

**An Examination of Employee Participation  
as provided for in the Labour Relations Act  
66 of 1995.**

A thesis submitted in fulfilment of the  
requirements for the degree of

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**ABSTRACT**

The thesis covers the field of labour law known as employee participation in decision-making. It deals with the examination of the extent to which the Labour Relations Act 66 of 1995 (the Act) promotes employee participation in decision-making. Firstly, the analysis shows that employee participation in decision-making is an aspect of democracy, which is translated into industrial democracy in industrial relations. In South Africa the philosophical foundation of employee participation is supported by the Constitution of the Republic of South Africa Act 108 of 1996 which embodies democratic values permeating all areas of the law including labour law. Secondly, the study elucidates the jurisprudential background of employee participation in South Africa. There is evidence of the development of some principles of participation like consultation; information disclosure; and the existence of participatory forums like works councils under the LRA 28 of 1956. Thirdly, in evaluating the extent to which the LRA 66 of 1995 promotes employee participation, the following aspects are covered: the relevance and contribution of information disclosure; the effect of consultation prior to dismissal for operational requirements; the role of collective bargaining; and the contribution of workplace forums. The conclusion is reached that all the foregoing aspects of the LRA 66 of 1995 will contribute to the promotion of employee participation in decision-making. The Labour Court and the Commission for Conciliation Mediation and Arbitration can also ensure that in interpreting the Act employee participation is promoted where appropriate. Finally, employers and employees will have to accept this necessary partnership for the entrenchment of employee participation in decision-making.

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**ABBREVIATIONS**

ACAS	Advisory, Conciliation and Arbitration Services (United Kingdom)
AD	Appellate Division
All ER	All England Reports
BLLR	Butterworths Labour Law Reports
BSA	Business South Africa
CILSA	Comparative And International Law Journal of South Africa
CLL	Contemporary Labour Law
COSATU	Congress of South African Trade Unions
ed	edition
EL	Employment Law
F	Federal Reports (USA)
FEDSAL	Federation of South African Labour Unions
IC	Industrial Court
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IRJSA	Industrial Relations Journal of South Africa
IRLR	Industrial Relations Law Reports
LAC	Labour Appeal Court
LC	Labour Court
LCD	Labour Court Digest
LLN	Labour Law News
LQR	Law Quarterly Review
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
NLRB	National Labour Relations Board (USA)
p	page
para	paragraph
pp	pages

RDP	Reconstruction and Development Programme
RPC	Restrictive Practices Court
SA	South African Law Reports
SAJLR	South African Journal of Labour Relations
SALB	South African Labour Bulletin
SALJ	South African Law Journal
SALLR	South African Labour Law Reports
Stell. LR	Stellenboch Law Review
US	United States Reports
VWSA	Volkswagen South Africa

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## CHAPTER 1

### INTRODUCTION

#### 1.1 OBJECTIVE OF THE THESIS

The main objective of this thesis is to consider, by an examination of the Labour Relations Act 66 of 1995, the extent to which the Act provides the answer to the issue of employee participation in decision-making. This is done by comparison against the background of the Labour Relations Act 28 of 1956 which did not expressly provide for employee participation in decision-making.

#### 1.2 BACKGROUND TO THESIS

The domination of the twentieth century by technological development may make man oblivious of the intrinsic characteristics of a human being, which have brought the subject of employee participation to the fore. It is in understanding these human qualities and the different stages of industrial development wherein lies the background to employee participation in decision-making. Perhaps one of the most defining characteristics of a human being is the desire for freedom and the struggle against domination. Unfortunately society today is organised on the basis of inequality in power and property, hence the continuous struggle for human beings to gain control of their lives. It is therefore possible to see employee participation in decision-making as representing a critical organisational form through which that desire to regain freedom is manifested.<sup>1</sup>

The organisation of the workplace revolves around the relationship between the parties involved in the working process. This relationship is not only technical but it is also social and characterized by relations of domination and subordination.<sup>2</sup> It was particularly strained in the nineteenth century and deteriorated further in the early twentieth century with the emergence of

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<sup>1</sup> Bayat A *Work, Politics and Power* (1991) p 2 writes that: 'human beings, as history has shown, tend to develop a strong desire to exercise control over their lives, and by the same token to reject attempts by other human beings to restrict their freedom.'

<sup>2</sup> Kahn-Freund O *Labour and the Law* (1977) pp 3-6, points out that the issuing of commands and subordination is an exercise of social power. He points out that the object of labour law is to be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship.

Taylorism and Fordism, and in recent years by the developments in technology.<sup>3</sup> This resulted in the alienation of employees from their work because employers determined how employees were to do their work. Consequently employees were unable to contribute to decision-making in the workplace, which is contrary to human nature.<sup>4</sup> This determination of work by the bosses in the workplace was seen largely as an encroachment on the liberty<sup>5</sup> of the employees, and has been met with continuous resistance.

