

IN SEARCH OF ALTERNATIVES OR ENHANCEMENTS TO COLLECTIVE BARGAINING IN SOUTH AFRICA

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1. Introduction

Collective bargaining has a long history. This is evident from the developments in different countries as well as the importance it has played in granting workers greater voice in organisations. Collective bargaining is largely an adversarial process, which involves negotiation between parties with conflicting interests in order to achieve mutually acceptable compromises. Collective bargaining (coupled with the right to strike) has become a primary means to force employers through negotiation to achieve the improvement of standards and conditions of employment. The South African labour market has been plagued by unprotected strikes as well as violent and lawless behaviour during both protected and unprotected strikes. Inter-union rivalry has also added to this problem. Some have said that the collective bargaining process is in trouble and have failed the objectives intended by the *Labour Relations Act* 66 of 1995 (LRA). As the landscape of work is ever changing and the need for more employment, wage and functional flexibility exist the current collective bargaining framework has been called into question. The fact that collective bargaining in South Africa and elsewhere is quite adversarial puts these criticisms into the spotlight again. Calls to explore a participatory structure, where distributive and non-distributive issues are separated from each other, supplementary to collective bargaining have been made again. What immediately comes to mind is the system of workplace forums, which has been unsuccessful in South Africa

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thus far.

Calls have been made to explore other areas, such as company law, where workers are granted a voice: For example on the social and ethics committee especially when dealing with issues such as employment equity, labour and employment issues, health and safety and skills development. In the same vein it has been suggested that the latter issues could be dealt with on topic specific committees that would remove these issues from the bargaining table restricting collective bargaining to typical distributive issues, such as wage. (Internationally the scope of collective bargaining topics varies considerably). Calls have also been made that when strikes carry on for prolonged periods and are no longer functional and in aid of collective bargaining to make use of interest arbitration. Some writers submit that should trade unions bargain from a sustainability perspective, long-term employment possibilities should be explored including promoting a decent work agenda where four core values, namely, the opportunity to work, the right to freedom of association, social protection, and voice are the central themes. The role of collective bargaining and the need for additional participatory opportunities for workers in this context are therefore reconsidered.

2. Collective Bargaining

2.1 General

Collective bargaining is one of the means by which employees can participate in decision-making in management, influencing, at least, pay and the terms of conditions of employment.¹ Collective bargaining is defined as “a method of determining the terms and conditions of employment and regulating the employment relationship, which utilizes the process of negotiation between

¹ Gold and Weiss *Employment and Industrial Relations in Europe* 35. See also *Rand Tyre and Accessories (Pty) Ltd v Industrial Council for the Motor Industry (Transvaal), Minister for Labour & Minister for Justice* in 5.3 below with regard to matters of mutual interest.

representatives of management and employees and results in an agreement which may be applied uniformly across a group of employees”² or collective bargaining can be defined as follows:

a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work.³

From the above, some of the important goals of collective bargaining can be summarised as follows:

[B]y bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc., should not be frustrated through interruptions of work. By bargaining collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and so to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonably secure.⁴

With regard to the employer-employee relationship, the employer provides the capital and commands access to capital, information and legal opinion. Employees work in order to make a living.⁵ The employer is in a stronger bargaining position and can dictate the terms and conditions of contracts of employment.⁶ In general, the parties to collective bargaining engage in the process because employees are not happy with a decision of management:

² Salamon *Industrial Relations* (2000) 323.

³ International Labour Organization (ILO) “Organizing for Social Justice – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work” (2004).

⁴ Davies and Freedland *Kahn-Freund* 69.

⁵ Strydom 1999 *SA Merc LJ* (part 1) 311–312.

⁶ Strydom 1999 *SA Merc LJ* (part 1) 311–312.

collective bargaining, thus, is more re-active than pro-active. Traditional collective bargaining is a mechanism to negotiate the terms and conditions of employment and is not a vehicle to facilitate joint decision-making.⁷

The contract of employment situates employees at a distance from decision-making because the employer controls employees. The social component of an employment relationship is largely neglected because the individual and collective interests of employees are not fully recognised. Consultation, at least as an initial step, can assist employers and employees in achieving a true democratisation of the workplace,⁸ and as a form of participation, should not be underestimated.

Kahn-Freund observes that "the principal interest of management in collective bargaining has always been the maintenance of industrial peace over a given area and period"⁹ and "the principal interest of labour has always been the creation and the maintenance of certain standards over a given area and period, standards of distribution of work, or rewards, and of stability of employment".¹⁰ It is submitted that this position remains valid. The differing interests present in collective bargaining inevitably result in conflict between labour and management, although the degree of opposition varies.

Four different models of participatory structures can be identified in terms of their relationship to collective bargaining:¹¹

- (i) an alternative to collective bargaining;
- (ii) marginal to collective bargaining;
- (iii) competing with collective bargaining; and
- (iv) an adjunct to collective bargaining.

The third model above refers to centralised bargaining forums in which

⁷ Esser 2007 *THRHR* 425.

⁸ Smit *Labour Law Implications* 55.

⁹ Davies and Freedland *Kahn-Freund* 69.

¹⁰ Davies and Freedland *Kahn-Freund* 69.

¹¹ Marchington as referred to by Klerck 1999 *Transformation* 19.

employee participation is an extension of collective bargaining.¹² This is an approach which the unions already understand. It is argued that this approach “does not depend for its success on receiving cooperation from management, the union structure remains independent of managerial structures in the workplace, and the union retains control over the shopfloor component of the programme”.¹³ Adversarial bargaining at a centralised level has a number of consequences for the initiation and development of workplace forums.

