for short of the other single mutually exclusive nouns.

Ehlers now adopts this mutually exclusive noun "industry" and does not enquire where or why Schaeffer has used it – a most devious creation of a false jurisdictional limit for the industrial council – despicable, to say it mildly.

1985, NICISEMI, Constitutional Dispute Settlement Procedure, section 21(1)(f) of the Act, This industrial council, at the time of its registration in 1944, had 18 employers' organisations and 6 trade unions as parties to it. Its registration was effected incorrectly that is in respect of the combined interests (expressed as industries) of the employers' organisations as stipulated in their individual registration certificates instead of as required by the Act in respect of a collective enterprise (uto).

In terms of section 21(1)(f) of the Act, the council's constitution has to provide for a *"procedure for dealing with all disputes in the undertaking, industry, trade or occupation (uito) concerned within the area in respect of which the council is registered, …"*

It is obvious that such procedure must be valid and usable or applicable to all the parties to the council, which in turn each have different interests from one another, expressed in their individual registration certificates issued in terms of section 4(3)(b) of the Act.

To distinguish the negotiations regarding any dispute the dispute settlement procedure must contain a mechanism whereby the different interest groups can be identified – this mechanism will be the various sections or portions of the undertaking, industry, trade or occupation concerned.

In two clauses 10(2)(b)(i) and 11(1)(b)(i) of the procedure such distinction is prescribed as follows: *" … nothing … shall preclude the right of any party to the council to attend any dispute meeting arranged by the council, subject to the proviso that any party so attending –*

(i) shall have members in that ***industry, undertaking, trade or occupation*** *that gave rise to the dispute (ii) shall be a party to the agreement, the negotiation, interpretation or application of which gave rise to the dispute."*

The significant aspect is that the functioning of our collocation is obviously fully understood by the council and that it has been man-handled by the interchange of the words undertaking with industry possibly in order to signify the alleged mutual exclusiveness of the collocation in line with the false registration of the council in respect of "industries".

1984, Director General Department: Manpower, Circular Letter 16.2.1984, this letter from the Director contains many false statements regarding the contents of council

agreements to be published by the Minister. All statements concern (i) (non-existing) non-parties, (ii) industry instead of collective enterprise and (iii) the Minister's incorrect notice in the Gazette.

One aspect he states in clause 3.14 of his letter needs proper scrutiny: *"All amending agreements should contain a "**scope of application**" clause similar to that of the original agreement to which the amendment relates."*

We must remember that this scope of application clause describes the constitution of and defines the 'undertaking, industry, trade or occupation to which the agreement relates', namely the collective enterprise which consists of some or all the members of the parties and all other employers and employees who are engaged or employed in it.

As said before, so-called non-parties are not engaged or employed in that collective enterprise.

1987, M Brassey, The New Labour Law, Juta, January 1987, in the course of some three short pages (19–21) the author of section B of the book, Mr MSM Brassey, managed to convert the entire tenet of the LRA from the correct application of the collocation undertaking, industry, trade or occupation in an area to the false and fraudulent notions of "*registered scope", "area and interests", "undertaking [etc]" and "sufficiently representative of the interests and area concerned".*

The cases on which Brassey relies (except for Goldstone, AJ in the Copystat Services matter) are all the result of Judge Schreiner's forgery of the definition of our collocation and the Minister's incorrect notices in the Gazette.

This behaviour of Brassey of forging the definition indiscriminately upon hearsay demonstrates another instance of the classical result of ending up with chaos by relying on wrong initial conditions in a fairly complex labour relations system.

Brassey appears to have been detrimentally influenced by Seifsa (B Angus) and Nicisemi (AO de Jager) and Officials (D v d Walt) of the DoM.

1987, SA Labour Bulletin, vol 13 at 76 H Cheadle, P Benjamin, Amendments to LRA, In this critical view of the proposed Amendments to the LRA in the 1987 Bill – P

Benjamin and H Cheadle argue matters concerning "The attack on majoritarian trade unionism". The provisions of the Act do not attack major trade unions at all but defend the right for any trade union to exist to represent their members' specific interests in respect of which that union has been found by the Registrar to be sufficiently representative.

A trade union might have as members the majority of total employees of their employers in a collective enterprise but it might not have the majority of a particular trade or occupation of those employees. These latter employees certainly have the right to be represented by their union at the negotiations at a council to which that union is a party.

This idea of majoritarian trade unions stems from, it would appear, the incorrect understanding of the two tests as per the establishment of the sufficient representativeness in regard to the interests of unions in terms of section 4 as opposed to the one in regard to the undertaking, industry, trade or occupation in terms of section 19 of the Act.

These incorrect statements of both authors have helped to create a false understanding amongst trade unionist about their legal standing and enticed their reasons to enter into early strike action in any negotiations with their employers – causing unnecessary labour unrest!

1988, Department Manpower, letter dated 30.6.1988, Jurisdiction of Industrial Council:
In this letter the Divisional Director of Manpower claimed that the dispute settlement procedure has been made binding on non-parties in terms of the extension of an agreement by the National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry (Nicisemi) published in Notice R222 on 9.2.1988.

As proof he attached a copy of the matter of *Manquasela v Rheem SA* (mentioned above) in which judge Erasmus had quoted that section of the ruling by Judge Schreiner in *Transvaal Man v Bespoke Tailoring* (see above) which contained the forgery of the definition of our collocation which converts it from representing a collective enterprise to a set of activities and thereby falling in line with the promulgated agreement unlawfully made binding on employers and employees in the **industry** to which the agreement relates.

In fact the Divisional Inspector was peddling the *Manquasela v Rheem* matter because it was several times removed from the irregularity committed by the Minister when publishing an agreement in the Gazette.

1988, Brassey, Clothing & Textile Workers Union v Nat Ind Council Leather Industry, In this case the problem created by M Brassey and J Brand through their misunderstanding and misconstruction of the difference of registration of a union in respect of interests, being the trade or occupation of its members as opposed to a collective enterprise (uito) has come to court. The court itself is totally confused.

The simple question whether or not a new trade union may be admitted to an existing industrial council is whether that union has members who are employed on trades or occupations in that undertaking, industry, trade or occupation and for which no other trade union has been found to be sufficiently representative in that collective enterprise. If yes then the union adds voices to it and if no, then who would the union be representing on the council? Nobody?

It would be excluded from the negotiations in regard to any portion or section of that collective enterprise - being a trade union with no legal standing relevant any dispute settlement procedure constituted in terms of section 21(1)(f) of the Act.

1988, Letter dated 21.7.1988 from Divisional Inspector, Department of Manpower, In this letter the Inspector explains that non-parties are subject to the jurisdiction of an industrial council in terms of the provisions of section 23(1) of the Act.

But this section limits the jurisdiction of a council to the undertaking, industry, trade or occupation and the area in respect of which the council has been registered.

A non-party is not in that collective enterprise and the assurances of the Inspector are incorrect. I do not want to go deeper into the details of that matter except to quote his penultimate sentence where he states: *"Finally I should mention that this office, having regard for the Industrial Court's integrity, associates itself with the relevant Industrial Court judgment, a copy of which was annexed to my letter of 30 June 1988." (*Manquasela)

We were at that time not too familiar with the functions of the Act or with the existing jurisprudence relating to industrial councils' jurisdiction and therefore could not

properly reply to this peddling of incorrect judgments based on forged statutes, but always felt that something is terribly wrong!

1988-1989, Heads of Argument, regarding matters relating to jurisdiction of councils, It is pointed out that the judgments in *Fry's Metals, Manquasela, Bespoke Tailoring*, *the false Notices of the Minister in the Gazette and the writings of Brassey, de Kock and others* have influenced the outcome of many related cases to the detriment of the right party.

