

**WORKPLACE FORUMS:
A CRITICAL APPRAISAL WITH SPECIFIC
REFERENCE TO SECTION 80(2) AND 84 OF THE
LABOUR RELATIONS ACT, 66 OF 1995**

Cagney John Musi

Master of Laws

Faculty of Law, University of Cape Town

Supervisor: Professor E Kalula

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DEDICATION

This work is dedicated to a man of many talents - my father, Jimmy.

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ABSTRACT

The interim Constitution and the final Constitution, respectively Act 200 of 1996 and Act 108 of 1996, has ushered South Africa into a new era. An era that will be characterized by its influence on our jurisprudential, political, socio-economic and religious rights.

The Labour Relations Act 66 of 1995 in general and workplace forums in particular ushered our labour relations into a new era. It is our attempt by the legislature to foster corporatism at the enterprise. It is hoped that workplace participatory structures such as workplace forums will lead to:

- better information flow and communication between management and the workers;
- better decision making by management;
- efficiency and productivity which will help the national economy.

The legislative framework that regulates the establishment of workplace forums however, present certain problems. The major obstacles that the act create is, firstly; the granting of the sole right to call for the establishment of workplace forums to majority unions (section 80(2)) and secondly; the high threshold of 100 employees that is required by section 84 of the Labour Relations Act.

These provisions are critically analysed from a comparative perspective. It is argued that the high threshold is totally inexplicable and unacceptable. It is contrary to the trend in Europe where experiments with workplace based structures were highly successful. This high threshold is also totally insensitive to the needs of SMME's. It is a known fact that workers in this sector are vulnerable, exploited and deserving of legislative or other forms

of protection. The introduction or legislative facilitation of the establishment of workplace forums in SMME's has potential to serve as a counterbalancing force. By engaging management and workers in a joint forum many of the problems in SMME's can be eradicated.

The position of the majority unions is also untenable. The legislature has in fact disempowered those that it seeks to empower - the workers. In most countries studied, unions not necessarily majority unions have the right to trigger the process of establishing "workplace forums." In other countries, like Germany workers that are not union members can also trigger the process. This power that is given to majority unions also further marginalises SMME's. The SMME sector is not sufficiently unionised because of the organizational problems that they present. In Britain for instance, only 8% of small companies are unionised. Unions will have logistic difficulties of organising and servicing a multitude of workplaces containing relatively small numbers of members.

Section 80(2) and Section 84 of the Labour Relations Act will have to be revisited with a view of making workplace forums an all inclusive process and not one dominated by majority unions. The threshold for entitlement will have to be lowered so that more employees can enjoy the potential benefits of workplace based institutions.

INTRODUCTION:

The interim Constitution, Act 200 of 1993, and the Final Constitution, Act 108 of 1996, has ushered South Africa into a new era. An era that will have a profound influence on our jurisprudential, political, socio-economic and religious rights. The Constitution was adopted as the supreme law of the land so as to "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, Lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law, Improve the equality of life for all citizens and free the potential of each person, and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

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Likewise the labour Relations Act, Act 66/1995, in general and workplace forums in particular ushered or Labour Relations into an new era. According to Du Toit, the provision for workplace forums "is the most radical innovation of the Act in that the concept it embodies is entirely new to or law."²

The need for and purpose of this innovation is succinctly stated by the drafters of the Act. According to them "workplace forums are designed to facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem-solving and participating on certain subjects. In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realization that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards. Workplace forums are designed to perform functions that collective bargaining cannot easily achieve: the joint solution of problems and the resolution of conflicts over production. Their purpose is not to undermine collective bargaining but to supplement it. They achieve this purpose by relieving collective bargaining of functions to which it is not well suited.

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1. Preamble to Constitution Act of 1996.
 2. Du Toit et al : The Labour Relations Act 1995 Butterworths 1996 at p227.

The forum's focus is qualitative - that is, it is on non-wage matters, such as restructuring, the introduction of new technologies and work methods, changes in the organization of work, physical conditions of work and health and safety, all issues best resolved at the level of the workplace. Workplace forums expand workers representation beyond the limits of collective bargaining by providing workers with an institutionalized voice in managerial decisions. "3

We are also informed by the drafters of the LRA, that in European countries where participatory structures at the workplace exists, there is an indication that they contribute to economic performance. According to the drafters research has shown that economic performance is enhanced in the following way:

- the flow of communication between management and the workforce is improved.
- the quality of decisions is improved because proposals are carefully scrutinized, flaws are discovered early and the range of alternatives explored and enlarged;
- the implementation of decisions is facilitated where the decisions is the result of informed input from the workplace; and
- the top level of the organization is provided with feedback on its middle management. "4

Jeremy Baskin observes that "unions have been vocal proponents of the need to limit managerial prerogative and empower workers at all levels of the economy. The RDP included, largely at COSATU's insistence, the call for workers participation and decision making in the world of work. With NEDLAC and the workplace forums, South Africa has one of the most institutionalized forms of concertation (or corporatism) in the world. Ironically this has emerged without any explicit union commitment to co-determination

3. Explanatory memorandum that accompanied the Labour Relations Bill: Government Gazette No. 16259, Notice 97 of 1995, dated 10 February 1995, page 135

4. Explanatory memo Supra 136

incomes accords and the social democratic type politics which normally accompany such developments.” 5

It is true that the RDP envisaged a system of worker participation that could increase economic growth strategies and thereby enhancing our position in the global village. Because of our political past that was driven by racial discrimination and undemocratic Labour Relations, it is no surprise that the RDP favours employee empowerment and motivation. The aim was to ensure that the unions “are fully involved in designing and overseeing changes at workplace and industry levels as well expanding the jurisdiction of industrial bargaining forums to include a range of RDP related policy issues. “6

Will the workplace forums, as they are currently structured, be able to fulfill their mandate? This question will be answered by way of a critical appraisal of workplace forums. The critique will mainly draw from examples in other countries - because workplace forums are also a product of international “borrowing and bending. “7

Before dealing with workplace forums it would be apposite to give a brief historical background of our Industrial Relations and Labour Law.

HISTORICAL BACKGROUND

The discovery of diamonds in 1867 and later gold in 1872 on the reef was the start of industrialization in South Africa. Skilled employees were recruited from Britain and Australia. These employees brought

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5. Baskin, J: Unions at the Cross Roads can they make the transition 1996 SALB, Vol. 20, No. 1
 6. ANC - The RDP: A policy framework 1994
 7. See Clive Thompson “Borrowing and Bending” The Development of South Africa’s Unfair Labour Practice jurisprudence (1993) 6,3 International Journal of Comparative Law and Industrial Relations 183 - 207

with them the British brand of the trade unionism “based at the time on the idea of a universal worker movement but balanced by the British sense of individualism. “⁸

Skilled workers were in demand because of their scarcity. Black workers were used as unskilled cheap labour whilst white skilled employees were paid high wages. Skilled white employees saw black semi-skilled employees as a threat. White unions started insisting on guarantees for white job security. As a result of the fears of white employees a regulation preventing African employees from becoming drivers was introduced in 1897. It was followed by the Mines and Workers Act of 1911 which reserved thirty two job categories for white mineworkers.

The Native Labour Regulation Act was passed in 1911 making it a crime for blacks to leave their jobs and strikes were prohibited. In 1913 the Land Act was passed. This act forced black peasants off their land and created the required cheap labour. Blacks were given approximately 10% of South African land. Black farmers could not do otherwise but leave their land and go to the cities. Shortage of land and overcrowding forced many of these farmers into towns to look for work and the migratory labour system was consequently created. In order to retain a cheap labour supply, the pass laws compelled blacks to look for jobs in specific districts where employers most needed labour. They were forced to take any job offered as the Pass law only permitted them a few days in which to find work in the allocated area. The Chamber of mines further agreed upon a low maximum wage to be paid black workers. Any company paying more could be fined. ⁹

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8. Bendix S, *Industrial Relations in the New South Africa*, 3rd Edition, Juta & Co. 1996, page 78: The historical background is mainly taken from Bendix, Finnemore and van der Merwe *infra*, and the Wiehahn Commission report *infra* and Ncube, D: *Black Trade Unions in South Africa* Skotaville 1985
 9. Finnemore, M et Van der Merwe, R: *Introduction to Labour Relations in SA* 4th Edition, Butterworths 1993, 23

From the early 1900's onwards strike action by both white and black employers increased. White workers started a major strike in 1913. By the time they already formed industrial unions as opposed to craft unions, in order to include white semi-skilled workers as well. They mobilized their interest on the basics of race than craft.

Black workers also started a strike in 1913. In 1914 there were strikes at railways and power stations as well as general strikes by white employees. The government answered by proclaiming martial law and deporting a number of white immigrant trade Union Leaders.

Blacks were not yet unionized. They only started organizing after the formation of the Industrial and Commercial workers union of SA (ICU) under the leadership of Clements Kadalie in 1919. In 1922 the Rand Rebellion erupted. Retrenched white workers sparked a general and crippling strike. The 1922 rebellion also increased hostility towards black workers because they were seen, by their white counterparts, as a threat to white interests.

In 1924 the Conciliation Act was passed. Its primary purpose was to prevent industrial unrest, by providing the machinery for collective bargaining and for conciliation of disputes. The act was later amended to cater for conciliation boards and industrial councils and placed a criminal sanction on strike action which occurred without prior arbitration. This act gave white trade unions statutory recognition but excluded all pass-bearing blacks from the definition of employee.

In 1925 the wage Act, which applied to Blacks, was enacted. It provided for the unilateral determination of wages and working conditions where there was no agreement under the Industrial Conciliation Act. During this time more and more black trade unions were formed.

In 1930 a multiracial conference assembled and the South African Traders and Labour Council (TLC) was established. The TLC

relentlessly, but unsuccessfully, called for the inclusion of Black Trade Unions under the Industrial Conciliation Act.

In 1942 all the existing black unions and federations came together to form the Council of Non-European Trade Unions (CNETU). Because of a lack of statutory backing unions under the CNETU were relatively weak. This weakness is the reason why the Chambers of Mines and the government could easily crush a strike by 75 000 black immigrant worker in 1946.

In 1948 the National Party gained power after elections. They acted swiftly and repressively to crush the black workers movement. In 1944 the TLC, under the influence of many of its members who were also members of the Communist Party, drew up a workers Charter which placed the federation on a socialist path. The Charter stated that "the people of South Africa are not prepared to go back to the conditions of the pre-war world, nor will they accept the uncertain and unplanned anarchy of production and distribution visualized by most sections of the capitalized class. The organized workers in the trade union movement know full well that the only solution to our problems lies in South Africa adopting Socialism as our form of government, which will bring emancipation to the working people from exploitation and oppression and will place the common people in control of South Africa. This must be the aim of the trade union movement. But we cannot sit back with folded arms and wait for the "Socialist Dawn" nor does it mean that we cannot in the course of our struggle win great improvement for the workers of South Africa, despite resistance which is being and will be exercised by the capitalist forces to maintain their privileged position." 10

Needless to say the Nationalist government passed the suppression of communism act in 1950 as a direct response to the proliferation of unions and to silence opposition. Large numbers of trade union

10. As quoted in Finne more and van der Merwe Supra at 26

leaders, members of political movements such as SACP were arrested or banned. The ANC (African National Congress) which was formed in 1912 was also the target of the legislation. The government also appointed a commission to investigate existing labour legislation. The Botha commission, as it was called, was of the view that parity restoration for white and black employees would put white supremacy at stake. The Commission recommended that separate bargaining bodies for blacks would be established. Black unions had to be allowed subject to stringent conditions and that strike action should be prohibited. The government accepted some of the recommendations and passed the Botha Labour (settlement of disputes) Act, later known as the Black Labour Relations Regulations Act in 1953.