The fourth model is the one proposed by the LRA.¹⁴ In terms of the model collective bargaining and participatory structures are kept separate: the latter handles issues not covered by the former. These activities, however, are viewed as complementary. The logic of to approach is that

strong workplace organisation will prevent consultative bodies from undermining negotiating bodies, the central role of shop stewards is protected through involvement in both channels, and management is committed to and perceives real benefits from involvement in participatory arrangements.¹⁵

It is crucial in evaluating workplace forums and co-determination to understand collective bargaining that the “existence of legislated centralised bargaining facilitates the separation of the relationship between workers and management into a collective bargaining channel and a co-determination channel”.¹⁶

From a workers’ point of view there are compelling reasons for collective action. In advanced industrial societies employers always have greater economic and social power than any individual worker, though a worker occasionally may find himself or herself in a stronger bargaining position if he or she possesses experience or skills that are much in demand.¹⁷ In general, however, workers

¹² Klerck 1999 *Transformation* 19.

¹³ Klerck 1999 *Transformation* 19.

¹⁴ Klerck 1999 *Transformation* 19.

¹⁵ Klerck 1999 *Transformation* 19.

¹⁶ Patel 1998 *LDD* 118.

¹⁷ Deakin and Morris *Labour Law* 771.

can influence power in their employment relationship only by collectively furthering their demands and only then stand a chance of counterbalancing the power of the employer.¹⁸

Collective bargaining (as indicated earlier) is widely accepted as the primary means of determining terms and conditions of employment in South Africa. Due to South Africa's particular history, collective bargaining has been "underlined by the legacy of deep adversarialism" between employers and organised labour.¹⁹ Various types of behaviour in the selection of collective representatives, the conduct of collective bargaining and the enforcement of collective agreements are prescribed and proscribed by labour laws.²⁰ The greatest net benefit from collective bargaining can be obtained when a system is in place that promotes good faith bargaining and efficient enforcement of collective agreements.²¹ One of the purposes of the LRA is to promote collective bargaining²² and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest.²³

3. Proposed Model for Employee Participation in South Africa

As a starting point it is emphasised that a better synergy is needed between labour law and corporate law. Labour and corporate law legislation creates frameworks for employee participation at different levels in different forms, but these frameworks lack real or meaningful forms of participation in decision-making that are effective in practice. The current *corporate law* dispensation has moved away from focusing primarily on shareholders and includes employees as important stakeholders, but it does not provide for full participation rights by

¹⁸ Deakin and Morris *Labour Law* 772.

¹⁹ Du Toit 2000 *ILJ* 1544.

²⁰ Dau-Schmidt, Harris and Lobel *Labor and Employment Law* 96.

²¹ Dau-Schmidt, Harris and Lobel *Labor and Employment Law* 96.

²² Chapter III of the LRA regulates collective bargaining in s 11-63 of the Act.

²³ Preamble and section 1 of the LRA.

employees in corporate decision-making. *Labour law* largely is concerned with the protection of the rights and interests of employees and has also failed to realise actual participation in decision-making through workplace forums. Consultation, joint decision-making, and disclosure of information are issues that labour law covers in this context, outside the traditional collective bargaining arena. In general, the LRA enjoys preference over other statutes and, therefore, has be kept in mind whenever employees are involved.²⁴ The *Companies Act* 71 of 2008 failed to provide a platform for better integration between the provisions of the LRA and the *Companies Act*, especially in dealing with issues such as employee participation in decision-making, and includes employee input in operational and strategic policies, strategies and direction.

3.1.1 Company Law

3.1.1.1 General

Traditionally, corporate law was unconcerned with the interests of employees. Corporations primary concern was the promotion of shareholder interests and, occasionally, other relationships such as those with creditors or suppliers. Primarily, company law regulates the actions of companies in the market, therefore, labour law and employees are usually excluded. On rare occasions, corporate law directly and expressly considers the interests of employees: the provisions governing the relationship between employers and employees, primarily, are governed by labour law.

An important question in company law remains: *In whose interest should the company be managed?*²⁵ Shareholders are the most important stakeholders of a company: it is evident from evaluation of the contracts (with various stakeholders) that shareholders “hold sway” and the company ultimately

²⁴ S 200A of the LRA regarding the presumption as to who is an employee; s 213 of the LRA regarding the definition of an employee as well as s 210 of the LRA regarding the application of the LRA when in conflict with other laws.

²⁵ My emphasis.

operates to serve their interests. The analysis illustrated that corporate law bestows legal personality on businesses which allows them to enter into bilateral employment contracts with workers, whereas labour law subjects the corporation's actions in establishing, conducting, and terminating such employment relationships to its norms and standards.

However, there is a synergy between corporate and labour law, especially with regard to corporate governance and labour management: for example, both create a framework in which whistle-blowing is promoted; both recognise the importance of information-sharing, albeit under different circumstances; both recognise the fact that employees and their well-being are important and that their "voice", relating to social as well as economic rights, should be enhanced and that human rights should be promoted; and both recognise the role that business (employers) plays in society.

It has been argued that the role of companies as members of society has changed. Shareholder wealth creation no longer is the only concern of companies: evident from developments in corporate law and corporate governance jurisprudence. These developments clearly articulate that shareholder primacy is out-dated and that note should be taken of other stakeholders of companies. The *Companies Act* empowers employees, as stakeholders in the company, not only granting them access to information under certain circumstances but giving them access to the statutory derivative action.

The pluralist approach (although the enlightened shareholder approach is preferred in the *Companies Act*) emphasises that employees, as stakeholders, have an important role to play in advancing the interests of the company as a whole. A reading of various reports on corporate governance in South Africa, as well as the *Companies Act*, supports this approach. From a social and economic perspective it is in the interest of employees to further the interests of the corporation they work for because it not only benefits them economically but

also results in social betterment if a corporation invests in social upliftment programmes, training, infrastructure, and so forth, as a result of increased efficiency and profits.

In short, companies no longer reach decisions without taking note of the protection and rights granted to employees by legislation, including the rights afforded to employees by the *Companies Act* itself.²⁶ It is submitted that if the living conditions of employees are appalling the company or employer should intervene as a social partner and act more responsibly. Companies in South Africa, unlike employees, are hugely powerful and thus they have direct access to political leaders and other business people that could assist these employees.