The motivation for this resistance is based on the tenets of participatory democracy, which has its foundation in the intellectual history of western societies.<sup>6</sup> In elaborating on the extent to which participatory democracy was to be practised in society, Pateman<sup>7</sup> (summarising the views of Rousseau, Mill and Cole), states that the existence of representative institutions at the political level is insufficient to sustain democracy. For maximum participation by all people at the political level, social training for democracy must take place in other spheres in order that the necessary individual attitudes to democracy can be developed. This requires the extension of participatory systems to other social institutions, and of particular importance in this regard is the workplace,

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<sup>3</sup> Sandberg A *Technological Change and Co-determination in Sweden* (1992) pp 1-6.

<sup>4</sup> Greenberg E *Workplace Democracy* (1989) p 16 states that: ‘Humans are purposeful beings who are capable, if given a chance of making decisions intelligently, who have intentions and purposes, and who can become aware of alternatives and rationally choose among them. People are potentially self-determining: and to be placed in a setting where others direct all essential aspects of their efforts is to be separated from one’s humanness.’

<sup>5</sup> Mitchell A ‘Industrial Democracy: Reconciling theories of the firm and state’ (1998) 14 (1) *The International Journal of Comparative Labour Law and Industrial Relations* pp11-14: writes that in modern industrialized western countries, liberalism is the dominant ideology. Although it is difficult to define liberalism, it embodies the following: liberty, according to which individuals should have the maximum freedom that is compatible with an equivalent level of freedom for all other individuals. Individualism, is in recognition of the fact that human beings are inherently self-interested and self-reliant. Therefore society must be organized to allow individuals to realize their full potential, utilize their talents and skills, and pursue their own ends in order that society may function better as a whole. Although individualism seeks to protect liberty of the individual, certain limitations must be imposed on individualism in order to ensure maximum liberty for all. Finally equality, according to which people must have an equal opportunity to influence decisions by means of a democratic process. This protects them from unwanted decisions which may regulate their lives.

<sup>6</sup> Rothschild J *et al The Cooperative Workplace* (1986) where they state that: ‘Indeed, some of the major architects of western political thought, such as Rousseau, J.S Mill, and twentieth-century theorists like G.D.H. Cole argued that direct participation by citizens in government and other institutions is crucial for a democratic society.’

<sup>7</sup> Pateman C *Participation and Democratic Theory* (1970) pp 22-43.

where most adults spend the greater part of their working lives.<sup>8</sup> Unfortunately workplaces, just like other social institutions, are organised hierarchically and the political system is built on representative democracy. This organisational set-up is based on the one-sided understanding of the ‘classic democratic theory’ being representative democracy, which was stressed by scholars like Bentham, Locke, and James Mill. According to them, the participation of the populace should be limited to voting and discussion of issues.<sup>9</sup> Such a view makes participation only relevant to the political sphere and irrelevant in the workplace. This understanding of participation poses a very serious threat to democracy, because as many commentators have argued, corporations have always had the potential to distort democratic processes through their control of the working lives of big groups of employees.<sup>10</sup> Motivated by this threat to democracy, the struggle to democratise the workplace has been evidenced in many stages of history, emphasising its importance.

In fact, the idea of employee participation is not new, it goes back to the industrial revolution. According to Vanek,<sup>11</sup> the idea of employees’ participation in decision-making emerged as an intellectual reaction to the evils of modern capitalism. The earliest ideas of employee participation were formulated by utopian socialists including Robert Owen in England, Saint-Simon, Charles Fourier, and the spiritual father of anarchism, Pierre Joseph Proudhon, in France.<sup>12</sup> Fourier and Owen advocated the establishment of autonomous communities to be organized by employees for their own good. For the anarchists, employees’ communities provided a response to the increasing alienation in the bleak conditions of the industrial environment. After World War 1 workers’ and soldiers’ councils emerged in Russia, Hungary, Poland, Italy, Germany and Bulgaria, by means of which the warmongering bourgeois states had been severely undermined, and revolutionary

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<sup>8</sup> Rothschild *op cit* note 6 p 13.

<sup>9</sup> *Ibid* p 14.

<sup>10</sup> Mitchell *op cit* note 5 p10, writes that: ‘ as corporations increase in size and economic power, this possibility may shift to the level of the state. Not only can corporations influence the choices and habits of employees, they now have the opportunity to influence the choices of government in a manner inconsistent with traditional notions of political democracy. Moreover it must be remembered that whatever the preferred ideology regarding the value of democracy and state regulation of business, the goal of individual corporations generally remains profit maximization. Therefore if subrogating democracy improves profit, there may be little to dissuade managers from choosing that option.’