The Black Labour Act was an attempt to kill trade unionism amongst blacks. This act made provision for the establishment of workers committees for black employees. These committees were to be established on the initiative of the employees themselves. Complaints were to be taken to the regional workers committees, consisting of blacks appointed by the Minister of Labour, under a white chairman. The regional committees were also to act as watchdogs over conditions of work pertaining to black employees and had to report to the Black Labour Board, which had a all white membership. According to Bendix the system of workers committees proved to be unpopular, because very few employees had the initiative to form committees and, even where they did, they had lacked the necessary expertise to present themselves efficiently. Besides employees shortcomings, there was the additional problem that only one workers committee, consisting of five members, was allowed per plant, preventing effective representation. Also, where committees did exist, they merely raised grievances and did not interact on a regular basis with management. What Bendix does not mention however, is that the early fifties was characterized by stay aways the defiance campaign and a out and out rejection of workers committees by black unions. It is therefore not surprising that in 1953 the Public Safety Act was enacted which prescribed a three year sentence for civil disobedience.

In 1954 TUSCA (Trade Union Council of South Africa) was formed to represent mainly industry based unions. Initially its members were only white registered unions later it allowed black union membership. Due to government pressure it expelled black unions in 1967. In 1955 SACTU (South African Congress of Trade Unions) was formed. It maintained political links with the ANC and was active in promoting a political role for trade unions. Many of its leaders were banned and detained. It was forced into exile.

Whilst SACTU was still functional, the government used its policy to divide the union movement further. The government passed the Industrial Conciliation Act of 1956. This act caused further polarization because it excluded all Bantu employees. It prohibited mixed unions. It also prohibited unions to have mixed executives where permission was given for the registration of a mixed union. It also introduced jobs reservation whereby a particular occupation could be legally reserved for a certain race group to protect white workers and to be lesser extent coloured workers in the Cape from competition.

In 1973 widespread strikes by black workers over wages, which were rapidly declining because of rising inflation erupted in Durban and spread to other centres. Industry and the government was panicking. The shortcomings of the labour laws were exposed. It became apparent that a dangerous vacuum existed because of a lack of formal and acceptable negotiating structures and procedures. The government passed the Black Labour Relations Regulation Act. This act provided for the establishment of liaison committees at plant level, as an alternative to the already existing workers committees. Liaison committees were to consist of representatives of employers and employees, selected on a parity basis. The main purpose was to improve communication between the employer and black employees. Although they could consult on any matter of mutual interest, the liaison committees subsequently established often confined themselves to matters of physical hygiene or other paltry issues. The Act also gave black workers a limited right to strike after they have exhausted certain dispute resolution mechanisms. This act did not live up to the expectations of black workers. Bendix quiet rightly observes that the "Committee system for black employees was introduced in South Africa not to supplement the process of

collective bargaining, as has happened elsewhere in the western world, but to replace it. Its introduction can be ascribed partly to the relief that blacks were not able to engage in responsible collective bargaining at official level, but perhaps more to the fear of black union power and the fear of bargaining systems. The irony is that the very structure intended to destroy unionism could equally promote. "11

It was clear that the black labour relations regulation act did not solve the "black worker" problem. The government then appointed the Wiehahn Commission. Prof. Wiehahn made sweeping recommendations. His recommendations brought tremendous change in our labour relations. The report inter alia recommended that -

- full freedom of association be granted to all employees regardless of race, sex or creed.
- Trade unions, irrespective of composition in forms of colour, race, sex be allowed to register.
- Stricter criteria to be adopted for trade union representation
- A system of financial inspection of trade unions be introduced
- prohibition on political activity by unions be extended
- Liaison committees be renamed as work councils
- where no industrial council had jurisdiction work councils and worker's committees be granted full collective bargaining rights.
- statutory job reservation be phased out
- safeguards be introduced to protect minorities previously protected by job reservation
- the industrial tribunal be replaced by the industrial court

11. Bendix Supra page 94

- allowance for a closed shop be maintained
- a tripartite national manpower commission be established

In 1979 the Labour Relations Act, which was repealed more the five times in six years, was enacted. The major changes implemented by the Act were

- full trade union rights were extended to every worker in South Africa irrespective of origin.
- full autonomy was granted in respect of their membership and all racial restrictions were removed and
- the black labour relations regulation act was repealed

The unions, however, did not jump at the opportunity of recognition. Most of the unions were very careful and skeptical. Most of them refused to register "either as a matter of principle and in protest at their exclusion or because they believed the registration would entail greater governmental control".¹² The unions however positioned themselves for a bigger fight. In 1984 the government created the Tri-Cameral parliament thereby giving coloureds and indians political rights. FOSATU (Federation of South Africa Trade Unions) which was formed in 1979 and CUSA (Council of Unions of South Africa) which was formed in 1980 campaigned against the Tri-Cameral parliamentary elections. They formed linkages with UDF (United Democratic Front) that was formed in 1983. The unions used their massive membership and following to call for stay aways and protest action

In 1985 COSATU (The Congress of South Africa Trade Unions) was formed. It consisted of 33 unions which amalgamated.

12. Bendix op cit 97

FOSATU was part of the amalgamation. CUSA however strongly supported the black consciousness movement and found a home with NACTU (National Council of Trade Unions) and formed strong ties with the PAC.

IN 1986 UWUSA (United Workers Union of SA) was formed under the umbrella of the Inkatha freedom party. UWUSA was later exposed as the brain child of South African intelligence service. NACTU and COSATU supported the political struggle and called for sanctions, boycotts, stay aways, recognition of certain "Black" public holidays like June 16 the release of political organizations. Union leaders were again subjected to victimization and harassment by the state. That did not deter them. The government invoked the provisions of the public safety act to curtail the activities of unions - still did not help.

By the end of the eighties, the economy was in serious recession and the country was politically isolated:

- Sanctions, disinvestment, capital flight and general disruption led to massive economic losses.
- The cost of enforcing apartheid and maintaining a police state became untenable.
- Unemployment, crime and violence had escalated in many townships.
- Black local authorities collapsed as rent boycotts bribery, corruption and pressure on officials took its toll.

The government unbanned the ANC and other political organizations. Nelson Mandela and other political prisoners were released.

COSATU, the ANC and the SACP formed a alliance. The historic power of organized labour led to transformation in the early 1990's of the National manpower commission (NMC) from a toothless advisory body into a forum where business and labour interests could

negotiate with government. Conflicts between government and labour over the introduction of VAT (Value added tax) resulted in the formation of the National Economic Forum (NEF), structured along similar lines. Both were replaced by NEDLAC (National Economic Development and Labour Council) in 1994. NEDLAC consolidated and extended the power of NEF and NMC.

NEDLAC institutionalizes tripartism and envisages the negotiation not only of labour policy but of key aspects of fiscal, industry and development policy. The objects, powers and functions of NEDLAC are stated as:

- to strive to promote the goals of economic growth, participation in economic decision making and social equity
- to seek to reach consensus and conclude agreements on matters pertaining to social and economic policy
- to consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament
- consider all significant changes to social and economic policy before it is implemented or introduced in parliament
- encourage and promote the formulation of co-ordinated policy on social and economic matters 13.

The scene was set for a corporative industrial relations dispensation.

CO-OPERATION VERSUS ADVERSARIALISM

The drafters of the LRA use the development, international restructuring and economic growth arguments to justify the

13. Section 5, Act 35 of 1994

introduction of workplace forums in our industrial relations. According to them we have "to reposition ourselves because our re-entry into international markets and the imperatives of a more open international economy demand that we produce value-added products and improve productivity"¹⁴. We are told that restructuring is a "massive task" and that adversarial industrial relations will not be up to the task. They forcefully argue in favour of a second channel of industrial relations and state that in countries such as the United Kingdom "where the adversarial labour relations system was not supplemented by workplace-based institutions for worker representation and labour management communication- a second channel of industrial relations- this process fared badly. Workplace restructuring has been most successful in those countries where participatory structures exist, for example Japan, Germany and Sweden."¹⁵

The Dunlop Commission in the USA found that "employee participation and labour -management partnerships are essential to improved productivity, enhanced quality and economic performance, and a increased voice in higher living standards for American workers. It is in the national interest to see participation and partnerships sustained and expanded to cover larger proportion of the American workforce and workplaces, and to address the full -range of issues critical to improving workplace performance and advancing workers economic positions and quality of working" ¹⁶. The links between workplace-based institutions, improved productivity and ultimately economic growth is a recurring theme.

Corporation, we are told, give employees a change to have a say in managerial decision making. Employees can therefore be in control of their destiny. They can learn a lot from management and teach management to be sensitive to employee issues. Summers, a proponent of workplace based institutions, remarks that "examination of various labour relations systems shows I believe,

14. See explanatory memo Supra 135

15. Ibid

16. The Commission on the future of worker management Relations chaired by Prof. Dunlop 1994, page 4

that no industrial society can compete and prosper in the world market unless there is co-operation and mutual problem solving between management and workers.

Workers-even unskilled and uneducated workers-know things about the reality of production process in their workplaces, the causes of defective products, lost time and work injuries, and the potential for improvement which management never learns. And the workers have the choice to do the least required or the most possible, which employers can not control by command. Every knowledgeable personnel expert agrees that giving the workers a voice in the decisions which affect their working life is essential for productivity and profitability.

And giving workers a voice is equally essential for improving the quality of the employees working life and providing a democratic workplace. The workers voice cannot be shouts of protest or demands, answered by the employers assertion of management prerogatives. The workers voice must be one which answers management's seeking of assistance with willingness to listen, a willingness to share in problem solving and a willingness to consider employees not as suppliers of hours of labour but as partners in the enterprise. "17 He further states that he does not believe "that a society can be democratic, an economy can prosper and workers improve their life if management and employees see each other as adversaries " 18

The other rationale for introduction of workplace forums is their non-confrontational nature. Because they facilitate and promote industrial peace at the workplace they are favoured above collective bargaining at the workplace. The envisaged scheme is for workplace forums to supplement collective bargaining. It can supplement collective bargaining if there is a separation of functions, between

17. Summers Clyde workplace forums from a comparative perspective (1995) 16ILJ 806

18. Op cit at 809

distributive and productivity issues. As Summers puts it “distributive issues- a division of returns from the enterprise, how much goes to workers and how much goes to the owners or shareholders, they too often are inescapably confrontational ... workplace and productivity issues are different. Both the worker and management have shared concerns over the productivity and profitability of the enterprise... Distributive issues... are... confrontational... productivity issues need to be co-operative” 19. Rogers and Streeck argue that second channel institutions extend their reach beyond the unionized sector. They agree that workplace institutions can supplement collective bargaining and state that as institutions of collective participation in the enterprise, works council perform functions that unions and collective bargaining cannot easily perform, especially on the joint solution of problems and the resolution of conflicts in production. Where they are well developed, councils support collective bargaining relieving it of tasks to which it is not well suited.

By providing management and workers with a reliable channel for problem oriented communication, they also help to integrate workers into the firm. Councils are generally aided (except in Spain) in performing this intermediate role not only by statutory support but also by their insulation from wage setting. With this crucial union function and source of conflict with management removed, they serve as instruments of negotiated exchange over such “qualitative”, non wage matters as work organisation, technological change, personnel policy and training-issues of ten best resolved at the level of the individual firm. 20

Cheadle states that workplace-based institutions have been “greeted with scepticism wherever they were introduced.” 21 The reason for the scepticism according to him, is firstly the unions fear that these institutions may undermine collective bargaining. Secondly the employers regard these institutions and processes as interference

19. Ibid

20 Roger J and Streeck W workplace Representation Overseas: The works Council Story in Freeman R working under different Rules Sage New York 1994, page 102

21 Cheadle et al workplace Forums Current Labour Law JUTA 1995, page 65

with the free exercise of their managerial prerogatives. Although these are valid reasons, they are superficial. The other more fundamental reasons question the rationale and foundation of corporatism.