An innovation in the *Companies Act* of particular importance to the current discussion is the introduction of a social and ethics committee. The committee must comprise at least three directors or prescribed officers of the company but no employee representative. Functions of the social and ethics committee include the monitoring of the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice relating to matters such as:

- (i) social and economic development: issues covered here include the EEA; and the BBBEE Act;

²⁶ The *Companies Act* provides for the following rights: (i) it enables worker representatives or trade unions to be involved in the formation of a company; (ii) they can propose an amendment of a MOI (allowing for an alternative arrangement which can be interpreted that worker representatives or trade unions can propose such an amendment) but they are not allowed to vote on such a proposal unless they are shareholders of the company; (iii) the company can be restricted by a trade union from doing anything inconsistent with the *Companies Act* by applying to the High Court for an order to that effect; (iv) the trade union can gain access to financial statements of the company for purposes of initiating a business rescue proceeding; (v) the trade union can apply to the High Court for an order in order to set aside a resolution of the board to stop the commencement of business rescue proceedings on the grounds that the company is not financially distressed; (vi) worker representatives or trade unions are granted *locus standi* to apply for a court order placing a director under probation or declaring a director delinquent. Other rights include the utilisation of alternative dispute resolution mechanisms to resolve a dispute, to gain access to financial assistance by the company to acquire shares in the company, as well as benefitting under an employee share scheme.

- (ii) good corporate citizenship: issues covered here include the promotion of equality, prevention of unfair discrimination and the reduction of corruption; contribution to the development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and record of sponsorship, donations and charitable giving;
- (iii) the environment, health and public safety, including the impact of the company's activities and its products and services;
- (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws;
- (v) labour and employment: included here are issues such as the company's standing in terms of the ILO Protocol on decent work and working conditions; and the company's employment relationships, and its contribution toward the educational development of its employees.

That employees are not represented on the social and ethics committee is a lost opportunity on the part of the drafters of the *Companies Act*, as it would have provided employees with the opportunity to have an input on issues such as health and safety and labour and employment; matters which affect employees directly. Also, it have provided them with the opportunity to have a greater voice in a formal company structure, thus expanding their participation rights within a company.

Social and economic development issues, especially the EEA and the BBBEE Act, affect employees and their input could be of value: the legitimacy of decisions relating to such development issues could be considerably improved through their input. Issues, such as good corporate citizenship relating to the promotion of equality, prevention of unfair discrimination, and the reduction of corruption, as well as a contribution to the development of communities in which the corporation predominantly conducts its business activities, should be dealt with in the same way. Issues, such as the environment, health and public safety, as well as labour and employment issues such as the company's standing in terms

of the ILO Protocol on decent work and working conditions, the company's employment relationships and its contribution toward the educational development of its employees, all call for giving a greater voice to employees. The workings of the social and ethics committee would be meaningful if it not only gave considerations to the welfare of employees but if they participated in decision-making by the committee: such a reimagined committee would grant employees a meaningful voice in the company.

Participation by employees on the committee will give legitimacy and authority to its activities and decisions, as the committee will not have merely a monitoring and administrative function. By granting it more authority the social and ethics committee can play a supervisory role (similar to that of the supervisory board in Germany) and, thus, force companies to take the decisions of the committee seriously and promote compliance with its decisions and directions.

The supervisory function of the social and ethics committee could evaluate management decisions with regard to non-compliance with the EEA or the BBBEE Act or the company's actions in promoting equality. The powers of the committee would be enhanced to make representations to the general meeting of shareholders at which they vote on decisions made by the board of directors, especially if the board did not have access from information from a director or prescribed officer, or receive an explanation as to why the board did not follow through on recommendations made by the committee. The social and ethics committee, thus, has reporting, supervisory and enforcement functions, especially in cases where there is an overlap between topics of decision-making and collective bargaining.

It is proposed that the *Companies Act* should be amended with regard to the social and ethics committee should be amended as follows:

- Currently the committee comprises at least three directors or prescribed officers of the company. At least one of them must be a non-executive

director who was not involved during the previous three financial years in the day-to-day management of the company's business.²⁷ It is not specifically stated that each member of the committee must be a director but merely that at least three must be directors; it seems in view of the non-director requirement, that employees, for example, can be members of the committee.²⁸ It is recommended that the provision pertaining to the composition of the directors is maintained but that the committee should be expanded to include employee representatives in the same ratio as directors or prescribed officers. It is proposed that half of the committee should comprise employee representatives and the other half directors or prescribed officers. This system is similar to the "quasi-parity co-determination" in Germany which can be found in certain industries: shareholders and employees can appoint an equal number of representatives on the supervisory board.²⁹

- Currently, the committee is not a board committee and is appointed by the company (shareholders).³⁰ The committee, as such, is a separate organ of the company. It is proposed that the committee should maintain its monitoring function with regard to the issues mentioned earlier but that the committee be given more authority: the board must take the recommendations of the committee seriously. This will result in the committee not merely supervising or monitoring the activities of the board regarding the issues listed above but also that they approve a decision made by the board regarding these issues. The impact would be that the committee could intervene in cases where the company's interests are seriously affected or where non-compliance of legislation has taken place (see comment above).

²⁷ Regulation 43(4) of the Companies Regulations.

²⁸ Esser 2007 *THRHR* 326.

²⁹ Du Plessis, Hargovan and Bagaric *Principles* 349-350. See also Wooldridge 2005 *Amicus Curiae* 21 and Addison and Schnabel 2011 *Industrial Relations* 356-357 regarding parity and quasi-parity.

³⁰ Delport *New Companies Act* 88.