<sup>11</sup> Vanek J *Self-management: economic liberation of man* (1975) pp 16-17.

<sup>12</sup> Bayat *op cit* note 1 p 3.

movements had spread throughout the continent.<sup>13</sup> In these countries the struggle for employee participation assumed two organisational forms: factory committees and councils. The third episode in the struggle for employee participation in Europe occurred in the 1950s in countries which after World War 2, and in the support of the Union of Soviet Socialist Republics (USSR) under Stalin, took a non-capitalistic road to development.<sup>14</sup> Amongst these countries we can count Poland, Hungary, Yugoslavia and other Eastern European countries. In these countries employees managed state enterprises and had rights to take decisions in important affairs, to express opinions, take initiatives, put forward recommendations and exercise control over the activities of the enterprises. The fourth historical stage took place in the 1960s as capitalist Europe experienced a significant growth in the economic militancy of the working class. In countries like Sweden and West Germany, the passivity of employees was broken and the weapon of the strike was rediscovered by the trade unions.<sup>15</sup> However, one of the most significant steps in employee participation in the present decade has been the adoption of the social charter of the European Community. This document calls for the representation of employees on the boards of large enterprises within the European Community.<sup>16</sup> The need for employee participation has not been confined to European countries, Japan and the United States of America (USA) have also realised the need for the inclusion of employees in the decision-making process. This is as a result of the developments in technology which have far-reaching implications for industrial relations.<sup>17</sup> In Japan there was a feeling that in order for employees to function smoothly in the new conditions, an understanding of the operations of the workplace was necessary. This understanding was to be obtained through the involvement of employees in decision-making.<sup>18</sup> In

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<sup>13</sup> *Ibid* p 16.

<sup>14</sup> *Ibid* p 18.

<sup>15</sup> *Ibid* p 20.

<sup>16</sup> *Ibid* p 22.

<sup>17</sup> Poole M *Towards a New Industrial Democracy* (1986) p 135 writes that: 'The so-called micro-electronic revolution has had far-reaching repercussions for industrial relations. Almost invariably the introduction of new technology is accompanied by extensive consultation, but in some companies new technology agreements have been signed which involve extensive trade union involvement in the implementation and (and sometimes the planning) process.'

<sup>18</sup> Kazuo O 'Workers' conditions and the functioning of trade unions in Japan under the conditions of contemporary technological changes' - paper presented to the International Round Table on Workers participation and trade unions in conditions of contemporary technological change, Belgrade (12-13 September 1988) pp 8-9.

the USA data shows that technology tended to encourage employee participation in two ways: through economic pragmatism, that is, a trade-off between the employment of the new technology by capital and some involvement in the organisation of work by employees. Secondly, there is evidence that manufacturing technology will work better when built into a system of participative management, in which employees are involved.<sup>19</sup>

South Africa has also not escaped the need for employee participation. The struggle for workers' control has long been the strategy of South African trade union federations like COSATU and its affiliates both against apartheid and the present socio-economic transformation, to achieve employee participation.<sup>20</sup> According to COSATU, under capitalism, conditions of exploitation and unemployment are realities facing every employee at all times. In fact in the 1980s there was a recognition that in South Africa, the introduction of new capital-intensive technology rendered the workers weak. Therefore there was a need to wage a democratic struggle in order to achieve employee participation in the decision-making process. This was seen by the South African labour movement as part of a broader societal struggle against an undemocratic apartheid system. According to COSATU leader at the time, Naidoo,<sup>21</sup> employees had to strive for a democratic socialist society controlled by the working class. Although employees had made employee participation part of their struggle, it was not legislated into law under the Nationalist Party government. However, employers and employees took some initiatives to achieve employee participation. There is evidence of such initiatives in the 1980s which can be considered as a foundation for the present day employee participation discourse. Smith<sup>22</sup> gives a detailed account of Volkswagen South Africa's holistic approach to worker participation. In the early 1980s VW SA experienced several work stoppages as a result of strike actions by NUMSA. By 1986 the company had to change its philosophy and thus adopted employee participation. This moved the

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<sup>19</sup> Steven D 'New Technology: union strategies and worker participation' (1986) 7 *Economic and Industrial Democracy* pp 529-39.

<sup>20</sup> Ramaphosa C 'Opening speech to the inaugural congress of COSATU' (1986) 35 *Review of African Political Economy* p 79. Also see September Commission Report 'From apartheid to democracy in the workplace strategic engagement for change' <http://www.cosatu.org.za/congress/sept.ch6>.

<sup>21</sup> Yunus C 'COSATU: towards disciplined alliances' (1987) 40 *Review of African Political Economy*, p 87.