In three related matters alone five advocates made use of the Bespoke Tailoring case in support of the unlawful jurisdiction of an industrial council.

1989, Joel Fourie, Director General Department of Manpower, Professor of Law, University Pretoria, Proceedings of the Labour Law Conference, 1989, Most of the participants of this conference claimed to be experts in labour relations, but all their papers were based on the irregular and unlawful applications, one way or the other, of forged statutes of our LRA 1956.

Even **Judge Goldstone** in his keynote address had to admit that: *"Of course I had been aware of the far-reaching amendments to the 1956 statute. I had not, however, been called upon to give detailed, let alone judicial, attention to the terms thereof. What a new world was presented to me by the advocates and how fortunate I was in having had extremely competent counsel on both sides. In effect I had to unlearn and discard many of the fundamental legal precepts and principles which I had been taught as a student and which, in turn, I had taught to my own students."*

And he unfortunately too loosely states that*: "In labour matters the problem is primarily that between the employer and* ***the*** *employee."* - Instead of correctly saying that the problem is between the employer and **his** employee, the correct basis of all labour relations.

But he admits that: *"Peaceful industrial relations can be encouraged by an efficient legal system."* We would add to this: Provided that the legal system is not tainted and its statutes have not been manipulated for fraudulent means.

The result of such tainting of statues was then demonstrated to be the "correct" law by the **Dir General: Manpower, Mr Joel Fourie**. He states: *"Neither the original objectives of the statutory industrial council system nor the principles underlying the system have changed over the years. Today industrial councils are still established for the consideration and regulation … of matters of mutual interest … and the settlement of disputes between employers and employees, as was the case when the first industrial council was registered in 1925."*

Well, we have demonstrated above how that first industrial council was unlawfully registered in respect of an "Industry" instead of an "undertaking, industry, trade or occupation" and how our first Minister of Labour, Colonel Creswell, had forged the provisions of section 9 of the 1924 Act so as to unlawfully bind employers and employees who are not engaged or employed in that collective enterprise and how he even went so far as to falsify the Certificate of Registration Form I.C.1 issued in terms of section 23 of the 1924 Act to make it appear as if the council has been "correctly" registered in respect of the **Industry**, the lone noun of our collocation.

All original objectives and principles underlying the council system have been violated and brutally undermined with the first unlawfully forged applications allegedly in terms of the provisions of section 2 and 9 of the 1924 Act.

The wilful misrepresentations of statutes delivered by Mr Fourie at the conference, concerning "industry" as opposed to a collective enterprise regarding councils are a repeat of similar attempts to mislead the public engineered by the previous Dir General Dr v d Merwe and Minister of Manpower du Plessis, dealt with above.

But I have to report one particular bad example of the twisted mind of the officials in the Manpower Department exposed in a letter from Mr Joel Fourie and signed under his hand as the **Director General : Manpower, dated 6.10.1989**. He states:

"Your contention that the registration of the Industrial Council in 1944 was irregular cannot be concurred with. In terms of section 19(1) of the Industrial Conciliation Act, 1937, the employers' organisations i.e. the employer parties which intended forming the industrial council, had to submit applications containing information as to the interests represented by each of the parties, the area and the character of the particular undertaking, industry, trade or occupation in respect of which it was desired that the council should be registered. Among the applicants were the –

- *Associated Manufacturers of Light Metal Products,*
- *Gate and Fence Manufacturers' Association,*
- *Non-Ferrous Metal Smelters' Association,*

- *SA Cable and Wire Rope Manufacturers" Association,*
- *SA Tube Makers' Association, '*
- *Cape Engineers', Founders' and Shiprights' Association and*
- *Transvaal Foundry Association.*

As can be seen, the applicant parties represented several interests in the iron, steel, engineering and metallurgical industry which formed the character of the industry in respect of which the council was registered."

Here we have independent proof that that council was registered not in respect of a collective enterprise (uito) but in respect of the character thereof. Needles to point out that the combined interests of the employers' organisation do not form the full character but only the half concerning the employers' interests – the other half namely the employees' interests he forgot to mention altogether.

The actual registration certificate of the council issued on form I.C.8 indicates another irregular manipulation in that the four pre-printed nouns of the collocation on the forms have been deleted and replaced with the single word "industries".

In the relevant space were then inserted the interests (industries) of the participating employers. The council in other words was unlawfully registered in respect of the combined industries of the participating employers instead of the undertaking, industry, trade or occupation concerned, as required by the Act and it is therefore nil and void.

1988-90, NICISEMI, Consolidated Agreements Handbook, Juta, As advised by a circular letter from the Department of Manpower the industrial councils should publish their own versions of the agreements otherwise published by the Minister in the Gazette, in order to save extra printing costs for the Department.

Such a handbook was duly published by Juta & Co. The construction of the hand book was left in the hands of the council in co-operation with the publishers Juta.

The Consolidated Registration and Administration Expenses Agreement was introduced on page 2-I and explains as follows:

*"There are two parts to this agreement. The first part requires all employers in the **industry** to register with the council even though none of their employees are effected by existing Council Agreements. The reason for this is that in terms of section 23(1) of the LRA, 1956, the Council is required to endeavour by the negotiation of Agreements or otherwise, to settle disputes*

*which have arisen or may arise between all employers and employers' organisations and employees and trade unions in the **industry** and area for which the Council is registered."*

This passage quoted above from the provisions of section 23(1) is false and for all to see that it is false.

"The second part of the Agreement prescribes the contributions to be made by employers and employees towards the costs of maintaining the council. The nominal amounts are payable only by those employers and employees whose conditions of employment are provided for in Council Agreements, … , and have to be remitted by the 15th of the month following the month for which they are due. Failure to submit the contributions is an offence."

Non-party employers are forced to contribute into such money fund and some six or so other types of funds despite the fact that these agreement do not apply to them or their employees.

1991, Eli van der Merwe Louw, Minister of Manpower, Notice to industrial agreements in the Gazette, No.R.793 of 19 April 1991, during about 1991 the then Minister of Manpower published agreements in terms of section 48(1) of the LRA which sported a somewhat new face, in that the reference to "Industry" in the notice had been changed to "Undertaking, Industry, Trade or Occupation" (capital first letters), which nevertheless referred to the Industry related to in the heading of the notice and therefore was as false as ever.

This new approach was adopted, according to the then Labour Relations Director D. van der Walt, to indicate the mutual exclusiveness of the collocation which now had been manipulated with capital first letters. This incorrect display of the collocation in the Gazette is a case of "improved" forgery of a statute by the Minister who still is desperately trying to hide his forgery of the provisions of section 48(1) of the LRA from public view.

1992, Seifsa v Numsa, Judge Myburgh, B Angus, J Gauntlett, Forgery of the Definition of "employers' organisation", the Steel and Engineering Industries Federation of SA (Seifsa) is a federation of employers' organisations and was registered as such in terms of section 80 of the 1937 Act. Seifsa is not a registered employers' organisation

and therefore cannot be or become a party to an industrial council, which it nevertheless always fraudulently claims it is.

The apparent reason for such unlawful claim is the fact that Seifsa managed since its inception in 1942-43, when it was still styled the "South African Federation of Engineering and Metallurgical Associations", to control the relevant industrial council (Nicisemi) in that it unlawfully claimed two representatives' seats on the council in addition to all employers' organisations' seats it also controlled.

This fact put the federation in a position to claim, in terms of the constitution of the pension funds, the right to control the appointment of all employer representatives as trustees of those Pension Funds, which in turn had been established in terms of industrial agreements published by the Minister and made binding on the so-called non-parties.

It is therefore obvious that Seifsa has to maintain its false image as a registered employers' organisation under any circumstances. This issue came up in the matter of *Seifsa v Numsa in 1992,* while dealing with a major strike in the metal industries, when the legal standing of Seifsa in relation to negotiations of council agreements was questioned by Numsa.