- As mentioned, the existence of a workplace forum could create an overlap, especially relating to labour and employment issues, educational development of its employees, social and economic development (issues covered here include the EEA and the BBBEE Act), promotion of equality, prevention of unfair discrimination, and so forth. In these instances the powers of a social and ethics committee should be limited. It is possible (depending on the size of the company) that a workplace forum is best suited to deal with these issues. The committee (as pointed out above) would have reporting, supervisory and enforcement functions, especially in cases where there is overlap between topics of decision-making and collective bargaining. It is conceivable in small establishments that neither a workplace forum nor social and ethics committee are best suited. In this case it is suggested that specialised committees should be investigated.
- It is proposed that a social and ethics committee's functions (if a workplace forum is not in place) cover issues of consultation and joint decision-making in terms of sections 84 and 86 of the LRA. When considering the matters included for consultation (with a workplace forum) in section 84 of the LRA it includes restructuring of the workplace (including the introduction of new technology and work methods); changes in the organisation of work, export promotion; job grading, education and training, product development plans, partial or total plant closures, mergers and transfers of ownership in so far as they have an impact on the employees, the dismissal of employees for reasons based on operational requirements, exemptions from any collective agreement or any law, and criteria for merit increases or the payment of discretionary bonuses. It is possible to include some of these non-distributive issues in the work of the social and ethics committee as it already covers many of these matters. Matters that require joint decision-making include disciplinary codes and procedures; measures designed to protect and advance persons disadvantaged by unfair discrimination; rules for the proper regulation of the workplace, other than work-related conduct; and changes to rules of

employer-controlled social benefit schemes by the employer or employer-representatives on the trusts or boards governing such schemes.³¹ Different options are possible: employee representatives, workplace forum representatives, or both workplace forums and trade unions could represent employees on the social and ethics committee. Such a committee should complement and enhance the functions of a statutory workplace forum. A provision, included in the LRA and the *Companies Act*, should be to the effect that if a workplace forum is in existence, the ethics and social committee cannot make decisions concerning those issues and their role is limited to the reporting, supervision and enforcement of decisions made by the workplace forum. The result would be to establish a complementary system to workplace forums. Such a committee (in the absence of a workplace forum) can exist in conjunction with a trade union as the trade union's functions would be limited to wage issues and non-wage issues would be dealt with by the social and ethics committee.

However, although there is a drive for a more inclusive and pluralist approach and a recognition of stakeholder rights, it is evident that the enlightened shareholder approach is still preferred in the *Companies Act* and more work needs to be done in this regard (see suggestion above).

3.2.2 Labour Law

3.2.2.1 Workplace forums and collective bargaining

Inequality is a major problem in South Africa, and is not just a social reality but also an economic one. As indicated (under the corporate law discussion) it is evident that corporations, in terms of the legal framework, find ways to address inequality to ensure labour peace. The same can be said of labour law. In South Africa workers have a greater voice since the inception of the *Constitution* and the LRA (and other legislation), especially in the domain of the workplace. The

³¹ S 86(1) of the LRA.

LRA recognises a collective bargaining framework as well as the establishment of workplace forums. Consultation rights and joint decision-making powers by employees were absent in the pre-1995 LRA-era, but through the current LRA the legislator introduced workplace forums as a means to promote employee participation in workplace decision-making. Workplace forums were introduced as part of a series of progressive labour law reforms and were intended to create a "second channel" of industrial relations or representation to act not as an alternative to collective bargaining but rather as a supplement to it.

The potential conflict between the items on the agenda of collective bargaining and those that are set aside for workplace forums exist because the legislation allows for an overlap. Clear parameters have not been set for which matters or issues are the subject of the collective bargaining process and which issues are earmarked for workplace forums only.

Collective bargaining, by its very nature, is adversarial. It is submitted that in South Africa collective bargaining is the primary means of negotiating with employers to determine working conditions and terms of employment, as well as regulating the relationship between employers and employees. To counter the adversarial nature of collective bargaining and its consequences the legislator introduced workplace forums to complement the collective bargaining system. It was anticipated that it would grant workers participatory decision-making power and a voice and would deal with production/non-wage issues at workplace level. As shown above, this sensible endeavour, regrettably, was spectacularly unsuccessful.

Workplace forums are similar to the works council systems that are found in European countries, such as Austria, Belgium, Germany and the Netherlands. The South-African workplace forum system is largely based on consultation and some issues are subject to joint decision-making. The limitations, in terms of real decision-making, are evident as the issues listed for joint-decision making (and even for consultation) are restricted in terms of the legislative framework.

Although it is possible to extend the list of issues through negotiation, in terms of section 23 of the LRA the support of the established trade union would be required in order for the agreement to have binding effect as a collective agreement. A further limitation that predates the former is that the statutory system depends on trade unions approval for the establishment of a workplace forum. The fear on the part of trade unions that workplace forums will make inroads into their bargaining power (with few benefits immediately visible to them in exchange) means that workplace forums remain unpopular and unsuccessful in South Africa.

Although the LRA, in sections 84 and 86, clearly identifies the issues that form the subject-matter for consultation and joint decision-making, the back door was left open for trade unions to approve these matters, in any case, in the collective bargaining domain. Clearly, collective bargaining covers issues listed in section 84 and 86 of the LRA, and the topics form part and parcel of trade unions' standard list of demands that, generally, are the subject of negotiations with employers. The results envisaged by the legislature have proved to be unsuccessful. Significantly, the nature and status of any agreement reached between the employer and workplace forum is not addressed in the LRA. Another problem evident from the current regulation, in particular regarding the establishment of workplace forums, is that it is subject to the control of trade unions.

It is suggested that for a dual system to work the following far-reaching changes should be implemented, after buy-in is obtained from the social partners:

- Workplace forums should be recognised as a legitimate forum in which to address the non-distributive issues identified in sections 84 and 86 of the LRA, as well as those identified by learning from comparative experiences.
- The status and legal nature of workplace forums should be spelled out clearly and the agreements entered into between the workplace forum and the employer should have the same legal effect as a collective agreement

otherwise entered into between a trade union and the employer. A legally binding effect and application similar to works agreements in Germany should be attached to agreements entered into between an employer and a workplace forum.