The proponents of workplace forums seem to accept that adversarial industrial relations and strikes are obstacles to economic progress or reform. Du Toit however points out that this view is "not prevalent among authorities on the system of worker participation countries such as Germany."²² Du Toit points out that plant level industrial relations is understood as only one of a range of factors which, in combination, determine economic performance. He mentions that investment levels for example have been higher in "successful" Sweden, Germany and Japan than in unsuccessful Britain.

The separation of distributive and productive issues can and is often dealt with through collective bargaining.

Trade unions did traditionally extend collective bargaining to a wide range of production issues. These included training, health, safety, productivity guidelines etc... It must also be remembered that in our modern economical climate the distinction between productive and distributive issues is artificial.

As Karl van Holdt puts it "training may mean higher wages and better productivity. Increased production may worsen working conditions. Improved quality might require better working conditions and could improve bonuses. Shiftwork might improve production but lead to a loss of overtime pay."²³

Moreover we must be mindful of the fact that the levels of output is not only affected by resources and technology but also by the cost of labour. It goes without saying that better paid people will generally speaking be more productive and put in more effort than underpaid workers.

22. Du Toit Corporatism and Collective Bargaining in a Democratic South Africa 1995 ILJ, Vol. 16, Part 4, Page 785 at 789

23 Von Holdt K: workplace forums undermining unions? SALB Vol. 19, No. 6 December 1995, Page 59

Good industrial relations can achieve what workplace forums is meant to achieve. If the "attitude of the actors" is positive the results, including productivity will also be positive. Freeman and Medoff puts it thus "If industrial relations are good, with management and unions working together to produce a bigger "pie" as well as fighting over the size of their slices, productivity is likely to be higher under unionism. If industrial relations are poor, with management and labour ignoring common goals to battle one another, productivity is likely to be lower under unionism".²⁴

Our industrial relations history will also have a profound influence on the success of workplace forms. Our industrial relations went through a period of repression, mistrust and sometimes violence. The actors will have to change their attitude and style of dealing with and solving problems.

The corporatism envisaged by the Labour Relations Act has potential to be confrontational.²⁵ One can only hope that we won't have more strikes because of strikes that start in workplace forums.

We are faced with a big and ever increasing economic problem. We are in a state of near economic recession. The global workers are at a very low if not at all time low. The rand dollar rate is one dollar to six rands. Likewise the pound sterling is equal to eleven rands. Economic crises is both a reason for developing consensual policies, and an "obstacle to the chances of corporatist success"²⁶

Globalization and liberalization and deregulation also poses as a problem for a successful implementation of a corporatist system.

Baskin also points out that unions lack professionalism and capacity to easily adopt the corporatist model. He argues that unions are no

24 As quoted by Macum Ian in Labour Productivity: Unions Strategy and Workplace SALB Vol. 19, No. 4, September 1995, Page 49 at 53

25. see discussion on right to strike infra

26. Baskin, J: The trend towards Bargained corporatism 1993 SALB Vol. 17, No. 3, Page 64 at 69

match for their intended partners.²⁷ He also points out that Ideologically, too, it can be argued that the union movement is ill equipped for the corporatist approach.. there is an established tradition of unions and employers reaching compromise settlements and package deals , even after the most extreme conflict with all these potential problems one might ask whether workplace forums will indeed be the panacea that it is made out to be.

THE HIGH THRESHOLD

In terms of section 79 of the Labour Relations Act No 66 of 1995 a workplace forum must:

- seek to promote the interest of all employers in the workplace, whether or not they are trade union members
- seek to enhance efficiency in the workplace
- is entitled to be consulted by the employee
- is entitled to participate in joint decision-making about the matters referred to in section 86

It is therefore clear that the purpose of workplace forum is to give workers a say in the governance of the workplace. It must facilitate communication, consensus and co-operation between management and labour production related issues which are explicitly stated in section 84 and 86 of the Act.

Wolfgang Streeck ²⁸ makes five basic points to illustrate the importance of what he calls co determination. He says firstly it is the collective participation of workers in the management of the workplace, or in the management of production. Secondly co-determination limits managerial prerogative. Information sharing, consultation and co-determination is also one of the reasons why management does not like co-determination because of the inroads that it makes on management power. Thirdly, it involves worker involvement in distributive issues. It is therefore about how labour and capital interact in the workplace to produce the product that later

27 Baskin Supra 69

28 Streeck Wolfgang: Co-determination and Unions 1994 SALB Vol. 18, No. 5, Page 87

gets distributed. Labour can influence production pro-actively. Fourthly, such intervention in managerial decision - making and in managerial prerogative is usually based on legal rights or a legally backed industrial agreement and not just on the sheer power of the union at the workplaces. Fifthly and more importantly he makes the point that "co-determination" typically does not take place through unions or collective bargaining, but through works councils.

If it is accepted that workplace forums, with their statutory rights to co-determination, have too many advantages then it is not clear why our legislature decided to put it out of reach for so many employees and, may I add, employers.

In terms of section 84 of the Act a workplace forum may only be established in a workplace in which an employer employs more than 100 employees. This threshold for entitlement to workplace forums is very high. In Germany the threshold for triggering the establishment of a works councils is remarkably lower. There, Germany, five employees is needed to trigger the process. Only three of the five employees must have voting rights.

In Spain the work centre council, which is the "representative and collegiate organ of the personnel of the enterprise for the defense of their interest", is the organ through which employees participate in the enterprise. In terms of Spain's Employee Statute (ET) there shall be one council in every work centre which occupies 50 or more employees. Thus, if the enterprise has more than one work centre with 50 or more employees, one council must be elected in each. If the enterprise has several centres, none of them with 50 employees but the total sum reaches 50, there shall be a "conjoint council", the only one for all the work centres. In a enterprise with more than one work centre which occupies 50 or more employees each, it is possible to form an "inter-work centre council" in addition to the other. The inter-work centre council can however only be created through a collective agreement. The Spanish system however also provides for the election of a delegate where there are between six and ten employees.²⁹

29 Manual A Olea and F Rodriguez - Sanudo: Spain in Blanpain (ed) International Encyclopaedia of Labour Law and IR Vol. 11

In Greece, the law distinguishes between two systems. Where workers are represented by another entity (such as a union) and situations where they are not. When the workers are represented, fifty employees are necessary for an outside representative. When they are not represented, the works council in practice constitutes the only form of representation. In such cases only twenty employees are necessary to establish a works council.³⁰

In France the establishment of a *comité d'entreprise* is mandatory in any enterprise employing at least fifty employees. The committee must be established whenever the size of fifty employees is maintained for twelve months, whether consecutively or not during a three year period. If the number of employees falls below fifty, the enterprise committee must remain, unless an agreement is reached with all the representative unions in the plant, or unless on request the Departmental Director of Labour and Employment permits its abolition. The Director must be satisfied that there is a "durable and important reduction in the number of employees".³¹

In the Netherlands the right to form works councils was extended to employees when their number is between ten and thirty-five.³²

In Switzerland the establishment of works councils is not mandatory. They are not even institutionalised. The main nation wide collective agreements however provide for the constitution of works councils, which are elected by the workers and represent them before the management. Alexander points out that the 1988 collective agreement for the machine industry provides that when in an enterprise there is no workers representation, one fifty of the workers may ask for a ballot. If the result shows that a majority of the workers want the establishment of a workers representation structure then such structures, (works councils) must be created.³³ This agreement does not state the minimum employees, but it is clear that there must be a minimum of five employees who are employed in the enterprise.

30 See Biagi M: Employer Representation in SMME's a comparative overview 1992 *Comparative Labour Law Journal* 257

31 Michel Despax and Jacques Rojot: France in Blanpain (ed) *International Encyclopedia ...* Supra

32 Biagi Supra 261

The threshold in most European countries is far lower than ours. Belgium however requires one hundred employees for the establishment of a works council. If the number falls below one hundred then the functions of the council are transferred to the health and safety committee. It is unclear why the legislature opted for such a high threshold.

I cannot but agree with Oliver when he says that the high threshold is unjustified.³⁴ Moreover this high threshold does not augur well for SMME's.

THE POSITION OF SMME's

It is practically impossible to fund a definition for SMME's. There are as many definitions as there are Commentators on SMME's. The ILO uses the expression in its broadest sense, ranging from modern enterprises with up to 50 employees, to businesses employing three or four family members, but also including domestic industries co-operatives, individual enterprises, micro enterprises, self employed workers in the informal sector, etc..³⁵ Our legislature has decided to use a qualitative and a quantitative definition to define SMME's. In terms of the schedule to the Act (Act 102/1996) the definition of an enterprise will depend on the sector, size or class, total full time equivalent of paid employees, total turnover and the total gross

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- 33 Alexandre Berenstein: Spain in Blanpain (ed) *Supra* Vol 12 160
- 34 Olivier in *Workplace Forums - Critical Questions from a Labour Law perspective* 1996 *ILJ* Vol 17 No 5 page 803
- 35 ILO: *The promotion of small and medium sized enterprises Report* iv Inter Labour Conference Geneva 1986. See also Servais Jean Michel: *Labour Law in SMME: An ongoing Challenge: International Journal of Comparative Labour Law and Industrial Relations* 1994 Vol. 10, Page 119. Du Toit D: *Small Enterprises Industrial Relations and the RDP* 1995 *ILJ* Vol. 16, Part 3, Page 544. Du Toit in footnote 3 states that the National Manpower Commission (NMC) used the following categories: Micro = workplaces employing up to five employees, small up to ten or twenty and medium up to 50 or one hundred.

asset value of the enterprise.³⁶ If one has regard to the schedule if it is clear that most SSME's will be excluded from the benefits of workplace forums most of the sectors must have less than 100 employees to qualify to be typified as medium sized enterprises.

The government's policy is to get SMME's involved in economic development both on a macro as well as a micro scale. Act 102/1996 was enacted to achieve this and equal treatment for all employees.

The preamble to the National Small Business Enabling Act in draft Bill form ³⁷ encapsulates government policy- it states "Since the constitution of the Republic of South Africa Act, 1993 (Act No 200/1993) provides that measures may be designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination and are not subject to economic and social prejudice irrespective of colour, race, class, belief or gender, and since the issues of economic empowerment, job creation and equitable growth have been placed high on the agenda of the Government of National Unity in South Africa, especially given that millions of South Africans are unemployed and underemployed, and since the Government is of the view that small, medium and micro enterprises represent an important vehicle to address the challenge of job creation, economic growth and equity in South Africa as part of an integrated strategy to make our economy more diversified, enhance productivity, stimulate investment and encourage entrepreneurship; and since numerous constraints, both historical and economic, have hindered the full participation of small, medium and micro enterprises in the economy, there is the endeavour to bring small business from the margins into the heart of economic activity, and to provide a mechanism to enable the increased participation of black owned or controlled enterprises in the production of value added goods in wealth generating enterprises and export markets.