The matter was initially decided on 6.8.1992 by Judge Joffe against Seifsa's legal standing as a party to the council: *"Nowhere in the Act is first applicant* [Seifsa] *recognised as a party that may take part in negotiations on behalf of the employers that it represents."*

In the following application of leave to appeal Judge Joffe ruled: *"Leave to appeal is granted to first [Seifsa], third to eighteenth applicants to the Full Bench of the Transvaal Provincial Division."*

It is the circumstances of this appeal hearing before Judge Myburgh and the full bench which are questioned, since it led to the Judge proclaiming, based on the "strength" of a false supplementary founding affidavit of the representative of Seifsa, Mr B Angus, that Seifsa is an employers' organisation.

Judge Myburgh: *"Accordingly, I turn to consider the allegations of fact made by Seifsa. … It is a federation of employers' organisations as defined in the Labour Relations Act 28 of 1956 ("the Act") and was formed to represent all its member employers for the purposes of collective bargaining at the level of the National Industrial Council of the Iron, Steel, Engineering and Metallurgical Industry ("the Industrial Council")".*

This statement is false, since Seifsa is not registered under section 4 of the 1937 or the 1956 LRA, and therefore cannot be or become a party to any industrial council in the Country.

And further, the Judge quotes from the affidavit of B. Angus the CEO of Seifsa: *"An employers' organisation is defined in the Act as: "Any number of employers in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation, between themselves, or some of them and* ***the*** *employees or some of* ***the*** *employees."*

This definition is incorrectly quoted and has been manipulated, since the relations to be regulated in terms of the correct definition of employers' organisation are between the employers and **their** employees or some of **their** employees in that particular undertaking, industry, trade or occupation.

This manipulation of a definition contained in section 1 of the LRA by B. Angus, considered and quoted by Judge Myburgh in his judgment, has the effect of virtually converting our *sui generis* collocation into four individual nouns each depicting activities or pursuits or industries of employers, so that Seifsa could be empowered to unlawfully negotiate as a fake employers' organisation with the employees of all the employers who are members of its member employers' organisations, which in turn each have different interests as per the determination in their registration certificates by the Registrar in terms of section 4 of the Act.

In addition it should be noted that if Seifsa wants to be such modified type of employers' organisation then it is not one as stipulated in the LRA and as a consequence is prevented from operating under the provisions of that Act.

The very disturbing aspect of this unlawful judgment of Myburgh are his remarks*: "It [Seifsa] set out the facts on which it alleges it has locus standi in its own right. In the answering affidavit those facts were canvassed by NUMSA, in general,* ***without comment****."*

Upon an investigation of the court records of this matter, supplied on 7.4.1994 by the Chief : Transvaal Archives Depot, the following is ascertained:

1) The affidavit (clause 2.1) and supplementary affidavit (clause 7 and 9) of B Angus of Seifsa indeed contain the two false statements dealt with above.

2) Advocate J.J. Gauntlett SC, acting on behalf of Seifsa, endorsed these false statements in his Heads of Argument (clause 35.4) before the court.

3) Advocate M.J.D. Wallis SC, acting on behalf of Numsa, indeed **did not comment** on these two false statements in his Heads of Argument (see clause 1 and 3) before the court.

The result of such ***judicial hocus pocus*** is that jurisprudence has been created which introduces a forged statute and confirms perjury as true fact – all fitting into the scheme designed to fall in line with the Minister's manipulated section 48(1)(b) as Notice to industrial agreements published in the Gazette.

1992, P Faber, Opinion, Industrial Council Building Industry (WP), Forgery of Definition of "Agreement", To make the forgeries dealt with so far withstand also the scrutiny of a party to the council which is not a party to an agreement published by the Minister in the Gazette, one more definition had to be unlawfully modified.

The definition of "agreement" in section 1 of the Act was forged by the addition of the definite article "the" before the word "parties", to make it appear as if an agreement is always one deemed to be between all the parties to the council, whether or not all the parties actually were in agreement.

Non-agreement by a dissenting party is resolved by the decision-making, in terms of section 27(7) of the Act, of a two third majority of the members of the council – or so goes the argument of the promoters of the false so-called majoritarian principle in labour law.

Now, it is clear that section 27(7) concerns decision-making regarding the domestic affairs of the council with a proviso that unfair labour practices may also be dealt with in terms of the two third decision making of the council, and provided only that such decision is agreed to in writing by the parties.

It is also clear that an agreement of some or all the parties to the council has always to be between the respective employers' organisation and a particular trade union, the members of both of which (or some of them) form a section or a portion of the undertaking, industry, trade or occupation concerned as stipulated in terms of the dispute settlement procedure contained in the constitution of the council and established in terms of section 21(1)(f) of the Act.

In a case of there being several employer parties and several unions involved in the negotiation process, each party has to negotiate with its counterpart in respect of the

particular section or portion of that collective enterprise. When all sections or portions have concluded their negotiations and are in agreement then the entire agreement may be reduced in a main agreement and send to the Minister in terms of section 31 of the Act.

See in this regard for instance the dispute settlement procedure of the National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry (Nicisemi) mentioned above.

Now, how did such misinterpretation of the provision of the definition of the Act evolve?

The answer to this question can be found in the records of a matter concerning the question whether a dissident registered employers' organisation, The Small Builders' Association (SBA), which is a party to the Industrial Council for the Building Industry (WP), but not a party to a subsequent industrial agreement reached by the other parties, may be bound to that agreement by the Minister's declaration in terms of section 48(1)(a) of the LRA in the Gazette.

A legal opinion for the Building Council was obtained on 24.2.1992 from P. Faber (Sonnenbergs) with a supporting opinion supplied by J. Gauntlett SC on 21.10.1992.

In that opinion Faber incorrectly relies on the provisions of section 27(7) for the conclusion of an industrial agreement between parties to it.

He then refers to the decision of the Appellate Division in *State v Prefabricated Housing Corporation (Pty) Ltd and Another, 1974 (1) AD535.* This case, it is submitted, relied on the forgery of Judge Schreiner in the *Bespoke Tailoring* case and has been dealt with above – it does not apply to this matter, since as has been shown that Judge Trollip misread the provisions of section 23(1), 27(7) and 48(1) of the Act.

Faber nevertheless in his opinion comes to an astonishing and totally false conclusion*: "The construction of the Act thus seems clear – where a two third majority of an industrial council takes a decision on an agreement then dissenting parties are bound by the agreement (once the Minister Gazettes it) even though they positively disagree therewith."*

But Faber continues with a further incorrect argument in support of his false conclusion, proclaiming that in terms of the definitions in the Act, *"Agreement means an agreement entered into or deemed to have been entered into by* ***the*** *parties to an industrial council or conciliation board under this Act: … ."*

It is submitted that the definition quoted by Faber has been forged by him in that the definite article "**the**" has been added before the word "parties" in the definition of agreement, trying to indicate that an agreement must be reached unanimously by a two third majority of the parties to the council in terms of section 27(7).

To strengthen his false argument regarding the forged definition of agreement, Faber now quotes from the matter of *Consolidated Wool Washing and Processing Mills Ltd v President of the Industrial Court and Other 1986 (4) D&CLD 850,* in which Judge Kriek quotes (on two occasions) the correct definition of "agreement", which Faber now also manipulates with the addition of the article "**the**" and then quotes the thus forged definition in his legal opinion.