- The power of trade unions over the establishment of workplace forums should be relinquished after 20 years. It appears to be a major contributor to the failure of workplace forums. From the recent amendments in the *2014-Amendment Act*, it is evident the legislator is attempting to move away from unbridled majoritarianism, for example, giving an arbitrator the power to grant minority unions (who meet certain conditions) access to the organisational rights that were available only to majority trade unions.³² The same principle should be applied to the establishment of workplace forums: the requirement for majority trade unions to be party to the establishment of a workplace forum thus falls away. In addition, it is proposed, if the dual system of collective bargaining and workplace forums continues, that there be an amendment regarding the representivity of trade unions on workplace forums. A compromise model could grant trade unions with a number of seats on the workplace forum: employee representatives would have 50% representation on such a forum and trade union representatives the remaining 50%; the casting vote in the case of a deadlock would be by an independent elected chairperson. These measures will ensure, when the workplace forum consults or engages with an employer on issues of joint decision-making and a vote is taken, that it results in a smoother process. At least, there should be significant agreement from the side of the trade unions. Another consequence would result in production issues being limited to the domain of workplace forums and non-productive issues to collective bargaining. The model is based on the German model of “quasi-parity co-determination”, which can be found in certain industries and refers to the arrangement whereby “shareholders and employees can appoint an equal number of representatives on the

³² See s 21(8A) and 21(8C) of the *2014-Amendment Act*.

supervisory board, but the right to appoint the chair belongs to the shareholders – thus tilting the power balance slightly in favour of shareholder representatives”.³³ The model is adapted to establish representation on the workplace forum without tilting the favour in the direction of either employee representatives or trade union representatives by appointing an independent chairperson. Such a model attach greater legitimacy to the process, as well as reassuring trade unions that they are not redundant or that their role in the workplace is usurped by the workplace forum.

- It is suggested that in order for the complementary system intended by the LRA to work effectively that clear boundaries be set between issues that fall within the power of workplace forums and issues that fall within the realm of collective bargaining. The non-distributive issues covered in sections 84 and 86 of the LRA fall squarely within the power of workplace forums: wage issues are restricted to the parties partaking in collective bargaining. This system is a mixed system that allows all workers greater decision-making influence and power, as well as adversarial participation power for trade union members. It is suggested that the “merger” between the issues covered by the social and ethics committee and those of workplace forums, if employees are granted participation on the social and ethics committee could be addressed to some extent. However, this is dependent on the following: as suggested above, a provision is included in the LRA and the *Companies Act* to the effect, if a workplace forum is in existence, that the ethics and social committee not make decisions in concerning those issues and that their role be limited to the reporting, supervision and enforcement of decisions made by the workplace forum. This provision would result in the establishment of a complementary system to workplace forums and unnecessary duplication would be avoided. If no workplace forum is in place, then the functions of the social

³³ Du Plessis, Hargovan and Bagaric *Principles* 349-350. See also Wooldridge 2005 *Amicus Curiae* 21 and Addison and Schnabel 2011 *Industrial Relations* 356-357 regarding parity and quasi-parity.

and ethics committee can be extended to cover issues that would have been covered by a workplace forum. Such a system would be dependent on the restriction of distributive/wage/non-productive issues to the domain of collective bargaining. The size of the workplace (company) is a factor that needs to be considered: a social and ethics committee is not always the best-suited solution and a workplace forum would be the better alternative. The type and size of the company (the workplace) plays a role in whether a social and ethics committee or a workplace forum should be the designated body dealing with production issues (which will complement the collective bargaining system). An amendment to both the LRA and the *Companies Act* is called for to enable such a framework. Also, the dependency for the establishment of a workplace forum on the agreement of a majority representative trade union (see above) should be scrapped.

- It is a concern that industrial action is possible after the consultation process (in terms of section 84 of the LRA) has failed. Thus, retaining the right to strike reflects a serious doubt as to whether the distinction between distributive issues (reserved for bargaining and strikes) and non-distributive ones (for workplace forums) realistically can be maintained. The right to strike exists in respect of matters for consultation once there is an issue in dispute in terms of section 64 of the LRA. Strike action is possible in respect of the employer's proposal itself and not in respect of alleged procedural defects in the consultation process (which must be referred to arbitration in terms of section 94 of the LRA).³⁴ The inclusion of the right to strike in the latter instance has been criticised as straining the co-operative relationship: not only could it ruin the whole endeavour but also introduce adversarial elements into the relationship between workplace forums and employers.³⁵ It is proposed that a position similar to that in Germany is adopted whereby the works council and the employer are required to seek to reconcile their interests as well as negotiate a social

³⁴ See Du Toit *et al Labour Relations Law* (2015) 416.

³⁵ See in this regard Slabbert *et al Managing Employment Relations* 5-266.

plan. Another possibility, having regard to Art 2(1) of the Information and Consultation Directive, which defines consultation as follows: “the exchange of views and establishment of dialogue between the employees' representatives and the employer”. In this regard the following requirements set by the directive are useful:³⁶

- (i) the appropriateness of the timing, the method and the content must be ensured;
 - (ii) the employees' representatives [workplace forum] are entitled to formulate an opinion based upon the relevant information that is supplied by the employer;
 - (iii) consultation must also take place in such a way that the employees' representatives [workplace forum] are entitled to meet with the employer and to obtain a response as well as the reasons for that response, to any opinion they may formulate; and
 - (iv) an attempt has to be made in case of decisions within the scope of the employer's management powers to seek prior agreement on the decisions covered by information and consultation.
- In addition it is suggested that workplace forums be allowed to initiate the consultative process by submitting proposals to the employer (unlike under the current dispensation by which the employer alone has this power).³⁷ This is a departure as it allows the workplace forum to raise issues in respect of matters listed in section 84 of the LRA and, thus, would be in line with the German position whereby works councils and employers enjoy equal status in raising matters for consultation and joint-decision-making.³⁸ It is proposed that section 85 of the LRA should be amended to call for consultation “in good time”,³⁹ as is the position in Germany, currently the provision does not specify when the employer must consult with the workplace forum. For the change to meaningfully affect the way in

³⁶ Art 4(4) of the Information and Consultation Directive.

³⁷ See s 84(1) of the LRA as well as Du Toit *et al Labour Relations Law* (2015) 403 in this regard.

³⁸ See Du Toit *et al Labour Relations Law* (2015) 403.