From the above one can assume that the Government is aware of the enormous and profound influence that SMME's can have on the

36 See Sec 1 read with the schedule of Act 102/1996. (The National Small Business Act)

37 Government Gazette No 16876 Notice No 1304 of 1995 of 15-12-1995

national economy. So too can one assume that the Government is aware of the fact that employees in the SMME sector are working under unsatisfactory working conditions and that their inputs in productivity, restructuring of the workplace etc.. is very minimal if any. SMME's more than big enterprises need institutionalised labour relations because they are not always unionised. As Servais puts it "In view of their inability to successfully organise workers in this sector, trade unions cannot easily monitor the implementation of the labour law or the improvement of conditions of employment by collective agreement."³⁸ Likewise it will be very difficult for government agencies to monitor whether employees in this sector are treated as their counterparts in big enterprises. Workplace forums could have gone a long way in playing at least a watchdog role to see to it that workers in this sector are not marginalised. This high threshold has effectively excluded up to 74% of the worker in the formal sector.³⁹

Many employers and employees in the SMME sector are not educated and do not have the necessary resources, facilities and infrastructure to implement workplace forums. This however should not be a factor to be used against lowering the threshold. In Germany many small and in quite a few medium sized plants no works councils are elected, in spite of the law. There are many reasons for such abstentions, ranging from the employers pressure up to the fact that workers simply lack information on what they give up if they do not establish a works council. In short ; the law is only observed to its full extent in the bigger plants."⁴⁰

The threshold problem is compounded by the definition of employee and workplace. In terms of section 78 (a) employee means any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to any of the following in the workplace:

- employ and dismiss employees on behalf of the employer

38 Servais Supra 124

39 See Olivier Supra at 809

40 Weiss M: The German model of worker participation. Some lessons in Hepple B (ed) Union Right in the Single market, London ICTUR 1991, Page 67

- represent the employer in dealings with the workplace forums; or
- determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace

In terms of this definition, all employees i.e. trial period, casual and seasonal employees are included in the definition. In Germany, of the five employees needed to trigger the process, three of them must have been employed for at least six months. In France, fixed term contract employees, home workers, employees whose contract of employment is suspended, traveling salesman, handicapped employees working under special conditions, employees working in foreign countries, apprentices, part-time employees whose hours of work amount to at least 20 per week or 85 hours per month, part-time employees working below these limits who (as is the case for temporary workers or employees seconded from another enterprise but working on the premises) are counted in proportion to the time spent on the premises.⁴¹

The France definition is too wide. The German one too rigid. Part of the South African definition is more practical. This part is however not problematic. Likewise parts (i and ii) of the definition is not problematic. Du Toit points out that it is difficult to ascertain at which point a particular level of decision making may be in conflict with the representation of employees and indeed what precisely is meant by he expression, could be contentions.⁴²

In Germany leading personnel: are also excluded from participation in or representation by works councils. In enterprises that have more than 100 employees however special economic committees of works councils must be established. They facilitate and give content to the works councils rights of consultation in respect of economic or financial proposals. In this sense works councils have access to experts on matters economic.

41 Depax and Rojot Supra 185

42 Du Toit et al: The Labour Relations Act 1995 Butterworths 1996:
Page 234

In France all permanent employees, employed as wage earners up to and including a salaried director may participate and be represented in enterprise committees. The vagueness of part (iii) of the definition means that more SMME's will find it difficult to reach the threshold. Many "executive employees" who may help, contribute and enhance the work of workplace forums are also cut out of the process. This may lead to valuable resources going astray.

In Germany executive staff that were excluded from works councils established their own representative body on the basis of an agreement between this group and the employer. This was pure voluntary agreements. The legislature in order to promote uniformity passed the 1989 Act on a Representative Body for executive staff. There is currently a legal basis for executive staff representation. In terms of the Act a representative body for the executive staff may be elected in establishment regularly employing at least 10 executive staff members. The executive staff decide by way of ballot whether such a body must be established. These bodies do not have co-determination rights, they only have information and consultation rights. Although the establishment of such representative bodies for executive staff will be onerous and a burden, the benefits to be derived from them are apparent. Our act is silent on a regime for "senior managerial" employees. It is submitted that this is a flaw that must be rectified. It goes without saying that those employees possess more technical detail, skill, know-how and information to engage "management" more effectively on matter of production. Invariably many of them are affected by restructuring, retrenchment, down sizing etc...

Workplace is defined in sec 213 as ⁴³ "the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation..." The act does not state what is meant by independent operation. It does not give guidelines on how to determine whether a operation is

43 Only the "private sector" definition is given. See however Du Toit et al The Labour Relations Act Ibid for the different forms of workplace forums in the public sector.

independent from another. It does not state what the size is required for an enterprise to be deemed independent. In the Netherlands one criterion of "independence" is whether the operation directly offers goods or service to the public.⁴⁴

In order to expose the flaw in this criterion DuToit gives the following example:

"Thus a factory producing silicon chips which are then added to compact disc players in another factory belonging to the same employer would not be independent because it offers nothing to the public. But, according to this criterion, different branches of a supermarket chain would be independent from each other."

In France they established group enterprise committees. This according to Depax and Rojot was a new development in trying to match the social obligations bearing upon enterprises with their nature as economic and social entities not as legal fictitious beings.⁴⁵ They go on to state that the 1982 Act that established group enterprise committees borrowed from business law. According to the 1982 Act a group may be constituted by:

- the dominant company itself
- its direct subsidiaries, when the dominant company owns over 50% of stock
- its indirect subsidiaries, which can be subsidiaries or corporations where the dominant company itself owns less than 50% alone, but together with one or several subsidiaries owns over 50%;
- other corporations, when the dominant company owns less than 50% and more than 10% of the capital, if there are relationships between the corporations "with a degree of importance and permanence which implies the existence of actual control" and the belonging of both corporation to a single economic entity

The elaborate definition and attempt to categorise independent or dependent companies is an indication of the magnitude of the problem. As Du Toit say, "such lack of precision is largely unavoidable."⁴⁶

44 M G Rood *Introductie in het social recht* 4 ed (1994) 207 as quoted by Du Toit *Supra*. See also item 10 schedule 2 of the LRA

45 *Ibid*

46 *Ibid* 236

This lack of precision is caused because in many cases an economic entity may be constituted from a group of corporations where theoretically legally separate and independent corporations actually either through holding, cross-participation or inter-locking directories for example- belong to the same economic set.

A good demarcation and understanding of what workplace means is very important and can sometimes be crucial. Unions and employers will implement and or amend their strategy based on their understanding of the definition in a particular case. "Unions may tend to favour workplace forums at central level in order to ensure consultation on the broadest possible agenda and, hence, to equate "workplace" with the enterprise as a whole, whereas employers who are unenthusiastic about workplace forums may wish to define "workplace" more narrowly to exclude participation at central levels or to dilute union representivity,"⁴⁷ The extend, interpretation and import of this definition will have to be developed casuistically.

The current definition of "workplace" is also something the unions will have to get used to. Traditionally unions divided the workplace into bargaining units. The representivity of unions in a particular bargaining unit determined its entitlement to certain right concessions and privileges.

THE POSITION OF THE MAJORITY UNION

In terms of section 80 (2) of the LRA 1995. Any representative trade union may apply to the Commission in the prescribed form for the establishment of a workplace forum. In terms of section 78(b) a representative trade union means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

These provisions exacerbates the high threshold set by section 80 (1) of the Act. This provision disempowers the employees even further. It is totally contrary to the rationale for the establishment and purpose of workplace forums. It will also serve to marginalise smaller unions.

47 Du Toit et al The LRA 1995 Supra 236

Like the high threshold of 100 employees- these provisions are not sensitive towards the needs and development of SMME's. What is the reasons for the bias in favour of majority trade unions? In order to answer this question one will again have to look at the position of the unions in South Africa's political socio-economic context.

The institutionalization of our labour relations must of necessity be viewed as a means of promoting or achieving certain political and social ends. It has been said that "Law is a technique for the regulation of social power. This is true of labour law, as it is of other aspects of any legal system. Power- the capacity effectively to direct the behavior of others - is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions, and to make sure that these are obeyed, is a social power. It rests on many foundations, on wealth, on personal prestige, on tradition, sometimes on physical force, often on sheer inertia. It is sometimes supported and sometimes restrained, and sometimes even created by the law, but the law is not the principal source of social power." 48

Unions, and in particular those affiliated to COSATU has played a major role in demolition minority rule in South Africa. COSATU together with the Communist Party and the African National Congress formed the tripartite alliance and thought the elections as such. The formation of NEDLAC has further strengthened the position of COSATU affiliated unions because they are the biggest grouping. Around 43% of union members belonged - in 1995 - to COSATU affiliates. The balance belonged to unions affiliated to other national countries or to unaffiliated unions, There are at least three major union groupings to wit COSATU, NACTU and FEDSAL. According to BASKIN " over the last ten years union membership has more than doubled and currently stands at over three million". 49

48 As quoted in P van Uyltrecht in Conflict, Power, Labour Relations and Labour Law 1995 ILJ Vol. 16, Part 1, Page 29

49 Baskin J: Unions at the Crossroads Can they make the transition 1996 SALB Vol. 20, No. 1

However union membership has sharply decreased since 1990. ⁵⁰ If one looks at the increase of membership from 1985 to 1993 then it becomes clear why labour was such an important partner for the ANC. In 1985 the registered members was 1 391 423 in 1993 the number was 2 890 174.⁵⁰

With all the potential; votes and historic power of labour a corporatist approach to industrial relations was inevitable. NEDLAC institutionalises tripartism and envisages the negotiation not only of labour policy but of key aspects fiscal, industry and development policy. It is paralleled in similar sectoral, industry regional and local institutions and forums throughout society.

It therefore comes as no surprise that unions would like to keep their dominance at all levels. Minority unions do not have sufficient power and cant exert pressure on national policy making bodies such as NEDLAC. They are therefore due to their weakness doomed to the margins of industrial relations.

DISEMPOWERMENT OF EMPLOYEES

Non unionised employees and employees belonging to minority unions are disempowered by the requirements for establishing workplace forums. There tends to be a ever increasing need for workers to have more say in the workplace. The purpose of second channel institutions, like workplace forums is to give workers a voice in the governance of the shop floor and the firm, and to facilitate communication and co-operation between management and labour on production-related matters, more or less free of direct distributive conflicts over wages. ⁵¹

Campling conducted a study amongst lightly and non union firms in Australia in 1995. The case study evidence indicated that lightly or non union firms were motivated to secure enterprise agreements due to one, or a combination of, the following four reasons:

- a competitive and/or technological necessity for work reorganisation

50. Ibid

51. Rogers J and Wolfgang S in working under different rules: Freeman R (ed) Russel Sage Foundation New York 1994

- the desire to develop a less conflictual and more co-operative and participative industrial relations and workplace culture
- to formalise, consolidate and codify existing employment and work organisation practices and finally
- to marginalise the workplace influence of trade unions ⁵²

Except for the last reason all the others can be accepted as universal amongst most workers. The call for participatory structures by unions was generally answered with a view of giving employees more power in the workplace.

In Germany, as was pointed out above, three employees with voting rights or any trade union represented in the establishment can trigger the process whereby work councils has to be established. The works council is not the union. The union - in Germany - is viewed as an outside force and the workers council as a inside group. Unions however play a major role in the election process of workers councils where there is no works council in existence. ⁵³

In Spain the emphasis is also on the number of employees in a work centre. In France the establishment of an enterprise Committee is mandatory if there are more than 50 employees in the workplace or enterprise. The responsibility for creating enterprise, establishment and central enterprise committees rests with the employer who must organise elections and is legally liable for not doing so. The employer must also take the initiative in organising elections of the enterprise committee at least once every two years.