Faber thereafter arrives in clause 10 of his legal opinion at his ultimate fraudulent statement in that he claims: *"The opening paragraph of section 48(1) makes it clear that an industrial council may decree that an agreement is only entered into by some of the parties to the council and similarly it may decree, by two thirds majority, that the agreement is entered into by all the parties to the council. If it so decrees then there is a deemed agreement between all the parties to the council irrespective of whether some of the parties dissent."*

The opening paragraph of section 48(1) in fact state: "

(1) Whenever an industrial council transmits to the Minister any agreement such as is referred to in section 24, entered into by ***some or all*** *the parties to the council, the Minister may, if he deems it expedient to do so, at the request of the council made either at the time of such transmission or at any time thereafter –*

(a) by notice in the Gazette declare that from a date and for a period fixed by him in that notice, all the provisions of the agreement, as set forth in that notice, shall be binding upon the employers who and the employers' organisations and trade unions which entered into the agreement and upon the employers and employees who are members of those organisations and unions."

It is absolutely clear that, even despite Fabers' forgery of the definition and his misrepresentation of the provisions of section 48(1), an agreement may be entered into by **some or all** the parties to the council and that such agreement between those parties constitutes a particular undertaking, industry, trade or occupation (uito) consisting of some or all the members of the employers' organisation engaged in their particular industries and some or all their employees who are members of the trade union employed on particular trades or occupations.

Therefore none of the members of any party to the council which is not also a party to the agreement is employed or engaged in that particular collective enterprise (uito).

In addition, the Act does not permit the council to decree anything in regard to an agreement between some or all the parties.

Now, to strengthen his false legal opinion, Faber commissions some 8 months later J.J. Gauntlett SC for a confirming opinion.

Astonishingly, Gauntlett confirms and agrees with Faber's dreamt-up and false conclusion about the construction of the Act regarding the council's two third majority requirement to take a decision in respect of an agreement between parties to the council.

Gauntlett further relies on the authorities quoted by Faber and by Brassey, the latter in his footnote 23 on page 20 of his book, The New Labour Law (1987) which refer to the matter in the Appellate Division quoted above of *State v Prefabricated Housing Corporation, 1974.*

The Appellate Division relied on the tainted ruling of Judge Schreiner regarding the meaning of the forged definition of undertaking, industry, trade or occupation – namely referring to it as **… industry …** , thereby creating the anticipation of a majoritarian system in an industry, instead of in a collective enterprise (uito).

Gauntlett states: *"That there may be dissenting parties in respect of such agreement is in my view plainly contemplated by the Act. Indeed, it is the very rationale for the transformation of what is agreement between some, into subordinate legislation which binds all. I agree with the words, "the employers who … entered into the agreement" must be read in the context of section 27(7) and the definition of "**agreement"** in section 1.*

Well, the terms of section 27(7) do not refer to an "agreement" but to a "decision" of the council, and the definition of "agreement" as manipulated by Faber also does not exist. Therefore one may ask the question on what legal basis Mr Gauntlett constructs his statements. He certainly cannot rely on the interpretation of forged statutes - or can he?

Gauntlett elaborates further: *"The term "agreement", in section 48(1) is no "contract in the legal sense" but a statutory term of art. Any other approach would in my view be in conflict with the approach laid down by the Appellate Division* (see above*), and lead to self-evidently anomalous consequences, quite subversive of the statutory scheme relating to industrial councils."*

The term “agreement” is clearly defined in section 1 of the Act and in my view it certainly is a contract in the legal sense, since it only has to be transmitted to the Minister in terms of section 31.

In order that the agreement cannot easily be defeated by non-compliant members the council may request the Minister at the time of transmission or at any time thereafter to make a declaration in the Gazette as per section 48(1)(a) and bind the parties and those of its members who constituted the undertaking, industry, trade or occupation to which the agreement relates.

In a further notice in the Gazette the Minister, at the request of the council, may, at his discretion, bind all other employers and employees who are engaged or employed in the undertaking, industry, trade or occupation to which that agreement relates - and there is no mentioning of any non-parties in the Act.

As an aside, on the strength of these fake legal opinions of Faber and Gauntlett the Building Council proceeded on 9.7.1992 in the Wynberg Magistrates Court with the prosecution of a small employer (of some 8 employees) who was a member of the Small Builders’ Association. The charge sheet amongst other read: “.. *wrongfully and unlawfully fail to produce to the Building Industrial Council … a record of remuneration paid and the time worked in respect of all persons employed by the Accused for the period … upon the written demand by a* ***designated agent*** *appointed in terms of section 62 of the said Act.”*

The employer, needless to say, was pressurised to such extent by these charges that he had to fold his small enterprise and some 8 employees lost their jobs.

In addition to all irregularities committed by the building council and its legal representatives, Faber and Gauntlett, one must point out that the powers of a designated agent of an industrial council are, in terms of section 62(4), limited to: “*the undertaking, industry, trade or occupation and in the area in respect of which that council is registered … “*

The actions of Faber in particular as an officer of the court were more than hideous and outright fraudulent – forgery for financial gain.

The ILO Report, 1992

As a result of the findings of the Wiehahn Commission all racial discrimination embedded in the LRA were removed with the amendments of 1979 and 1981.

The racial discrimination contained since 1924 in the definition of “employee” was deleted and so were all racial differentiations between white and coloured persons in respect of the registration of trade unions.

We want to recall that the introduction of the latter differentiations had been made possible due to the fact that the previous Labour Ministers had published manipulated provisions of section 9 and 48 of the 1924 and 1937 Acts respectively. This unlawful manipulation of statutes was subsequently “endorsed” by Judge Schreiner’s forgery of the definition of undertaking, industry, trade or occupation”. This resulted in the interpretation of the four nouns in the collocation as being activities or endeavours of some kind or other of employers only.

Therefore no noun of the collocation was left open to be allocated as the interests, or the activities, namely the trades or occupations of employees so that the thus created artificial void could be filled with all sorts of additional interests – be they based on race, religion, sex or any other distinction.

As a matter of fact, it would appear that for political reasons the race of coloured persons was chosen as an additional interest of a trade union in respect of which it had to be determined by the Registrar to be sufficiently representative in a particular area, which was then inserted in its respective registration certificate (I.C.4) issued by the Registrar in terms of the Regulations to the Act.

These measures were introduced with the publication of the 1956 Act, coinciding with the removal of coloured persons from the general voters roll in the Cape Province.

These discriminatory regulations, which somehow remained in place in the registration certificates of unions even after the race consideration had been deleted from the Act, became in years to come a serious bone of contention when Cosatu, represented amongst other by M Brassey and H Cheadle, launched its complaint of infringements of trade union rights with the ILO on 11 May 1988.

The Department of Manpower now found itself between a rock and a hard place when the International Labour Organisation compiled its report of the Fact Finding and Conciliation Commission, because on the one hand it could not admit that it had applied the provisions of the Act incorrectly for many years and on the other hand it now had to go along with the incorrect ideas of Cosatu and its representatives M Brassey and H Cheadle who did not acknowledge or even understand (possibly in light of the existing jurisprudence created by forged statutes), the difference of a trade

union being sufficiently representative of trades or occupations in an area (or an employers' organisation being sufficiently representative of the industry (its activities) in an area) on the one hand and a trade union together with an employers' organisation being sufficiently representative of the undertaking, industry, trade or occupation (collective enterprise) on the other hand.

Resulting from these discrepancies emerge false statements made to the ILO in respect of the functioning of our Labour Relations and now reported incorrectly in its report of 1992.

These incorrect statements are (paragraph referred to in the report):

a) Par 137. The definition of trade union is quoted significantly incomplete by referring to it as *"an organisation whose purpose "whether by itself or with other purposes" was to regulate matters of common interest between employers and employees."*

This incorrect definition can be linked to two false quotations authored by H Cheadle and P Benjamin in the SA Labour Bulletin (SALB 1981 vol 7 at 19) and by H Cheadle in the Industrial Law Journal (ILJ 1981 Vol 2 at 86).