³⁹ See Du Toit *et al Labour Relations Law* (2015) 403 in this regard.

which employers consult with workers, it should shift from merely notifying the forum of any proposal to considering legitimately and in good faith suggestions the workplace forum makes. The demand is for a committed process in which “voice” of the workplace forum is taken into consideration and its proposals are taken seriously: a change which calls for better regulation.

- On the other hand, it is suggested, if matters in terms of section 84 of the LRA were maintained then the option of strike action would either be limited and the dispute subjected to mediation and possibly arbitration after mediation. Immediate strike action would fall away as these issues would not be “strikeable” in terms of the limitation of section 65(1)(c) of the LRA as it would be considered a “rights dispute”. This will thus force the parties⁴⁰ to continue with mediation (possibly followed by advisory arbitration) when consultation is unsuccessful or there is a dispute regarding reaching consensus. The situation would be dealt with in similar manner as when a refusal to bargain takes place. A dispute concerning an alleged refusal to bargain⁴¹ is subject to advisory arbitration. It is proposed that in cases where consultation in terms of section 84 of the LRA is unsuccessful that the dispute should be referred to compulsory mediation where an independent mediator would facilitate the process which is then up to the parties to reach an agreement. Further, it is proposed that when mediation is unsuccessful the parties should then refer the dispute to advisory arbitration. The position is similar to the arbitration committee found in the German system. It should be noted that strikes are not ideal

⁴⁰ If a workplace forum is in place, the LRA should be amended regarding the resolution of disputes by limiting the right to strike regarding issues that are the subject of consultation and joint decision-making. If it is a social and ethics committee that is in place a provision should be inserted in the *Companies Act* that limits the right to strike to issues that are covered by the social and ethics committee and provide that the preferred method of resolving such a dispute is an alternative dispute resolution.

⁴¹ See s 64(2) of the LRA in this regard. Refusal to bargain is defined as including (a) a refusal to recognise a trade union in a collective as a collective bargaining agent, or to agree to establish a bargaining council; (b) a withdrawal of recognition of a collective bargaining agent; (c) a resignation of a party from a bargaining council; (d) a dispute about appropriate bargaining units or appropriate bargaining levels or bargaining subjects.

after unsuccessful section 84 consultations but in context of fundamental rights and existing suspicion/opposition of trade unions it is proposed that the right to strike should only be allowed after mediation and advisory arbitration has proven to be unsuccessful. An advisory award should be obtained from the CCMA (similar to refusal to bargain cases) before notice of a proposed strike or lock-out is given. In the case of section 86-matters the employer may not unilaterally implement a proposal and the right to strike over such issues also does not exist. The parties are subject to an alternative dispute resolution to settle disputes concerning matters with reference to joint decision-making. It is proposed, in order to address the inclusion of the right to strike in consultation matters, that the limitation (as set out above) should be applied to consultation matters (with regard to the use of strike action).⁴² Currently the level of dispute resolution is different when it comes to matters relating to consultation and joint decision-making. Strikes should be limited in cases of consultation after consultation: after consultation was unsuccessful a dispute should also be referred to mediation and if the parties cannot reach an agreement be referred to advisory arbitration, only after advisory arbitration the parties can give notice of industrial action.

3.2.2.2 Industrial action, labour peace and dispute resolution

With regard to industrial action, labour peace and dispute resolution it is suggested that the objectives of the LRA should be enforced more strictly, especially labour peace and dispute resolution.

⁴² The major difference between consultation and joint decision-making is the fact that the employer must seek to reach consensus with the workplace forum in the case of consultation whereas, in the case of joint decision-making, the employer must consult with the workplace forum and actually reach consensus (in respect of the matters listed in section 86 of the LRA) before implementing a proposal. If consultation produces no consensus, the workplace forum or employer may resort to unilateral action whereas, in the case of joint decision-making, "if a workplace forum disagrees with an employer's proposal and thereby prevents its implementation, the employer's only remedy is to refer the matter to arbitration and abide by the arbitrator's award". The level of dispute resolution, therefore, is different (Du Toit *et al Labour Relations Law* (2015) 403).

For purposes of this discussion it is important to reflect on the consequences of strike action in recent years:

	2008	2009	2010	2011	2012	2013
Number of work-stoppages	57	51	74	67	99	114
Working days lost	497,436	1,526,796	20,674,737	2,806,656	3,309,884	1,847,006
Loss of wages (ZAR 000m)	ZAR 48,000m	ZAR 235,458m	ZAR 407,082m	ZAR 1,073,109m	ZAR 6,666,109m	ZAR 6,732,108m

Source: Department of Labour Annual Industrial Action Report (2012 Figures 1, 2 and 5 and Figures 1, 2 (2013))⁴³

From the above table strikes clearly are not only disruptive but have huge economic impact. Note the frequency and high level of strike activity, coupled with accompanying violence, has led to the call for the reintroduction of strike ballots.⁴⁴

The reintroduction of strike ballots could resolve some of the issues raised in the workplace as to whether workers want to strike or in instances when the trade union's interests conflict with those of their members. The opportunity to address the prevalence of unprotected strikes which negatively impact on employer-employee cooperation has been missed. Strike balloting would also support the introduction of the "*ultima ratio*" (proportionality) principle found in German and EU labour law into the domain of South African labour relations. It is submitted that its introduction would increase the legitimacy of the process of calling strikes, as well as force trade unions to listen to the wishes of their members. In other words, if a strike is called without complying with the ballot requirement, the strike will be unprotected because a procedural requirement

⁴³ Department of Labour 2012 <http://www.labour.gov.za>; Department of Labour 2013 <http://www.labour.gov.za>.

⁴⁴ See Rycroft 2015 *ILJ* 18-19.

was not adhered to by the trade union. It has been suggested that the period for the commencement of a strike should be increased as well as the introduction of a secret strike ballot.⁴⁵ The increase in the notice period could result in the resolution of the dispute by means of conciliation and can possibly be viewed as a “cooling-off” period. For example, an extension of a 14-day notice period could bring about changes in how conciliation, as a process, is utilised in the South African labour framework. It is proposed that the manner in which conciliation is viewed as a dispute resolution process utilised as a mere box-ticking exercise and that parties to a dispute should show a serious intention and commitment to resolve the dispute rather than merely comply with an initial stage in the process in order to obtain a required result (the dispute remains unresolved).