Besides, within that period on the request of an individual employee or a representative union the employer must organise elections within one month of the request. The employer must also firstly before elections are held inform the personnel about the elections by posting of a notice and inviting representative unions to nominate lists of candidates. The employer is however not held responsible if no committee exists after he/she has taken the appropriate steps for elections. Only representative unions may nominate candidates at

52 Campling J T: Enterprise Bargaining in Lightly and Non-Unionsed Firms: Comparative Australian Case Study: The IJ of Comparative Labour Law and Industrial Relations Winter 1996 page 315 at 320

53 Summers C Supra

the first ballot. Every representative labour union at the enterprise level has the right to send one and only one delegate to the committee. This delegate must work in the enterprise and fulfill the conditions of eligibility to serve on the committee.

In the Netherlands the establishment of works councils is also mandatory in certain instances. If the enterprise employs one hundred or more employees than the establishment of a works councils is mandatory. The act was later amended and it made the establishment of a works council mandatory also in enterprises with less than 100 workers provided at least 35 workers were engaged for more than one third of the normal working time (at the moment on average 38 hours a week). Finally there is also a form of direct participation for enterprises where at least 10 persons but less than 35 are employed. In such enterprises the employer must hold a meeting with his personnel at least twice a year. Furthermore the employer must discuss, amongst other things, the general state of affairs with his workers at least once a year and provide them with data on the results of the enterprise as well as its prospects. ⁵⁴

In Sweden on the other hand participation at all levels is through the unions, and representation at the enterprise or plant level is tied closely to the union that makes collective agreement. ⁵⁵ In Sweden the works councils are formed in terms of the co-determination act. They all have collective agreements as their basis. The establishment of works councils is mandatory.

The labour Relations is based - like in the United States of America- on voluntarism. In Sweden the works council "was a medium for information and joint consultation between the management and the employees through their trade union (observe the wording) within the enterprise. ⁵⁶ The employer on any matter relating to the relationship between the employer and any member of the organisation who is or has been employed by that employer. An employer shall have a

54 Rood M G The Netherlands in Blanpain (ed) Supra Vol 9 page 82

55 Summers C: Worker participation in Sweden and the United States: Some Comparisons from an American perspective 1994 Univ of Pennsylvania Law Review Page 175 at 178

56 Adlercreutz A Sweden in Blanpain (ed) Supra Vol. 12, Page 213

corresponding right to negotiate with an organisation of employees. A right of negotiation under the first part of this section shall also be enjoyed by the organisation of employers in relation to any organisation to which the employer belongs, and by the employer's organisation in relation to the organisation of employees.

Section 11 of the Act also imposes on the employer a so called primary duty to negotiate. It reads as follows:

“Before an employer decides on important alteration to his activity, he shall, on his own initiative, negotiate with an organisation of employees in relation to which he is bound by collective agreement. The same shall be observed before an employer decides on important alteration of work or employment conditions for employees who belong to the organisation. If urgent reasons so necessitate, the employer may make and implement a decision before he has fulfilled his duty to negotiate under the first part of this section.”

The employer in Sweden can therefore not make unilateral changes without consulting the union. The Swedish Co determination Act stands on the premise that management and the employees are partners in the enterprise and that the employees are entitled to participate in decision making. The employees as partners are therefore entitled to know of all aspects of the business and to a voice in all its activities. 57

In Japan on the other hand there are strong enterprise unions who bargain on enterprise level only. The enterprise union is a union that is organised exclusively by the employees in a particular enterprise. Since all employees in an enterprise - except supervisory personnel and temporary workers - are entitled to join unions the enterprise union in the larger enterprises often organise nearly all the employees at the plant level, if they are majority unions, they are responsible for accepting overtime agreements, voicing the employees opinion of any proposed new work rules and representing the employees on several committees, including those on safety and hygiene in the plant. All these tasks are imposed by various laws.58

57 Summers Clyde Worker participation in Sweden and USA Supra 203

58 HANAMI TA Japan in Blanpain (ed) Supra Vol. 7 at 115

The overview of a few different systems show that in neither of the systems is there a reliance on majority unions to trigger the establishment of workplace forums or works councils. In some countries like the Netherlands and France it is mandatory if the employees reach a certain number. In other countries - like Germany - also a certain number of employees may decide to trigger the process. In other countries where works councils are not institutionalised it is up to the union to decide to implement works councils by way of collective agreements. In Sweden the unions have, in any event, co-determination rights that is statutorily defined. The employer is however given the right in certain extreme cases to implement certain changes without negotiating with the employees.

In Japan where the system is strictly based on collective bargaining with strong enterprise level bargaining the employees rights and interest are protected by enterprise level unions.

It is totally unacceptable that workers will only be able to enjoy the fruits of workplace forums if the majority union is of the view that the time is ripe to trigger the process. Minority unions will practically have no say in such workplaces and will slowly wither away. Bendix is of the view that the decision to assign the triggering process to majority unions was a political decision. She states that "They (i.e. the legislator) have inadvertently expressed the opinion that, despite recent developments, the majority of South African employees are not capable of asserting themselves and their rights in an organisational context; alternatively, that employees who are unionised are not sophisticated enough to make a significant contribute on their own, that they may be swamped in forums by non-unionised (mostly white collar) employees and that they therefore need the union to support them... Many employees may lack education, but a lack of education is not synonymous with a lack of intelligence and opinions. It could be alleged that both unions and the legislature have underestimated South African employees and that, had they not done so, they would have provided all employees with legislated rights to participation and to the necessary education and training... On the other hand, if they were of the opinion that employees were not yet capable of effective representation on workplace forums, then the provisions should never have been instituted as they would be bound to failure or subject to misuses by

either employers or unions. “⁵⁹ I fully agree with the sentiment.

THE POSITION OF SMME's

There is another dimension to this provision. It is the position of the SMME's. In most countries SMME's are barely organised let alone unionised. Workers in SMME's sometimes find themselves in a vulnerable situation because their employment is not stable and protection offered to them is non-existent or very limited. They are in most cases not allowed to participate in trade union activities. If they do they do so at peril to be dismissed. According to Biagi in most SMME's “it is more appropriate to speak of under representation rather than representation.” He states that “the relationship between company size and the level of unionisation is well known, and the phenomenon of lower unionisation of smaller companies may be observed in several countries.”⁶⁰ In France, less than 40% of workers employed in the enterprises with between ten and forty employees elect personnel delegations. Only about 75% of these enterprises with between fifty and one hundred employees have a works council, and only 55% of enterprises with more than fifty employees have trade union delegates.

In Britain, where union figures have fallen the past 10 to 15 years, only 8% of small companies are unionised. In Germany where there is a powerful centralised collective bargaining system and an exemplary works council system the figures are also not that wonderful. In Germany works councils have been found in only about 6% of establishments with between five and twenty employees.

In 1989 a study commissioned by the Ministry of Social Affairs and Employment in the Netherlands found that only 42% of the 9100 companies with between thirty-five and one hundred workers have a representative body, and that only 40% of these enjoy anything more than extremely limited rights. Of the companies with between thirty-five and one hundred employees that are obliged to have

59 Bendix as quoted in Olivier Supra 810

60 Biagi Supra 257

representative bodies, only 62 to 74% do in fact have such bodies. Twenty percent of companies of this size have no form of representative body or otherwise. ⁶¹

In Greece a minimum of twenty employees is required to establish a trade union. In companies with fewer than twenty employees, in Greece, there can be no trade union activity or representation. If at least ten employees are employed they may establish a quasi-union body. This arrangement is only valid for six months and it must be declared valid by a justice of the peace. This arrangement is however only possible if the overall number of employees is not greater than forty and if there is no other union having more than half of the employees as its members.

With the marginalization of SMME's, the Labour Relations Act and particularly the provisions on workplace forums perpetuate the dual system of industrial relations. On the one hand there is a system for employees who are unionised and work in big enterprises and on the other hand there is a system for employees who are invariably not unionised and employed in small, medium and micro enterprises. A study that was done of Western Cape hives owned by the Small Business Development Corporation (SBDC) in 1991 revealed a number of problem areas ranging from inadequate health and safety precautions to neglect of basic labour rights. Du Toit further stated that Although certain of the hives had been exempted from industrial council agreements and other regulatory statutes, employers in the hives were bound by their contracts with SBDC to maintain certain basic standards. Moreover they were arguably, under closer supervision from hive managers than the vast majority of small employers outside the hive, where industrial council inspectors are very few in number and enforcement of applicable rules remain, at best, haphazard. ⁶² He further states that although there was no systematic study of working conditions in SMME's in the formal sector, anecdotal evidence suggests that violations of labour rights and protective laws are considerably more widespread here than on the hives.

61 Ibid

62 Du Toit D Small Enterprises, Industrial Relations and the RDP 1995 ILJ Vol. 16, Part 3, Page 546 footnote 9

Management in small business do not always welcome unionisation with open arms. They see any invasion of their managerial prerogative as an attempt to take over the enterprise. Unions are seen as trouble makers, who will instill in employees an adversarial attitude that will culminate in endless strikes and strike at the workplace.

Du Toit argues strongly in favour of encouraging unionization of SMME's. ALthough Du Toit argues in favour of collective bargaining in the SMME sector, those comments are also relevant for SMME's in a co-determination/workplace forum set-up. He states forcefully that "there can be no collective bargaining in the SMME sector without extending the frontiers of trade unionism." ⁶³

How does one move towards unionization if management is hostile? There are obstacles abound for unions. They will have to deal with employer hostility and obstructiveness, reluctance of workers to, quite rightly in our economic times, jeopardise their jobs, and the "sheer logistical difficulties of organising and servicing a multitude of workplaces containing relatively small numbers of members." ⁶⁴

In the Australian study of light and non-unionised firms, one of the respondents, a construction company, argued that the marginalisation of the building union was a prerequisite for improving the workplace culture.⁶⁵ For management the productivity benefits of moving from a conflictual low trust relationship with the union and employees to a co-operative high trust relationship made the substantial investment of management resources into the enterprise bargaining process worthwhile. With improved workplace labour - management relations the firm believed that it could achieve the longer - term aim of establishing a participative and high commitment workplace culture which would deliver increased, productivity quality and identification of company goals. What emerges is that management equates high productivity and quality with the absence of unions. For management the first step is to ostracise the union and deal with the employees in a "union free" enterprise.

63 Ibid

64 Du Toit Ibid 554

65 Campling JT Supra 322

Where there is union involvement in SMME's they (the unions) are seen as a threat. Where there is no union involvement the basic labour rights of employees are disregarded and the employees are subjected to harsh conditions of employment.

Unions are also to be blamed for the maltreatment of employees in SMME's. Unions are traditionally more concerned about boosting membership and unionising big enterprises. This drive to unionise big enterprises comes at a price. The price is unfortunately the employees in SMME's. Du Toit says that "unions have tended to give little priority to the organisation of workers in SMME's as a result of the organisational difficulties involved, the relatively limited results attendant on such efforts and what are perceived as more pressing demands on their already strained resources."⁶⁶ Du Toit also pleads for an integrated support programme for SMME's, that brings with it a greater commitment to fair employment practices. Modern industrial relations on the part of employers, could increase the scope for workers to exercise their legal rights without fear of victimization.

In order to accommodate SMME's and to facilitate their moving into the mainstream. Du Toit makes three suggestions. Only two of these are currently relevant. Firstly he states that a support programme could subsidise unions for the specific purpose of expanding their organizing efforts in that sector. This will obviously bring about greater union representation in the SMME sector. With this improved representation comes inevitable spin-offs like collective bargaining powers, co-operation between management and unions and improved productivity which might lead to better wages. Health and Safety Standards will also be adhered to if the unions can vigorously fulfill their watchdog role. This involvement of unions in the SMME sector will create opportunities for unions and management to explore whether they can enter into "workplace forum like" agreements.