It is pointed out that the missing portions of the definition deal with the basic principle underlying the entire LRA, in that the labour relationship consists between employees and their employers in a particular undertaking, industry, trade or occupation - with the emphasis on the possessive determiner "**their**".

Whereas the correct definition of trade union is as follows*: "**trade union**" means any number of employees in any particular undertaking, industry, trade or occupation associated together for the purpose, whether by itself or with other purposes, of regulating relations in that undertaking, industry, trade or occupation between themselves or some of them and **their** employers or some of **their** employers."*

The particular collective enterprise (particular uito) mentioned twice in the definition therefore consists of the members of the trade union or some of them and their employers or some of their employers – a vast difference to the incorrect and undetermined definition dreamed up by Cheadle and Benjamin, which can only cause unnecessary labour unrest with trade unionists.

b) Par 166 and 211 – 222. The queries in these paragraphs concern the registration procedure and the "sufficient representativeness" of a trade union or employers' organisation.

It must be understood that the purpose of the selection process for registration of a trade union in terms of section 4 is to establish that after registration there is not in existence in the area another trade union representing identical or part of identical interests (trades or occupations).

Since it is hardly ever clear exactly how many employees (members and non-members) there are employed on particular trades or occupations in the area it may be understood that no absolute numbers are ever available to calculate a percentage quotient – hence the expression "sufficiently representative" of the interests in the area.

c) Par 225. Cosatu had argued *"that, although the courts had held that "interests" meant industrial and not racial, religious or political interests, there was nothing in the Act which precluded the registration of racial or sectional organisations."*

Cosatu had a point there since the Minister and Registrar had altogether fallen in line

with the Minister's false Notice in the Gazette and the unlawful registration of councils in respect of industries, there was no noun left in our collocation to cater for the interests of trade unions – hence anything goes with any interests also racial ones.

On the other hand, had the Minister abided by the provisions of the statutes in the Act there would have been in our collocation the "trades or occupations" available as specific interests for the members of trade unions, as in most instances correctly recorded, I understand from the records of some 12 registration certificates.

d) Par 227. The representative of the Minister of Manpower *"recognised that there was nothing in the Act to suggest that that sectional or racial organisations could not be registered and stated that the Minister's policy was to allow members of trade unions to decide for themselves on the matter of membership, provided that they met the sufficient representative criterion for registration".*

This statement of the minister's representative is false, since race may not be included in the interests as recorded in the registration certificates of trade unions. This is so because when a trade union agrees with an employers' organisation to form an industrial council and register it in terms of section 19, both parties have to state their interests and the character of the undertaking, industry, trade or occupation as information in the application form to be supplied to the registrar and there is no allowance for a racial consideration.

So, contrary to the assurances of the representative (D v d Walt) of the Minister there are restrictive provisions in the Act and in the Regulations to prevent racial considerations to be taken into account as to the interests of a trade union or as to the registration of an industrial council in respect of a collective enterprise (uito).

e) Par 169, 171, 176. These paragraphs concern industrial councils and as expected are full of falsifications. In **Par 169** the report states that "*an industrial council has to be registered in conformity with the requirements of section 19 in order to benefit from the provisions of the LRA.*

When the registrar approves the registration of an industrial council, he will send the council a certificate of registration which sets out the area and ***interests*** *in respect of which a council had jurisdiction and which defines the nature and extent of that jurisdiction.*

No council agreement may go beyond the area or ***industry*** *defined by the registration certificate."*

First of all, the requirements of section 19 of the Act stipulate that if "*the registrar is satisfied that -*

(a) …, and (b) …, and (c) …, and

(d) the parties to the council are sufficiently representative, within any area, of the undertaking, industry, trade or occupation concerned, he may register the council in respect of the area and undertaking, industry, trade or occupation referred to in paragraph (d)."

Second, the registrar is obliged by the provisions of section 19 of the Act to register the council in respect of the area and undertaking, industry, trade or occupation concerned and not, repeat not, in respect of the area or industry.

Third, the registrar will send the council a certificate of registration on form LR12, which stipulates the area and undertaking, industry, trade or occupation in respect of which the council had jurisdiction. It does not stipulate the industry, as claimed in the report.

Fourth, the correct stipulation in terms of section 48(1)(b) is, to use some of the words of the report, that *"No council agreement may go beyond the area or undertaking, industry, trade or occupation to which that agreement relates."*

In **Par 171** of the report it is claimed that *"in addition to providing a forum for collective bargaining within an **industry**, an industrial council is required to deal with all disputes arising in the **industry** in respect of which the council is registered (section 23(1)). The constitution of an industrial council is required to provide for a procedure (section 21(1)(f)) for dealing with all disputes which arise within its jurisdiction."*

The correct stipulations of the Act are (using some of the words of the report*): "in addition to providing a forum for collective bargaining within a collective enterprise, an industrial council is required to deal with all disputes arising in the **collective enterprise (uito)** in respect of which the council is registered (section 23(1)). The constitution of an industrial council is required to provide for a procedure (section 21(1)(f)) for dealing with all disputes which arise within the collective enterprise (uito)."*

In **Par 176** the report states as follows: *"Once an agreement is reached at the industrial council and signed by the parties, it is submitted to the Minister of Manpower (section 31). Such agreements only become binding on the **industry** as a whole once the Minister, by notice in the Government Gazette has declared the agreement to be so binding. The Minister may extend the application of the agreement beyond the parties to the industrial council to all employers and employees in the **industry**."*

This statement is obviously false, because the agreement can only be made binding by the Minister on the parties to the agreement and the employers and employees who are members of the parties and in addition in an extension notice he may bind all other employers and employees who are engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates.

Officials of the Department of Manpower who appeared as sworn witnesses

Summarising the above quoted information reported by the ILO one has to submit that it is very false and it appears has been supplied by the same officials of the Department of Manpower as mentioned before.

The names of the officials who appeared as witnesses before the Commission and who submitted documentation to the commission are listed in Annex IV and V on pages 172 and 175 of the report. They could only have been witness No.10 Mr D van der Walt, Director, Labour Relations, Department of Manpower and witness No.11, Mr D.W.James, Industrial Registrar. The false statements, referred to above carry the pen

of Mr D v d Walt, which I am sure can be confirmed from the records of his written submissions and documentation.

Finally I point out that the conduct of the hearings of the witnesses was stipulated in paragraph 85 of the report, which included the following declaration to be made by them:

> "I Solemnly Declare Upon My Honour And Conscience That I Will
>
> Speak The Truth, The Whole Truth And Nothing But The Truth"

From the evidence listed in this paper it would appears that Mr v d Walt did not speak the truth regarding those provisions of the Act concerning industrial councils.

Case No 12786/1992, SA Commercial Catering and Allied Workers Union v Minister of Labour, Industrial Registrar, & Another TU, this case is remarkable for a statement made by Judge v d Walt: *"By way of introduction I may state that the Labour Relations Act is designed to regularise labour relations, i.e. relations between employer and employee organisations, and to enable to take place between these bodies. The provisions of the Act are mixed and where it deals in another section, section 43, with a term such as "unfair labour practice" it is a mixture of social justice, common sense and labour law – far removed from the ordinary principles of common law ordinarily dealt with by the courts. And for that reason a whole new field of labour law has come into being – a field which is sometimes mystifying to judges of the Supreme Court, say."*

It should be pointed out to Judge v d Walt that this mystification of the labour law is obviously caused by the fact that the all-important *sui generis* collocation undertaking, industry, trade or occupation has not been understood by the judiciary or members of the legal fraternity and that in fact members of the judiciary themselves have manipulated and forged the wording of definitions and sections of the Act, i.e.the definition of "undertaking, industry, trade or occupation" by Judge Schreiner, section 19(3) by Ehlers, DP, definition of employers' organisation by Judge Myburgh, definition of trade union by H Cheadle & P Benjamin, section 48(1) by the Minister, definition of agreement by Faber of Sonnenbergs in collaboration with J Gauntlett SC.