The challenges experienced in the past relating to technical non-compliance, arguably, may be addressed with careful regulation. The constitutional framework now ensures that the right to strike is entrenched. Regulation also ensures that trade unions adhere to notice periods when calling a strike action and guarantee that the use of strike action is a last resort. Stricter enforcement by the CCMA and the labour courts is required, especially in cases of a strike which has lost its purpose and has carried on for a long period without achieving anything. It is suggested, in such an instance, that the Labour Court should intervene and force the parties to resolve their dispute by means of compulsory arbitration. Compulsory arbitration would be necessary if a strike is no longer functional, is violent or relates to issues in terms of section 84 of the LRA that

⁴⁵ Brand, for example, proposes that, the notice period for a strike should be increased to 14 days, creating a longer period for conciliation and the introduction of a right to a secret strike ballot within the 14 days' notice period (Rycroft 2015 *ILJ* 18-19). “Adherence to this requirement can be rewarded with strike protection under the following circumstances: if (a) the ballot is called by any one of the social partners in a workplace; (b) the ballot is conducted by the CCMA or a suitably accredited independent body; (c) the ballot is conducted among the categories of workers who wish to participate in a strike in a workplace; (d) the quorum for the ballot is 50% plus one of those workers who wish to participate in the strike; (e) 50% plus one of those workers who vote, vote in favour of the strike; and (f) the ballot is conducted within the 14-day notice period before a strike, then the ballot will be deemed to be valid for the purposes of any urgent interim court relief sought by any party. A further ballot may be called after 30 days from the date of a previous ballot” Rycroft 2015 *ILJ* 18-19).

are not “strikeable” in terms of section 65 of the LRA, and would be considered a “rights dispute”. This system would be similar to the one found in Germany which involves an arbitration committee in dispute resolution if there is deadlock between the employer and the works council.

It must be stressed that the parties to the bargaining table should try to facilitate the flow of information between them; a prerequisite for smooth negotiations.

It is recommended that, usefully, the German system could be explored in relation to co-determination rights, information and consultation rights, especially with reference to works councils and the separation of workplace councils in terms of consultation and decision-making as they relate to social, personnel and economic matters. Full disclosure of information is needed versus what is currently considered relevant information in the context of the South African framework. Such a bold move, in essence, calls for trust between trade unions and employers; unfortunately it is lacking in South African labour relations. A disclosure obligation structured in this way enhances the rights granted to trade unions/workplace forums in sections 16, 84, 86, 189, 189A, 197 and 197A of the LRA. The submission is for an extension of the disclosure-obligations of employers to other parties if there is no trade union or workplace forum in place, as well as to the scope of information to be disclosed in certain circumstances.

The disruptive effect of strike action should be re-examined, especially the long term and adverse effects it has on the well-being of the workers and the corporation. The right to strike should not be abolished or unjustifiably limited, but the parties to the bargaining table should find alternative ways of addressing issues other than the use of industrial action (especially in instances which industrial action was utilised in the previous negotiation cycle). Currently, the conclusion of long-term agreements prevails only in certain industries. It is recommended that the Minister of Labour is granted the power to intervene in

certain industries in which strike action is prevalent and compel the bargaining parties to conclude long-term agreements spanning two or three years; collective agreements that are binding on both the employer and the workers. If workers then have problems with the agreement, they should resort to other means of dispute resolution: strike action would be barred in these instances.

Unfortunately the system has failed: 48% of all strikes embarked on in 2013 were unprotected strikes.⁴⁶ It was mentioned that stricter measures should be implemented to curb the regular occurrence of unprotected strikes and their effects. Such measures would place a moratorium on strikes in the case of a trade union embarking on unprotected strike action, or of protected strike action becoming violent, or of strike action being dysfunctional. Stricter liability for trade unions by which they can be held civilly liable or even criminal sanctions may be implemented: the court in *SA Transport and Allied Workers Union v Garvis*⁴⁷ held that a trade union could escape liability only if the act or omission that caused the damage “was not reasonably foreseeable”, and if it took reasonable steps within its power to prevent that act or omission.⁴⁸

Parties show their commitment and good faith to the resolution of wage disputes in a particular negotiation cycle by agreeing that in the following cycle an embargo would be placed on industrial action and that disputes would be resolved, for example, by means of arbitration if negotiation fails. The reason that unprotected strikes and unnecessary protracted or violent strikes must be better addressed is that the consequences spill over into the cooperative relationship between employers and workers and negatively influence worker voice in decision-making.

In Germany the right to strike is conditional on the “capacity to bargain collectively”: the right to strike is guaranteed only insofar as that right is understood as being necessary to ensure proper collective bargaining. It is

⁴⁶ Department of Labour 2013 <http://www.labour.gov.za>.

⁴⁷ *SA Transport and Allied Workers Union v Garvis* 2012 ILJ 1593 (CC).

⁴⁸ *SA Transport and Allied Workers Union v Garvis* 2012 ILJ 1593 (CC) para 42.

suggested, when a deadlock is reached and the matter is referred to compulsory arbitration that a limitation should be placed on embarking on strike action and that workers would return to work. The definition of a strike in South Africa entails the following:

the partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers for the purpose of remedying a grievance or resolving a dispute over any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.⁴⁹

From the prevalence of strike action in South Africa, in most instances, strikes are used not to remedy a grievance but to force the employer to concede to the demands of trade unions. Sometimes these demands do not relate to the negotiations or fall outside wage issues. It was proposed that a greater commitment should be attached to conciliation as a dispute resolution process before strike action can be embarked on. It is further proposed that issues about which workplace forums should be consulted over in terms of section 84 of the LRA should be limited and be dealt with in a similar manner as regard to the issues listed in section 86 (see discussion above).