The other point is that the establishment of industrial districts to promote economic and technical co-operation among small

66 Du Toit D Small Enterprises... Supra 555

employers could create territorial bases for trade unions. Structures encompassing numbers of workplaces which might be too small to be organised individually. This concept is also not entirely new. In Italy SMME's engage in special industry-wide collective bargaining, performed by autonomous employers association established to represent smaller companies.

Spanish law on the other hand provides that as few as six employees may bargain collectively. In fact there are many company agreements in Spanish enterprises with fewer than fifty workers, and even some in enterprises with fewer than twenty-five workers. Biagi however points out that these agreements is to exempt the company's employees from the application of agreement of wider scope, thereby permitting inferior working conditions as compared to those provided for in more comprehensive agreements. 67

To guard against "agreed exploitation" it would always be better for the process of workplace participation by means of collective agreements to be union driven. It would be practically, tactically and strategically more viable for unions if they operate and represent workers in SMME's in territorial units and not as enterprise units. In this case one thinks of the industrial hives that are managed and financed by the SBDC. Why cant a hive have one employees organisation. Those bodies will then negotiate and enter into collective agreements that will ensure worker participation via the union or otherwise in the workplace. In Italy there have been numerous instances in which territorial units where created and financed by employers. The financing necessary for performing representative activity is requested and obtained from the employers. It is then managed by bodies where representatives of both labour and management are represented.

What we need to do is to investigate the viability of such structures with the specific aim of creating by way of collective agreements structures for worker participation. In view of their inability to successfully organise workers in this sector, trade unions cannot easily monitor the implementation of the labour standards or the improvement of conditions of employment by only concluding

67 Biagi Supra 270

collective agreements. Trade unions therefore have to make concerted efforts to provide information and offer advice on the legislation in force, and to strike for increased protection by proposing legislative amendments. Obviously, when trade unions are not strong they cannot effectively conclude collective agreements. They may assist in the establishment of participative and consultative machineries with individual employers, groups of small enterprises or public authorities. By doing so, they may contribute to the improvement of the employment relationship and encourage the state to more actively support the workers concerned. They may also encourage the state, such as is the case in Japan to promote associations or groupings of small enterprises to initiate measures for improving working conditions among member undertakings. 68

It would take considerable time, resources and repositioning if the whole provisions pertaining to workplace forums were amended to accommodate SMME's. It is a known fact that SMME's sometimes face special difficulties in applying labour legislation which has not been concerned with the specific character of smaller enterprises in mind. The problem of the insensitive nature - towards SMME's - of the workplace forums provisions highlights the fact that differentiation between small and large companies frequently means separation between a relatively protected area, in which forms of "industrial democracy" are practiced, and weak areas in which the logic of market forces is predominantly uncontrolled.

The low rate of unionization and weak collective action in SMME's should drive all the parties concerned to look for more workable and practical solutions in order to achieve cooperative instead of conflictual industrial relations in SMME's. The LRA as it is currently structures does not lend itself to such a goal.

OTHER "FAVOURABLE" PROVISIONS

It is not only the triggering process that favours majority unions. There are other provisions- which will be discussed below - that also unashamedly favour majority unions. These provisions must also be

68 See services Supra 125

seen in the broader context because “in the final analysis, industrial relations can be understood and explained only as an offshoot of all the characteristic features of a given society - economic and legal, political and cultural, rational and irrational. Therefore, anybody who attempts to understand the industrial relations system of another country needs to acquire a knowledge and understanding of all the characteristics of that country.”⁶⁹ These provisions are also manifestation of the strength of the labour movement of South Africa. Majority unions have a privileged and protected role in South African labour relations when it comes to workplace forums. These provisions also flies in the face of the aims and functions of workplace forums.

It must be remembered that workplace forums must in terms of Section 79 of the Act:

seek to promote the interest of all employees in the workplace, whether or not they are trade union members;
seek to enhance efficiency in the workplace....

Section 81 (1) of the Act however provide for the establishment of a union based workplace forum. In terms of this section “If a representative union is recognised in terms of a collective agreement by an employer for the purpose of collective bargaining in respect of all the employees in a workplace, that trade union may apply to the commission in the prescribed form for the establishment of a workplace forum.” This in effect means that a majority union or unions acting in concert may apply for the establishment of a workplace forum. A minority union does not have that right irrespective of the number of employees it represents.

This provision also creates problems for majority unions, because a majority union will have to satisfy all the requirements of the section before it will be able to apply for the establishment of a workplace forum. The requirements of the section are:

- the union must be recognised in terms of a collective agreement by an employer

69 Schregle J: Comparative Industrial Relations: pitfalls and potentials 120 International Labour Review 1981, Page 24

- it must be a representative trade union as defined in the Act
- it must be recognised for collective bargaining purposes and
- it must be recognised for collective bargaining purposes in respect of all employees in the workplace.

As mentioned above unions have traditionally negotiated and organised as bargaining agents for the particular bargaining units, and very seldom in respect of all employees in a workplace, this provision would necessitate, in most instances at least, a renegotiation of recognition agreements so that unions that want to proceed along this route could qualify. It would also mean that unions acting jointly will have to make sure that their bargaining units should include all “employees” in the workplace in order to meet the requirements of section 81 (1). These stringent requirements might put union based workplace forums beyond the reach of most employees. Mayer points out that section 81 was enacted to “please the unions.” He points out that the possibility for this option - union based workplace forums - is very limited. He quite rightly states that it doesn’t apply unless a union is already recognised by an employer for the purpose of the collective agreements of all employees in the workplace - which (most importantly) is hardly existing anywhere.⁷⁰

In Germany unions don’t have a monopoly to call for the establishment of works councils. Unions have however a right to call for the establishments of a works council. They can call a works meeting of the employees in order to arrange for elections. Unions in Germany are further “privileged in nominating candidates for election. A list of union candidates doesn’t need a petition signed by a specific number or percentage of employees as the list of non-union candidates.”⁷¹

In Sweden collective agreements are negotiated by national unions on an industry-wide basis, and under the 1976 Co-determination Act (MBL) the legal right to co-determine at the enterprise level runs almost exclusively to unions that have collective agreements. If the problem at enterprise level involves only members of a union that

70 MAYER UDO: The German system of worker Participation: A model for South Africa Institute of Development Labour Law UCT

71 Ibid

has not entered into a collective agreement of the employer is still required to negotiate with a union to which the particular employees belong.

In the United States of America representation at the enterprise level is tied closely to the union that makes the collective agreement. In the US the majority union is the exclusive representative for purposes of negotiating collective agreements, and the employer is prohibited by law from negotiating with anyone other than the majority union.

The similarities between the USA and Sweden are apparent because both countries depend in principal on the free choice of the employee. Enterprise structures are not institutionalised like in Germany or France.

If a union qualifies for a trade union based workplace forum it may, in terms of section 81 (2), choose the members of the workplace forum from among its elected representatives in the workplace. This provision "appears to be a concession to COSATU's proposal that the composition of the workplace forum should be the shopstewards committee."⁷²

Olivier points out that this provision potentially undermines the notion that representatives at this level should be democratically elected, and that the workplace should directly be involved - otherwise the forum could be seen as just another union too and employees could be discouraged from participating meaningfully in a body which is suppose to be independent and separate from unions, both institutionally and structurally.

If workplace forum members are chosen from among the unions elected representatives there would be no "democratic" election at the workplace. The members of the workplace forums will also be members of the shopsteward's committee. They will be wearing two hats when dealing with the employer. They would, as members of the workplace forum, need to seek to enhance efficiency in the workplace and promote the interest of all employees in the

72 Du Toit et al Supra 243

workplace, whether or not they are union members. As members of the shopstewards committee they will have to represent the interest of the union members who in most cases democratically elected them to be shopstewards. Du Toit points out that "If the same individuals constitute both bodies, their meetings as a workplace forum should be demarcated from their meetings as a shopstewards' committee to reduce the possibility of procedural challenges. Even so, the potential for conflicts of interest - for example, if the enterprise is in financial difficulty - remains obvious." 73

In Germany and the Netherlands there is also a tension in the function of works councils. In Germany works councils and employers must discuss matters "with an earnest desire to reach agreement and make suggestion for settling their differences. In the Netherlands works councils are established for the dual purpose of the effective functioning of the enterprise and representation of employees. The tension is less pronounced however, in that the works council is a separate body from the trade unions branch. It does not have to accommodate the entire spectrum of enterprise and employees interest within its own decisions but may - and in practice often does - arrive at a practical division of labour within the union.

74

Majority unions may also, by way of collective agreements with the employer, determine which matters are open to consultation and over which matters must joint decisions be taken. They therefore have the right to set the agenda and determine what will take place in workplace forums. (sec 84 (1) and (3) section 86 (1) and (2). If a matter is regulated by a collective agreement the workplace forum is barred from dealing with it. There is nothing sinister in this provision because such a provision does also lead to industrial peace and co-operation. It also eradicates duplication - because in its absence the employer will have to agree with the workplace forum and with the majority union on the same issue.

73 Du Toit et al The LRA Supra 243

74 Ibid

Olivier however points out that these wide ranging powers are within the South African context statutorily restricted to majority unions and, secondly that the powers should not be seen in isolation but against a background of extraordinary privileges being accorded to these unions. He further stresses that the dominant position and role of the unions might seriously hamper the growth of workplace forums as independent bodies that play a constructive part in the day - to day relationship between the employer. ⁷⁵

In terms of section 82 (1) (v) and (w) the employer and majority union/ representative trade union may by agreement change the constitution of the workplace forum and establish the manner in which decisions are to be made. It must be remembered that the constitution of a workplace forum can be the product of an agreement of all registered trade unions which have employees in the workplace and the employer. ⁷⁶ Although Olivier finds this a "rather strange" provision there seems to be merit in such a dispensation. If a union becomes the majority union as defined in sec 81 (1) of the Act it acts and deals with the employer in respect of all the employees. Why must it be bound by a constitution that is a product of co-operation between itself and other rival unions and the employer? There might be provisions in the constitution that is a product of compromise with which the current majority union does not agree. What this provision reflects however is that the majority union is given extensive powers to determine the functioning and operation of workplace forums.

In term of section 82 (1) (f) if another registered trade union becomes representative, it may demand a new election at any time within twenty-one months after each preceding election. If one accepts that workplace forums are totally independent of unions then one might have a problem with this provision. However practice and lesson from other jurisdictions reveals that unions are a dominant driving force behind works councils or rather seconds channel institutions. As will be pointed out later the relationship between works councils and other unions in Germany for example is much closer than the

75 Olivier Supra 811

76 See section 80(a) of the Act

law indicates. The solution to this problem would be for the new representative trade union to wait until the next election of the workplace forum members. Union membership is influenced by many factors. There seems to me to be no reason why the existence of the workplace forum must be coupled with union strength.