And all these troubles were caused, I submit, by our first Labour Minister, Colonel Creswell in 1924 in that he submitted to the pressure and blackmail of one Mr M.J. Adams, Chairman, Building Trades Conciliation Board, Cape Peninsular, to make the

agreement, reached by that board, unlawfully "*binding upon all employers and employees in the building industry"* in the area specified.

The closed shop

I think it may now be opportune to discuss shortly the functioning and the reasons for a "closed shop" provision embedded in an industrial agreement.

One of the first closed shop provisions was embedded in clause 12 of an agreement of the Industrial Council for the Clothing Industry of the Transvaal, published on 14.9.1925 under notice No. 1514 in terms of section 9(1)(a) of the 1924 Act.

The closed shop provision in Clause 12 of that agreement, under the heading "Union Workshop", reads as follows: *"(12) No employer shall employ any employee who is not a member of the Witwatersrand Tailors' Association (Manufacturing section), and no member of the latter association shall enter the service of an employer who is not a member of the Transvaal Clothing Manufacturers' Association.*

It is submitted that there are two reasons for inserting this clause in the agreement: 1) It apparently helps to increase trade union membership on the principle: "if you are not a member you cannot get a job" and 2) It helps to create a void of the other employers and employees who are in the undertaking, industry, trade or occupation to which the agreement relates and who are not members of the parties. This void obviously cannot be there, since there are other employers and employees in that "industry" – in later years to be known as the so-called non-parties.

And in fact the agreement contains under the heading "Observance" a clause (1) which demands from the Minister as follows: *"The terms of this agreement shall be observed by all members of the Witwatersrand Tailors' Association (Manufacturing section),* ***provided*** *the Minister extends the operation of the same to every manufacturer of ready-made clothing in the Magisterial Districts of … ."*

The Minister gave in to this blackmail of the council and published the agreement in terms of section 9(1)(a) **and** (not **or** as stipulated by the Act) in terms of section 9(1)(b) of the Act and made the agreement unlawfully *"binding upon all employers and employees in the* ***clothing industry*** *in the magisterial areas of … .",* instead of, as prescribed by the Act, upon all employers and employees in that undertaking, industry, trade or occupation.

A different scheme to create the void of non-member employers and employees engaged or employed in the collective enterprise (uito) was invented by the Transvaal Industrial Council for the Engineering Industry in an agreement published under notice No.103 on 20 January 1928, which inserted a clause headed “Working Employers and Partners” in terms of which “*10. All working employers and partners shall observe the recognised working hours, rates of pay, and other conditions prescribed for employees in this Agreement.”*

These working employers and partners are in fact the non-member employers who are not represented on the council but are in the collective enterprise, They may only be bound to the agreement by the Minister’s notice in the Gazette in terms of section 9(1)(b) and not by a clause in the agreement itself – creating the void.

It is submitted that the closed shop provision as applied to employers and employees is an irregular mechanism to deceive members of the Public and make them believe that, due to the void created by that closed shop (called “Observance”) provision, the other employers and employees identified by reason of similar activities (industries) must be those as referred to in the forged notice (referring to industry) published by the Minister in the Gazette. But that, with respect, is not in terms of the correct statutes.

Seifsa and Pension Funds

So far we have established that a scheme has evolved whereby through forgeries of statutes it has been made possible to quasi-lawfully enlarge dramatically the number of employers and their employees who may be forced unlawfully to comply with agreements containing provisions to contribute financially to so-called benefit funds such as pension, provident, expenses, holiday, sick, medical, agency and other money funds which are totally controlled by the councils in terms of the constitutions of those funds.

Copies of the latter are hardly accessible and clouded in secrecy.

Particular attention receive for example the pension funds illegally controlled by the Steel and Engineering Industries Federation of SA (Seifsa) which is not a registered employers’ organisation and therefore not a party to the industrial council (Nicisemi).

Many employers and their employees were forced to contribute to these funds. A particular nasty feature contained in the rules of the funds was the stipulation that an employee who leaves the employ of a contributing employer may claim back from the fund his own contribution and sign an acknowledgement that he/she is *"fully aware that unless I have the required ten years contributory service as a member of the fund, I will forfeit my rights to benefits from my employers' contributions to the fund."*

Many employees left their employ before the required ten years of service and thereby abandoned the contribution of their employers and all interests accrued thereon in the fund. These abandoned moneys had accrued to some 11 billion Rand in 2005 and were claimed to be surplus accrued in the fund and not the abandoned contributions of the contributing employers, mostly so-called non-party employers.

It should be mentioned further that the pension funds were unlawfully registered under the Pension Fund Act No 24 of 1956 (PFA) despite the fact that in terms of section 2(1) of that Pension Fund Act the provisions of it do not apply to a pension fund which has been established in terms of an agreement published by the Minister of Labour in terms of section 48 in the Gazette.

The funds were nevertheless unlawfully registered under that Act and the Executive Officer of the Financial Services Board (FSB), Mr Piet Badenhorst, gave on 25 February 1994 the following written explanation: *"As regards the provisions of section 2(1) of the Pension Funds Act, 1956, this office has always held the view that although this section exempts a pension fund which has been established in terms of an agreement published or deemed to have been published under section 48 of the Industrial Conciliation Act, 1956 (Act No 28 of 1956), from registration in terms of the Act the section does not prevent or prohibit such registration. Should a pension fund organisation as defined therefore, nevertheless decide to apply for registration, it is the standpoint of this office that this registration and the protection afforded members under the provision of the Act should not be denied to such pension fund organisation and members."*

In a preceding paragraph of his letter Mr Badenhorst had explained: *"The Metal Industries Pension Fund, Metal Industries Provident Fund and the Engineering Industries Pension Fund were registered in terms of the provisions of the Pension Funds Act, 1956 (Act No 24 of 1956), after applications for such registration were received and such applications complied in full with the provisions of the latter Act. Your allegation that the registration of these funds are invalid are incorrect and denied."*

Now, at first glance, there is nothing wrong to get extra protection for the members of the fund under the Pension Funds Act were it not for the provisions of section 19(4) of that Act for instance, which stipulates: *"19. Investments, (4) No registered fund shall invest any of its assets in the business of an employer who participates in the scheme or arrangement whereby the fund has been established or in any subsidiary company (as defined in the Companies Act, 1973 (Act No 61 of 1973)) of such employer's business or lend any of its assets to such employer or subsidiary company: Provided that the Minister may exempt wholly or in part any fund established or conducted by a* ***statutory body*** *or utility undertaking from this provision.*

We must assume that the Minister had incorrectly understood that the industrial council is indeed a **statutory body** in the sense that its agreements as published by the Minister do affect persons who are not in the collective enterprise constituted by the parties to the council, instead of being limited entirely to their own companies.

From the FSB we also get written confirmation dated 2 June 1997 that the Pension Funds of the Metal Industries, registered in the late 1960 and early 1970 under the Pension Funds Act, had for years been exempted by the Registrar of Pension Funds from the Investment provisions of section 19(4) and were thus entitled to invest in the business of participating employers.

In a confirming letter of 3 August 1995, the Principle Officer of the Metal Industries Group Pension Fund, Mr R.A. Byrne asked for confirmation of his understanding of the exemption granted by the FSB on 12 April 1995: *"Temporary exemption from the operations of the provisions of section 19(4) of the Act is granted this Fund until 31 December 1998 on condition that the total amount of the fund's investment in the business of* ***each single employer*** *shall not exceed 5% of the total assets of the Fund. We also note that your office will be concerned should any investment by the Fund in the equity of any company exceed 15% of the issued capital of that company."*

The FSB had granted exemption from the provisions of section 19(4) of the PFA to the pension funds of the Metal Industries, controlled by Seifsa, since 1970 already!