Because workplace forums have been hugely unsuccessful and matters listed in sections 84 and 86 of the LRA fall within the domain of collective bargaining and, by implication, within matters of mutual interest, strike action is called upon if these issues fall outside what are called "disputes of right". It is recommended that the issues listed in sections 84 and 86 of the LRA, specifically, be mentioned as a limitation if they were subject to collective bargaining, especially in the absence of a workplace forum. It is also possible to amend the sections on strikes by specifically excluding inter-union disputes: they are not for the purpose of remedying a grievance or dispute between employers and employees. Another possibility (as indicated) is the introduction of the "*ultima ratio*" (proportionality) principle in section 64 of the LRA by which strike action

⁴⁹ S 213 of the LRA.

may be exercised only as a last resort. In this regard, as pointed out earlier, the Labour Court should intervene when it appears that the strike is no longer functional or that the trade union has no interest in trying to resolve the dispute and reach an agreement.

4. Concluding remarks

The role of employees in corporate decision-making is an important issue in both company and labour law. From the discussion above, a few concluding remarks are made regarding employee "voice" and participation in South Africa:

- The aims of economic democracy coincide with some of the objectives of industrial democracy: continuity consists in the fact that any participation in the economy of the enterprise requires a certain degree of participation in management decisions: evident by reference to the different forms of participation, the different levels, the nature, the status and appropriate regulation of participation. Participation include not only the disclosure of information, consultation and issues pertaining to joint decision-making but should extend to the domain of company law so that employees have a meaningful voice in companies.
- Both "strong" and "weak" forms of employee participation grant employees with "voice" in companies. The degree of voice depends on the circumstances, the role-players involved and the type of participation that is present. It is clear "participation" and "voice" are problematic terms and no consensus exists exactly as to what they entail or should entail. However, what is clear are the rights to be informed and to be consulted. It is possible to effect small amendments (such as to section 16 of the LRA relating to information which must be disclosed) that might have a significant impact on a social plan. There are varying levels of disclosure of information, consultation and joint decision-making. Unfortunately, a lack of trust impacts directly on the type of information disclosed by capital to

labour, as well as on the commitment level in consulting or achieving joint decision-making.

- The two-tier board system is not necessarily the answer to addressing the lack of participation of employees in companies in South Africa. However, it has been suggested that the existing framework should be enhanced to provide employees greater “voice” and participation: first, through providing workers with seats on the social and ethics committee, enhancing new rights provided for in the companies act (such as notification, information and voting rights when it comes to mergers, schemes and arrangements and so forth), as well as granting the social and ethics committee more functions and authority that add to its legitimacy. Second, the amendment of current workplace regulation as indicated above should take place. Third, improving the general environment for cooperative workplace decisions by limiting the unintended and undesirable consequences of too adversarial collective bargaining. In the fourth instance, the manner in which strike action and conciliation is utilised should be addressed, as well as non-compliance with the procedural requirements for strikes and the behaviour of the parties when embarking on industrial action.
- Both labour and company law in South Africa require fixing: in some instances small amendments, in other instances it requires major changes. Proper integration is the key, not only with regard to labour legislation but also regarding corporate and insolvency law where these pertain to employees. At face value it appears that the *Companies Act* has granted employees substantial rights regarding business rescues and so forth: from the above discussions their role and voice in decision-making are still severely limited and lacking. The same can be said about the LRA: since 1994 no changes have been implemented regarding integrating the workplace forum system within or alongside the collective bargaining framework. Were the positive consequences of employee participation in

cooperative structures and processes to be strengthened, it might be a solution to adversarial bargaining in South Africa as parties would try to achieve greater co-operation and a mutually beneficial agreement.

- The objectives of the LRA should be reinforced, especially with regard to orderly collective bargaining and the enhancement of labour peace. In order to achieve this calls for a re-evaluation of how both capital and labour bargain, the perspective they bargain from as well as whether good faith, trust and mutual respect are present. Present in the regulatory framework in South Africa (as suggested above) are good elements regarding both social and management co-determination. What now should happen is the establishment and fostering of a unitary framework that makes provision not only for employee participation in corporations but integrates and enhances the various remedies and protections available.

It has been accepted (in this paper) that the primary goal of employee voice is to grant employees access to participation rights within the different levels of decision-making (from shop-floor level to company level). Employees are indispensable resources of and stakeholders in any organisation and are important stakeholders in a company. With the granting of access by employees to structures and processes in corporations it is important to note that both labour and company law should be “in sync” and should facilitate a strict adherence to statutory measures in the event of non-compliance or an abuse.

Bringing company and labour law into line would enhance the existing rights granted to employees and would strengthen the remedies available to employees. Unfortunately, both labour and corporate law disappoint employees as regards facilitating true democratisation and “voice” in companies. The workplace forum framework will have to be amended (as proposed above) in order for such a system to work in conjunction with collective bargaining. The adversarial element of collective bargaining should be limited and characteristics

such as trust, integrity, discipline and good faith, to mention a few, should be evident in the behaviour of the bargaining parties.

The dispute resolution process should be utilised for the intended purpose: resolving a dispute and not merely as a means to reach the next stage in the dispute resolution process. At company law level the rights granted to employees also be enhanced by providing workers with voting rights regarding business rescue proceedings or providing them with proper channels to offer input in the case of a merger or sale of the business. The social and ethics committee can provide a meaningful voice in corporate decision-making by allowing employees not only access to such a committee but also by their input into the issues discussed at the committee.

It is suggested that the proposed changes should be effected as a matter of urgency. They would result not only in the streamlining of provisions in the LRA and the *Companies Act* when it comes to employee decisions in corporations but would result in the proper integration of labour and corporate law frameworks. It is clear that corporations no longer can ignore employees or the principle that labour is not a commodity: corporations must have regard to the social component of the employment relationship in addition to economic principles. The value of employees in achieving the triple bottom-line, as well as their input in decisions that directly and indirectly affect them are important items on the agenda of corporations. South Africa is ready to articulate and deliver a tailor-made regulatory framework (which will then have to be rolled out to the shop floor) in which both social and supervisory co-determination issues are provided for in an integrated fashion.