In terms of section 82 (1) (u) only office bearers or officials of representative unions may attend meetings of the workplace forum, including meetings with the employer or the employees. It is unclear why only majority unions are able to enjoy this privilege. The only inference to be drawn is that the legislature wanted to make workplace forums more attractive for majority unions. In Germany for instances all unions that have members as employees in the workplace are accorded certain rights and duties without any reference to their strength or representativeness in the workplace. I fully agree with Grogan when he questions “whether a workplace forum packed with members of a majority union will constantly fulfill its statutory task of protecting the interest of all employees, non members included, may be too much to expect.”⁷⁷

It is clear that majority unions wield considerable power to establish and control the functioning of workplace forums. Why the legislature decided to link workplace forums to unions is unclear. The only explanation is political. The lessons in countries such as France, Germany and the Netherlands is that the functioning of these institutions must not depend on union strength or weakness. Olivier puts it succinctly that “It appears that we still have to take note of the experience of other systems where the independent nature of the two bodies and the functions exercised by them are taken for granted, irrespective of the personnel and functional links that may exist and irrespective of whatever measure of influence unions might be able to exercise in practice.”⁷⁸

77 Grogan J: Poor Relations: Minority Unions under the new LRA 1996 Employment Law Vol. 13, No. 2, page 27

78 Olivier Supra 812

RELATIONSHIP BETWEEN TRADE UNIONS AND WORKPLACE INSTITUTIONS

Workplace institutions can take different forms. It can be statutorily institutionalised and “independent” of unions. It can be union driven like in Sweden and Japan or it can be a ordinary agreement between employees and the employer, as is the case in Italy.

Rogers and Sreeck make the same point and state that “where there are workplace based unions, as in Japan, employees articulate their interests through the union, and second channel arrangements take the form of labour - management consultation committees. Where unions are centralised at the national or sectoral level, outside the firm - as in the Netherlands and Germany - or where unions are weak and not widely present at the workplace - as in France and Spain - second channel functions are usually performed by what are known as works councils.”

In South Africa workplace forums could be the answer to the undemocratic practices in some workplaces. Workplace forums could provide unions with the necessary mechanisms to exalt the quality of working life and prevent management from unilaterally restructuring the workplace. They also offer the unions an opportunity to intervene in management decision making and to be part of the productive process. Unions are acutely aware of the considerable gains that can be made if they participate in the process. Marcel Golding the ex NUM assistant general secretary spelled out the vision of unions along the following lines: “There are two ways we can respond. We can either stand by while the process takes place or we can become centrally involved. Our union will fight to be a central player in the management of transition...For us the struggle for greater control over the production process is starting with participation...We are now talking about one of the most critical areas itself, the workplace, and participation in decisions made at the workplace. We are firing the first shots in beginning to challenge managerial prerogative in the production process. We’ve already challenged managerial prerogative on dismissals and other abuses.

But I think through this we are beginning to challenge managements prerogative in decision-making over what they believed was their exclusive right - setting targets, setting the production plan."⁸⁰ Regrettably the unions have not lived up to the challenge to grab the chance to pierce managerial prerogative. Up to now unions have been very cautious about workplace forums.

This begs the question why unions are so slow to embrace these structures? What are the advantages or disadvantages for unions? Are these structures a threat to unions? Do unions have the capacity to embrace and successfully drive these institutions?

Streeck argues that there is a relation between union strength and workplace participation. He points out that the USA and Britain have considerable problems with their industrial relations, unions have not fared well in those countries in the last 10 to 15 years, because they have no works councils or co-determination structures. Whereas in countries like Germany, Sweden and Italy in the 1970's and 1980's, council like structures emerged and contributed significantly to the strength of the labour movements and to their capacity to survive the pressures of restructuring and internationalisation. To substantiate his point he give an example of six European countries and the percentage of the workforce which is unionised in each country; Germany 38%, Netherlands 26%, France 10%, Spain 10 - 15%, Sweden 85% and Italy 39%.⁸¹

These arguments must not be accepted at face value. It is true that American and British unions are facing and experiencing more difficulties than their Swedish and German counterparts, in making their influence felt in industrial relations and in the society at large. There are however numerous factors that contribute to this phenomenon.

Some of the factors are government policy, attitude of the role players and the overall environment within which they operate. Pankert in analysing certain monographs that were received by the

80 As quoted in Van Holdt Karl: What is the future of labour? 1992 SALB Vol. 16, No. 8

81 Streeck W: Supra 89 - 90

ILO states the following "The central idea is that the trade unions, as a consequence of an overall environment that is unfriendly to them, are insufficiently involved in many aspects of public and industrial life and that this lack of involvement unavoidably leads to a low performance of the national economy as whole. The United States monograph states for example that the countries with low union involvement are condemned to go up the "low road" by locking themselves into the vicious circle of low skills, low quality jobs, low wages and low productivity. Similarly, the United Kingdom monograph, referring to the policies of the Thatcher Government, states that "the publicly endorsed opposition to union involvement has encouraged employers to pursue low skill, low wage solutions to Britain's chronic problem of under investment.." and that Britain is in danger of being left without the means of winning consensus in industrial restructuring which exists in other countries, while trade unions are left out of the equation in so many areas of industrial and public life."⁸²

On the other hand it must also be remembered that the Swedish and German unions do not find themselves in comparable situations: while many traditional features of the Swedish industrial relations system (eg. the predominance of the LO on the union side; the importance given to the welfare state, to central bargaining and to the wage solidarity principle) have been under attack for some time, the key features of the German system (e.g. the simple trade union structure; the emphasis placed on branch level bargaining and co-determination) are practically unchallenged.

If on the other hand there is no will on the part of the management and employees to work together union density will also be adversely affected. Management will try its best to bash the union while the union will endeavour to obstruct all plans to restructure and reconstruct the workplace. Unions will have to be prepared to act jointly with employers and sometimes government to manage wealth

82 Pankert A: Adjustment Problems of Trade Unions in selected Industrialised Market Economy Countries: The Union own view International Journal of Comparative Labour Law and Industrial Relations 1993 Vol. 9, Page 3 at 11

creation rather than seeking confrontation over wealth distribution. This was also a central theme in the monographs that Pankert analysed "the basic message of the monographs is that the scope of collective bargaining and/or workers' participation should be broadened and that the unions - while of course continuing to consider the defense of workers interests as their fundamental task - are aware of the fact that excessively conflictual industrial relations as well as excessive rigidities in legislation and collective agreements are likely to have adverse effects on the competitiveness of the enterprises and on the national economy as a whole." 83

What is unquestionable is the fact that the existence of strong unions at all levels (if they function at all levels) is per se indispensable for the national economy to regain competitiveness and to go up the high road of high skill, high quality jobs, high wages and high productivity.

In Northern Europe where unions are strong, negotiations are centralised, and legal extension of collective contracts is easy, the scope for council activity is often explicitly defined to exclude subjects dealt with by unions and employers' associations outside the individual firm. For example the German Works Constitution Act forbids councils to bargain over basic wages and hold them legally responsible to uphold and supervise the implementation of any collective agreement applicable to their firm. Also councils are typically placed under a legal obligation to seek co-operation with the employer. Likewise the Co-determination Act of Sweden gives the union certain rights to information, consultation and joint decision making. Thus Belgium law declares that works councils "exists to promote collaboration between employer and employee" and in France where the Ministry of Labour extends collective agreements and where minimum wages are important, councils administer a firm's social funds but have little power in other areas. In contrast, where the external institutional structure is less elaborated like in Spain, Greece and Italy, council powers more closely resemble those of local unions. Spanish law permits councils to bargain over wages

83 Ibid 12

and allows them to call strikes. In Italy, council functions are performed by union workplace organisations and the elected delegates, which for historical reasons often include workers not belonging to unions. 84

In Germany works councils are entitled to close connections with unions. In Germany unionised councils work very closely with the union office either at the local or if it is a large firm at the national level. This close relationship involves in particular advice given by the union to the works councils. Works councils are however not unions although most of their members are union members. Speaking in favour of the German model Rogers and Streeck referring to works councils asserts "to be effective, they must be neither fish nor fowl - not merely disguised unions nor surely, disguised management. They are mixed institutions, varying along a line of compromise between worker interest in institutionalized representation and collective voice, and employer interests in workforce co-operation and communication to enhance economic performance."⁸⁵ They also make the point that the distribution of power between labour, capital and national labour relations will shape the form that the works councils will take. For instance, French councils are presided over by the employer German councils are worker only bodies. For most of the postwar period, Dutch councils were employer lead, but legal changes in the 1970's reorganised them on the German model.

PROBLEMS FOR UNIONS

The workplace forums as they are currently structured present a lot of problems.

The first problem is the lack of a central bargaining system. This means that unions will have to be involved from two perspectives in the same workplace. Even in industries with centralised bargaining there tends to be workplace collective bargaining as well. Workplace forums and union representatives will invariably be the same people - in that shopstewards will also be workplace forum members. This

84 Rogers and Streeck Supra 100

85 Ibid 103

could create demarcation conflicts between forums and confusion among workers and managers. Issues could be shunted back and forth between forums for expedient reasons, undermining the quest for new bargaining relations. It could also facilitate factionalism and divisions within unions between shop stewards in the workplace forum and shop stewards in the collective bargaining forum. Summers points out that "unless the bargaining council can and does limit supplementary bargaining by local union, the employer may be confronted with demands on both fronts. Each will compete for concessions, neither will be able to agree for less than the others demands, and under the proposal as now drafted either can call a strike. This is not likely to create a climate of co-operation and mutual problem solving"⁸⁶ Olivier also refers to this problem and states that it is a peculiar characteristic of the South African labour relations scene, as majority unions are rooted on this level of the workplace, and even smaller unions prefer bargaining at plant level, at least to the extent that they are not bound to do so at central level.⁸⁷

The other danger however is that management might use the two structures against each other. Managers might feel tempted to reject union proposals - in order to undermine their credibility - and then accept similar or the same proposals from workplace forums. In Germany, Sweden and Italy collective bargaining takes place in national industrial bargaining forums, while co-determination bargaining takes place in the workplace. Thus the more conflictual bargaining over wages and conditions does not interfere with negotiations over production and management issues. Councils are generally aided (except in Spain) in performing this intermediate role not only by statutory supports but also by their insulation from wage setting.

Will forums marginalise unions in the workplace?

The two structures at enterprise level will be very onerous to

86 Summers C: Workplace forums from a comparative Perspective Supra 810. See also Von Holdt K: Workplace Forums: Can they tame management 1995 SALB Vol. 19, No. 1

87 Olivier Supra

maintain. Over time it will be difficult to maintain two strong structures, both representing workers and both negotiating with management, at the same workplace. In general, the stronger structure will tend to drive out the weaker. In Sweden, before the Co-determination Act in the 1970's weak forums with consultation rights were marginalised by the unions that had more power and credibility. In the Zambian Copperbelt, on the other hand, management succeeded in marginalising the unions by granting real benefits and improvements to workers through non-union forums.⁸⁸ The forums in South Africa have the potential to enjoy more privileges than shopstewards ie time-off, access to experts etc.. They might become stronger than union and marginalise unions. The only thing that can eradicate this threat is a clear move away from two structures that are both union driven at the workplace.

In Germany work councils are used by unions as a organising tool. Unions have a right to be at works council meetings even if the works council does not want it to be present. Once a election takes place, unions can begin to put up candidates. Even if at the first election of work council the majority of the council members are not union members, with time they often become members, because they find out that without the training and the advise provided by the union they cannot perform their function properly/effectively. As a result the most common organising tactic a German union uses these days is to begin by setting up a works council and everything else follows.⁸⁹ There seems to be no clear answer. The unions will have to look at their peculiar circumstances and their position viz a viz the employer and non union members before it makes a choice for or against.

Will unions have the capacity to cope with forums?

The forums provide unions with the opportunity to increase capacity through rights to training, paid time off, full time representatives, administrative facilities and access to experts. Unions are unlikely to develop this capacity on their own without forums. Unions need not

88 Von Holdt K: Workplace forums undermining unions 1995 SALB Vol. 19, No. 6, Page 59 at 62

89 Streeck W Supra 93

negotiate every issue that is discussed at the forums. Unions could choose those issues of most concern to members. Unions will also have the capacity to negotiate better with the employer because of the information that they will get via workplace forums.