In plain words, Seifsa had used, by way of its unlawful registration of the Funds under the PFA, the pension contributions it had extorted illegally from the so-called non-parties to invest that pension money into the companies which were members of its member employers' organisations and which were the direct competitors of the non-parties – what a fraudulent scheme!

But this grand larceny saga does not end here.

In 1995 the new LRA was introduced, which by "misinterpretation" of Mr H Cheadle, the convener of the 1995 Labour Relations Bill, of the provision of section 21(3) of the previous 1956 LRA, introduced a new section 53(5) which completely defeated the purpose of protecting the future retirement benefits of the workers in this Country.

Section 21(3) required: *"The funds of an industrial council surplus to its requirements for expenses shall not be invested otherwise than in –*

(i) Union or local Government stock; (ii) Union Loan Certificates; (iii) Post Office Savings Accounts or certificates; (iv) Savings Accounts, permanent shares or fixed deposits in building societies or banks, or in any other manner approved by the registrar." (a specified portfolio).

In his deliberations, published in the ILJ 1981 vol 2 page 94, on the Industrial Conciliation Bill of 27 March 1981 H Cheadle commented as follows on this issue: *"An industrial council is required to invest surplus funds in certain stipulated portfolios* (footnote:*section 21(3)). This will be extended to surplus funds* ***of any fund established by the council, such as pension, sick, medical aid, unemployment, holiday or training funds."***

The Act, in fact, was amended regarding section 21(3) to read as follows*: "The moneys of an industrial council and in any fund established as provided in section 24(1)(r) or 48(1)(d) surplus to its requirements and those of such fund for expenses shall not be invested otherwise than in* – (the prescribed portfolio).

Mr Cheadle must have "misread" the Amendment Bill since in terms of the amendments it is only the surplus to its requirements of the funds accumulated in terms of section 48(1)(d) and the surplus of the funds for expenses in excess of its requirements that shall, in addition to all other moneys of the council and moneys in any of the funds established in terms of the provisions of section 24(1)(r) (the funds listed by Cheadle) of the LRA, be invested in – the prescribed portfolio.

But as it turned out Mr Cheadle was appointed the convener of the new 1995 Labour Relations Bill and he must be held responsible for the insertion of the incorrect provisions regarding investment conditions of the funds of the council into the provisions of section 53(5) of the new 1995 LRA, which now reads: *"The money of a council or of any fund established by a council that is surplus of its requirements or the expenses of the fund may be invested only in* – (the prescribed portfolio).

The result of such wilful misrepresentation is that now under the 1995 Act only the surplus moneys of all these fund need to be invested as per prescribed portfolio and

not only the surplus of the (training fund – fallen away) expenses fund - leaving the bulk of the funds which now may be invested and handled by the trustees as they deem fit in terms of the constitution of the funds which may be amended at any time by resolution of the trustees.

Now, contemplate that an industrial council may invest the pension fund contributions, unlawfully collected from you and your employees, into the business of your direct competitor, for instance, and you realise the distaste of non-parties generated by such fraudulent scheme.

The 1995 LRA

The new 1995 LRA thus contains several key sections which are in fact the equivalent manipulated sections of the previous 1956 LRA.

They concern the false registration of industrial (now bargaining) councils in respect of a sector and area, identical to the previous incorrect registration in respect of industry and area.

They concern the manipulated definition of “trade union”.

They concern the “simplified” registration procedure for trade unions and employers’ organisations, which are now issued with “empty” registration certificates (i.e. no sufficiently representative interests are established and stipulated). The now “empty” registration certificate of employers’ organisations hide the fact that its previous registration is identical to the unlawful registration of an industrial council in respect of the identical interests. Remember that the now renamed bargaining councils are, in terms of the 1995 LRA, the previous industrial council as incorrectly registered since 1924.

They concern the extension of collective agreements of a bargaining council to so-called non-parties, without specifying who exactly those non-parties are.

They concern the incorrect stipulations regarding the investment of moneys unlawfully extorted from non-parties.

Necessary amendments to the 1995 LRA to stipulate the exact legal standing of non-parties

The term “non-parties” needs to be defined exactly so as to state that they are eligible non-members of the parties to the agreements but engaged or employed in the collective enterprise formed and registered by the parties to a bargaining council.

The term “collective enterprise” needs to be defined as being the set of employers who are members of the employers’ organisation and their employees who are members of the trade unions and who have constituted that collective enterprise.

Marikana - a Consequence of Inadequate Labour Relations Formalities

The Farlam Commission of Inquiry unfortunately stopped short of asking pertinent questions as to why there was no adequate representation for the RDO (Rock drill operators) in place at Lonmin ? Why did the RDO not join Amcu at the time but did so later on ? And why did many RDO resign from Num ?

Had the RDO lost faith in the collective bargaining structures or had they become aware that Amcu their union of choice did not have a place at the bargaining table at Lonmin even if they had joined the union ?

What would have been the necessary mechanism for Amcu to legally claim a place in the bargaining structure at Lonmin ?

The answers to these questions are contained in the registration certificates of the four unions involved at Lonmin, namely Num, Solidarity, UASA and Amcu.

Num (registered 1986), Solidarity (1975) and UASA (1924) were registered under the provisions of section 4 of the 1956 LRA and section 14 of the ICA 1924 respectively meaning that these three unions were registered in respect of those interests – the trades or occupations of members – in respect of which they had been determined by

the Registrar to be sufficiently representative in the particular area in which they operate.

Amcu on the other hand was registered in 2001 in terms of section 96(7)(a) under the 1995 LRA and was issued with an empty certificate containing only its name, a reference
number, date of issue and the signature of the Registrar – but containing no details as to the particular trades or occupation of its members which it could represent at the negotiations with their employer – Lonmin.

Num, being the representative union could establish in terms of section 18 of the 1995 LRA a threshold of representativeness regarding only the number of members with no particular trades or occupations considered.

In Num's first (original) registration certificate no particular mention was made of the interests of RDO and it appears they (the RDO) fell under the general description of persons employed in the Mining Industry *"for the purpose of searching for, winning, extracting, processing or refining minerals."*

Num therefore, in its negotiation with Lonmin, would not specifically consider RDO save for some general classification of employees at the bargaining negotiations.

The RDO being unhappy about this, therefore resigned from Num and went on a wildcat strike on their own – no trade union was involved.

Why?

Because Num did not negotiate satisfactorily and Amcu could not negotiate at all on behalf of the RDO, who now found themselves between a rock and a hard place.

The RDO therefore wanted to speak directly to Lonmin who refused due to the fact that there are only Num and two other unions (Uasa and Solidarity) which had seats at the bargaining table, obviously effected in terms of section 18 of the current LRA.

Uasa was mainly representing underground officials and Solidarity was representing persons in specialised trades.

Amcu could have been registered in respect of the interests of RDO and would most certainly have been determined by the Registrar to be sufficiently representative of those trades or occupations in the area of Marikana and issued with a relevant registration certificate, which would have been the entitlement to sit next to the other unions at the bargaining table, negotiating on behalf of RDO.

Why was this not effected ?

The explanation is to be found in the reasons given by H Cheadle, the convener of the 1995 LRA, to change the detailed registration procedure under the 1956 LRA.

This was done under the pre-text stated in the 1995 Draft Labour Relations Bill, that *"the existing system of registration is cumbersome, lengthy and outmoded."*

This opinion, expressed by the Task Team under Cheadle, is based on a deliberate misreading and misinterpretation of the provisions regarding the establishment by the Registrar that a trade union is sufficiently representative of the interests it wants to represent at the stage of registration of a trade union in terms of section 4 of the 1956 LRA, on the one hand, and the deliberate misreading of the provisions of section 19 of the 1956 LRA regarding the establishment by the Registrar that the parties to an industrial (now renamed bargaining) council are sufficiently representative of the collective enterprise (the particular undertaking, industry, trade or occupation, (uito)) they have formed under section 18 of the 1956 LRA, on the other hand.

A trade union might be sufficiently representative of its stated interests (trades or occupations) in an area but which does not automatically mean that it is also sufficiently representative of the employees in a particular collective enterprise (uito).

This is so, since there might be more non-union employees than there are union employees in that collective enterprise, which explains the necessity of both types of investigations by the Registrar.

Now, H Cheadle, M Brassey and J Brand already in their representations to the Department of Manpower published in 1981 in the ILJ (Industrial Law Journal) could not comprehend the fact that there is a difference between an "industry" and an "undertaking, industry, trade or occupation" - the first being the interests of employers

and the second one being a particular collective enterprise consisting of employers and their employees.

Brassey SC and Brand in fact predicted incidents like Marikana and still they promoted their false ideas, which were eventually adopted by Cheadle as quasi-valid statutes into the 1995 LRA.

They promoted Cheadle's own published forgery of the definition of "trade union" and thereby failed the underlying basic principle of freedom to associate or not to associate, in that organised employers now could negotiate not only with "their" employees in their enterprises but also now unlawfully with "the" employees in an industry, and vice versa, organised employees in trade unions now could negotiate not only with "their" employers but now also with "the" employers in an industry.

All these notions were false and based on further forgeries of the definitions of "agreement", "employers' organisation", "undertaking, industry, trade or occupation", and the forged sections 19(3) and 48(1) of the 1956 LRA and their subsequent unlawful interpretations in our law courts.

The result of these forgeries of statutes was that Amcu could not be registered to represent the interests of RDO at Lonmin who nevertheless joined that union after the tragic incidents.

I therefore accuse Mr H Cheadle and the Ministers of Labour of being ultimately responsible for the killing of the mine workers at Marikana, because without the Ministers', past and present, forged Notices to industrial agreements published in the Gazette and without the follow-up of Cheadle's unlawful forgery of "trade union" (also misleading the ILO in 1989) and the adaptation of the misinterpretations of the forgeries of definitions and sections of statutes mentioned above, Amcu would have been registered in respect of RDO and Lonmin would have to negotiate officially with all four trade unions peacefully.

I submit that the missing information as to the interests of the members in the certificates of registration of trade unions and of employers' organisations was effected in an attempt to hide from public view the unlawful registration of industrial (bargaining) councils in respect of industries, namely the activities (industries) of participating employers, instead of in respect of a particular collective enterprise

consisting of particular employers who are members of a party to the council and some or all their particular employees who are members of the trade unions which are parties to the council.

The deaths of some 44 persons at Marikana was partly the result of the cover-up of an enormous multi-layered fraud engineered by the Ministers of Labour, in connivance with certain industrial councils, specifically the federation of employers' organisations Seifsa, H Cheadle et al and M Brassey SC et al.

The Trade Union Conflict with the Deutsche Bahn – a similar conflict between unions in SA

During 2014 to 2015 a serious conflict developed between two trade unions on the one hand and the Deutsche Bahn (German Railways) on the other.

The conflict concerned obviously the terms of employment of trade union members but equally important it concerned the question which of the two trade unions involved has the right to negotiate with the employer on behalf of specific classes of employees – in this case the Engine Drivers (Lokfuehrer) and the Train Conductors (Begleitpersonal).

The employer was adamant not to negotiate with each of the unions, both with relevant members, separately and thereby ending up with two different agreements for employees employed on identical trades or occupations.

The solution to such problem offers itself in the provision of section 4 of our South African 1956 LRA, in terms of which an authority (here the industrial registrar) determines which of the two unions is sufficiently representative of the trades or occupations in question in a particular area.

But the Germans do not have such provision in their labour laws and the conflict dragged on for a long time with enormous financial losses and huge inconveniences to the great section of the Public.

Eventually the Government intervened and threatened with new laws – resulting in a truce subject to lengthy litigation.

Now, we in SA have abandoned such plausible provisions to separate at the source any such conflicts between trade unions, because our legal fraternity with influence on

law makers could not comprehend the difference between two different types of establishing the sufficiently representativeness in respect of the interests of unions and organisations on the one hand and in respect of a collective enterprise on the other.

The FMF Labour Challenge

Finally, a few words regarding the Labour challenge initiated by the Free Market Foundation (FMF). The issue concerns the extension of bargaining council agreements to the so-called non-parties.

All of these and related issues have been dealt with in the paragraphs of this paper.

Most of the manipulations and forgeries of definitions and section of the LRA 1956 are repeated and referred to in the Answering Affidavit of the 20th Respondent, the Metal and Engineering Industries Bargaining Council (MEIBC).

But there are contained two additional irregularities in that affidavit, one of which fits into the line of other forgeries of definitions engineered by P Faber of Sonnenbergs.

(1) On page 10 of the affidavit (page 14 of the papers), the provisions of section 48(1) of the 1958 LRA are quoted.

In the first paragraph of it the correct words " … *entered into by* ***some or all*** *of the parties to the council, … -"* have unlawfully been changed to read " *… entered into by* ***some or other*** *of the parties to the council … -"*

I submit that this is not a typing mistake but a deliberate change of the provisions of section 48(1), to unlawfully intimate that not all the parties to a council are normally also parties to the agreement and that therefore a two third majority of the council in terms of section 27(7) of the Act decides that the dissenting party will be bound to the agreement by the Minister's notice in the Gazette.

The fact is that a dissenting party cannot be bound by a domestic decision of the council but only by agreement reached between the parties in the particular section or portion of the collective enterprise (uito) and in terms of the dispute settlement procedure embedded in the constitution of the council in terms of section 21(1)(f) of the Act.

(2) On page 38 of the affidavit (page 42 of the papers) in clause 96 reference is made to the attached "*Certificate of Registration of the Bargaining Council, marked "**TM1**".*

On page 95 of the papers we find the first page, marked TM1, of the Certificate of Registration of Bargaining Council, issued in terms of section 29(15)(a) on LRA Form 3.4, which states that "*The registered scope of the Bargaining Council is the Iron, Steel, Engineering and Metallurgical Industry as approved and **set out in the annexure hereto** in the Republic of South Africa."*

Turning over to the next page we find instead of the registered scope of the council its constitution, marked TM2. The reason for such replacement of required information is that the scope of registration lists, instead of the collective enterprise (uito), the interests of the participating employers who are members of the employers' organisation which are parties.

In other words with the full but false registration certificate in place the danger of exposing the incorrect registration by comparing it with the details contained in the certificates of the employers' organisation is too great.

Well, we have all the correct certificates on hand for the court's attention.

Conclusion

Collective bargaining in a collective enterprise really refers to collective bargaining in a in a particular undertaking, industry, trade or occupation, which was the original basis of the underlying principle of labour relations between employers and their employees introduced in the 1924 Industrial Conciliation Act.

Political considerations, financial greed and ignorance derailed the correct application of the Act already in 1924, the year of its introduction.

The Act has been abused and manipulated ever since and has been used for unlawful financial gain at the expense of the working class and their mainly small employers.

With its legal framework correctly applied, the Act as at 1956/1994, I submit, would be the most advanced piece of labour relations legislation, not introduced anywhere else in the world, since its *sui generis* collocation in conjunction with the area aspect represent five variables which determine in all instances precisely the set of persons involved without impinging on anybody's rights who is not concerned.

Unfortunately, its manipulated and forged provisions were injected into the 1995 LRA where they as remnants of apartheid cause havoc to unemployment and to healthy labour relations.

Horst Peschkes

Cape Town 3 August 2015