Will forums co-opt unions?

Unions in South Africa have a history of adversarial bargaining. They have been built around strategies of militant resistance. Forums will entail a greater emphasis on co-operation. But co-operation does not mean the end of struggle and conflict. According to Streeck Co-determination is not necessarily identical with labour/management co-operation either. Very often under co-determination labour and management argue for a long time over a decision, for example the introduction of new technology. And they will have very different views on this at the beginning and they will need a long time to come to a consensual solution. This is not co-operative. Indeed it often requires that workers make their voices heard very strongly before management is willing to make a concession, and in this respect it is not so different from collective bargaining.⁹⁰

Unions must always stay focused on their goals and maintain their independence. They must be careful not to be co-opted in these structures at the expense of their members. Instead of co-option unions must seriously consider strategic unionism at this level. In short they must stop paying lip service to strategic unionism.

Will union accommodate themselves to capitalism?

Only a conscious and committed strategy by unions will be able to fight the capitalist onslaught on the union movement. As stated above strategic unionism is the only viable option for unions. It is I believe the only strategy that will be able to promote the unions agenda and the national agenda of economic development.

Strategic unionism is a strategy for far reaching reform of the state, of the workplace, of economic decision-making and of civil society. It is a strategy driven by a broad based coalition of interest groups,

90 Streeck W Supra 93

at the centre of which is the labour movement. Strategic unionism develops a step-by-step programme of radical reforms - each of which extends the arena of democratic decision-making and deepens the power of the working class.⁹¹

Unions in South Africa will always be afraid that involvement in the workplace forums could increase workers identification with the interest of the enterprise and its productivity and competitive position, and so undermine class solidarity. However unions which organise in capitalist society always experience such pressures and already do so in SA. Unions have a choice, they can either succumb or they can limit these pressures to the extent that they maintain independent democratic goals in the workplace, and continue to campaign around natural collective bargaining, industrial and restructuring issues.

WORKPLACE FORUMS AND COLLECTIVE BARGAINING

The traditional way of representing workers interest at the shop floor is through collective bargaining by unions. The introduction of second channel institutions to promote workplace democracy via statutory bodies very often raises union fears and anxieties that these bodies might usurp their role.

This is however not always the case. In Germany unions bargain on a central level over wages and other distributive issues. At the enterprise level the unions are involved more in a advisory role. They guide and in most cases lead work councils. The two processes complement each other. The works councils are not substitutes for collective bargaining. Normally collective bargaining leads to collective agreements. Those agreements are concluded for a whole branch or at least for a region within a branch. According to Weiss one of the main problems of the German industrial relations system has to do with the inter-relationship of the two different levels.⁹²

91 Von Holdt K: Workplace Forum can they tame management Supra 34
and Von Holdt K: Workplace Forums undermining unions: Supra

92 Weiss M: Trade Union Rights in a Single... Supra 64

In Sweden the system of collective bargaining is also centralised, with national industry agreements negotiated between national unions and national employer associations. According to Summers plant organisations in Sweden are very weak or non-existent.⁹³

In America the unions are decentralised. In the remaining, I might add, unionised enterprises bargaining generally if not always only take place at enterprise level. Decentralisation in the USA is rooted in part in the legal principle of employees having a free choice. They have “the right to bargain collectively through representatives of their own choosing” in the words of section seven of the National Labour Relations Act. Summers states that to “maximize freedom of choice, subject to majority rule, the election or bargaining units are relatively small, often splitting a single enterprise into a number of units.” It must however be pointed out that although the law is a “decentralizing force” it does not force unions not to combine bargaining units.⁹⁴

In Sweden the co-determination act empowers workplace involvement. The Act puts a duty on the employer to bargain with the trade union is the only bargaining agent for the employees.

In Japan they have strong enterprise unions and they conduct all the bargaining on behalf of the employees. The enterprise unions are organised in such a fashion that all the employees are basically members of the union. The general pattern of bargaining within the enterprise in Japan is as follows:

- The enterprise union bargains about general working conditions and other issues applicable to all the plants and workplaces in the enterprise, and concludes agreements for the whole enterprise
- The plant branches of the union bargain with the plant managers about issues peculiar to the plant concludes agreements within the framework of the general agreement and negotiate over matters arising out of the application of the general agreement to the particular situation in the plant and

93 Summers C: Workers Participation in Sweden and the USA Supra 189

94 Ibid

- The divisional branches within the plant have almost the same scope within their own range, except that on this level formal agreements are not generally concluded and informal understandings between the union representatives and the shop-floor supervisors are observed instead - as long as they do not contradict the principles established by the upper levels of institutionalised industrial relations in the enterprise ⁹⁵

It is evident from what was said above that workplace institutions and collective bargaining are not mutually destructive of each other. Depending on the peculiar circumstances and statutory regime of a particular country collective bargaining and institutionalised "second channel" forums can function side by side. Unions fears tend to exaggerate because in some countries like Germany unions actually use these councils as hunting ground. Unions can also use these structure to get much more information from employers. They can then bargain from a better position because they have more information.⁹⁶

The aim of workplace participatory structures have, as their main aim, industrial peace and prosperity. The Zambian Labour Relations Act comprehensively states that the two main objectives of works councils are:

- to promote and maintain the effective participation of workers in the affairs of the undertaking
- to secure the mutual co-operation of workers, management and trade unions in the undertaking in the interest of industrial peace, improved working conditions, greater efficiency and productivity.⁹⁷

95 HANAMI TA Supra 115

96 Information sharing, joint decision making and consultation rights is beyond the scope of this paper, therefore it is not discussed

97 As quoted in Kalula E: Labour Law and Policy in a Post Colonial State 1986

CONCLUDING REMARKS

The attempt by the legislature to create workplace democracy in the form of workplace forums is sabotaged by the very provisions that are meant to facilitate it. The provisions pertaining to workplace forums will have to be amended because of the numerous problems that they create.

The high threshold of 100 employees is totally inexplicable. It is also contrary to the trend in Europe where experiments with workplace structures were highly successful. Although union membership in the Netherlands is low their different regimes of participation in the way that the enterprise is run is attractive. In the Netherlands there are different regimes for enterprises of the following sizes:

- 100 or more employees
- between 35 - 100 employees
- between 10 - 35 employees

This is a option that will also be able to cater for the specific needs of workers in the SMME sector. These workers are the most vulnerable, exploited and deserving of protection. The sooner that workplace institutions can serve as a counterbalancing force the better. They will be able to tame managements attitude. The organizational problems that unions face, in this sector can also be addressed by a thorough investigation of the possibility of organizing forum along territorial lines. What will be important for small enterprises is not the enterprise itself but the geographical area within which it operates. Unions will have to take the geographical area into consideration when they organise. In Italy collective bargaining increasingly reflect the idea that territorial units and not company units should represent workers employed in smaller companies. This may lead to flexibility. According to Biagi these kind of agreements are prevalent in Italy. He also makes the point about flexibility and states "There, (in Italy) employer and employee representatives have agreed on provisions in the labor contracts that

show remarkable flexibility in working hours, night work, shift work, and remuneration.”⁹⁸

Such agreements are also very functional. They can promote uniformity. They can also serve as watchdogs over employees that make themselves guilty of gross violations of workers' labour rights.

It is unfortunate that the legislature opted for a model that favours majority unions. There seems to be no rational reason why this route was chosen. The only inference it seems to me is that the legislature was influenced by the unions' potential strengths as a votes collector for the tripartite alliance. It is clear that unions wanted to be in the driving seat of these institutions. The bias in favour of majority unions not only marginalises smaller unions it also disempowers workers. Democracy and especially workplace democracy has been identified as a very important ingredient in harmonious relations between labour and management. There are indications that workplace democracy leads to efficiency in the workplace. Efficiency on the other hand enhances productivity. Productivity is not only beneficial for the national economy and management it also has positive spin off for employees. A productive firm can make more profits - with more profits management will not be able to justify the absence of wage increase when those are bargained with the unions, at any level.

It is understandable that unions will fear being undermined by these structures. These fears are however unfounded because unions can always enter into collective agreements with the employer and put certain topics beyond the jurisdiction of workplace forums. The union can effectively snooker many issues that may or may not be raised in workplace forums. If a collective agreement requires a matter to be raised with the union then the forum will not deal with that issue. The employer and union can also agree to add to the matters which must be dealt with.

If the power to trigger the establishment of workplace forums is given to unions that are sufficiently representative more workplace forums will be formed. Unions must however have the opportunity to

98 Biagi Supra 270

nominate candidates to workplace forums. The election of the candidates must be an open process in other words all employed in the workplace must be able to vote for the nominated candidates. In this manner democracy is taken to its logical meaning.

The other issue that will have to be looked at, is the fact that workplace forums have been given the right to strike.⁹⁹ The German Works Council Act for example clearly states that works councils and management shall work together in a spirit of mutual trust and shall discuss matters at issue with an earnest desire to reach agreement and make suggestions for settling their differences. Schregle states that employer and work council are not allowed to exercise pressure on each other by industrial action. This means that works council may not call a strike to press their demand (although it does not affect the right of works council members, as of all other workers, to strike in support of collective bargaining demands put forward by the trade union.¹⁰⁰

In Spain and Greece, where the external institutional structures is less elaborated council powers resembles those of local unions. Spanish law in fact permits councils to bargain over wages and allows them to call strikes. I can't but agree with Olivier when he says that the right of workplace forums to strike is unfortunate and that this could ruin the whole endeavour and introduce adversarial elements into the relationship.¹⁰¹ What the act should rather foster is a development of a new spirit in the enterprise. The new spirit must be one of concertation and not adversarialism. The parties must move away from the they/we/us them mentality which currently characterises over labour relations system.

The other problem that will have to be investigated and remedied is the dissolution of the forums. Only a representative trade union may request a ballot to dissolve a workplace forum. If more than 50% of the employees who have voted in the ballot in support of the

99 See Du Toit et al Supra

100 SCHREGLE J: Co-determination in the FRG: A comparative view 1978
Internation Labour Review Vol. 117, No. 1 83

101 Olivier op cit 813

dissolution of the workplace forum, the workplace forum must be dissolved. It is regrettable that these institutions which are supposed to usher us into a world of competitiveness, efficiency, co-operation between management and workers can be killed at the whim of a majority union.

What happens if the members of a workplace forum fall to below 100? The act is silent on this aspect. In Belgium, when the number of the employees fall to below 100 the competence of the works councils will be carried by the committee of hygiene. In France the works council continues even if the number of employees fall below the threshold of fifty. Its survival is guaranteed unless the employer and the trade unions agree to abolish it or unless the director of the office of labour and employment at the departmental level so decides.

It is hoped that unions will soon start embracing these forums as part of union strategy to boost overall national economy. Unions in South Africa are positioned in such a way that they have no choice but to consider, strongly, participatory structures.

Industrial peace is now more than ever in the unions' interests. Already COSATU's companies have made investments worth billions of rands. They partly own a bank, an insurance company, transport concerns, a slew of information technology companies, a television station and are major shareholders in YFM, South Africa's most successful radio station.¹⁰²

With the necessary political will and the will to create a conducive legislative framework, workplace forums can indeed become everything that the drafters of the Act hoped it would be. They thought workplace forums are the right weapon to kill all the strike and strive in the workplace. For now they are a gun with a dysfunctional trigger!!!

102 Mail and Guardian , 11 September 1998

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