<sup>22</sup> As referred to in Anstey M *Worker Participation* (1990) pp 225-44.

company away from the conflict that characterised its relations with the employees. Another example is given by Dewer<sup>23</sup> of 'Total worker involvement at Toyota.' This system was adapted from Japan and it encouraged the total involvement of employees in quality circles, the aim of which was to create thinking people within the workplace. Other attempts were by means of the Anglo American Group's employee shareholding schemes.<sup>24</sup>

The foregoing shows that employee participation in South Africa has roots in voluntary initiatives by some employers and unions particularly in the 1980s. The courts have also developed some principles of employee participation in decision-making under the LRA 28 of 1956, particularly through the unfair labour practice jurisdiction. However, it was not until 1993 that a legal foundation for the legislation of employee participation was set, through the Interim Constitution of the Republic of South Africa Act 200 of 1993. This constitution provided the foundation for the democratic transformation of all South African institutions. It was partly on the basis of the quest for democracy in the workplace on the part of the unions and improvement of productivity on the part of government that employee participation was to be legislated.<sup>25</sup> Employee participation saw its way into the statute books in 1995 under the Labour Relations Act 66 of 1995. The objective of this thesis is therefore to evaluate the extent to which the LRA is providing the answer to employee participation in decision-making.

### 1.3 OUTLINE AND APPROACH

The subject is dealt with in seven chapters. The first part consists of the philosophical antecedents of worker participation (Chapter 2). These are examined mostly through the concepts of democracy, industrial democracy, the different forms of participation and industrial relations theories.

Chapter two is followed by a jurisprudential analysis of employee participation in decision-making in South Africa. This is traced through a summary of the previous legal regime, particularly the Labour Relations Act 28 of 1956 and the historical underpinnings of the Labour Relations Act

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<sup>23</sup> *Ibid* pp 245-55.

<sup>24</sup> *Ibid* pp 257-69.

<sup>25</sup> This shall be discussed in detail in Chapter 2 below.

66 of 1995 (Chapter 3).

Thirdly, an evaluation is made whether the LRA 66 of 1995 achieves employee participation. This is done through analysing the following aspects of the Act, disclosure of information (Chapter 4), consultation prior to dismissal for operational requirements (Chapter 5), collective bargaining (Chapter 6) and workplace forums (Chapter 7).

The thesis concludes (Chapter 8) with reflections on whether the LRA 66 of 1995 is the answer to employee participation in decision-making and with indications of how the Act can be reformed in order to achieve more employee participation in decision-making.

Where possible there will be a comparative analysis with other jurisdictions like Germany, the Netherlands and others.

### 1.3.1 Germany

The German system has been chosen for its emphasis on workers' rights to participate in decision-making at the workplace. The principle of co-operative governance with employees is stressed more than the conflict of interests between labour and management. This can be seen in the intensive consultation with works councils and co-determination practices which compare well with the concept of consultation and joint decision-making under the LRA 66 of 1995.

### 1.3.2 Netherlands

The Dutch system has been chosen for the firmly established works councils which have to be consulted over a variety of matters, and which may compare with our workplace forums. For instance, employers are expected to consult with works councils on major decisions like mergers, closures, changes of location or important re-organisations.

Reference to the above-mentioned countries, does not exclude reference to jurisdictions like Britain, USA and others in respect of their well-developed collective bargaining jurisprudence and principles that support employee participation.

#### 1.4 SOURCES AND METHODOLOGY

Although the LRA is a new legislation, sources will be drawn from recent published work on the Act. There is also some published work in Industrial Relations on employee participation which is referred to. In order to make an extensive analysis, reference is also made to foreign sources for comparison. Any relevant South African case law is also relied upon in order to trace the development of employee participation prior to the promulgation of the LRA 66 of 1995. The facts of the respective cases are outlined where necessary for purposes of illustration.

## **CHAPTER 2**

### **THE PHILOSOPHY OF EMPLOYEE PARTICIPATION IN DECISION-MAKING**

#### **2.1 INTRODUCTION**

In order to avoid any misinterpretation, the definition of a concept must be canvassed if it is to be subjected to some theoretical analysis. Since the subject matter of this thesis is employee participation in decision-making, in relation to the LRA 66 of 1995, concepts like participation and decision-making will be defined. Participation can best be defined with an understanding of both political and industrial democracy. Since for a long time now trade unions have dominated the employee and employer relationship, it is important to highlight the effect they may have in the participation discourse. Finally, the corporate decision-making structures also have to be explained, because they may determine the success of employee participation in decision-making.

#### **2.2 POLITICAL DEMOCRACY**

In defining political democracy, Nel<sup>26</sup> states that:

‘[P]olitical democracy refers to the extent to which an individual or a group of individuals are involved in the making and execution of decisions concerning the primary concerns of their particular society or community. The majority or minorities of that particular community are able to participate in governance through an orderly and peaceful way accepted as legitimate in that society .’

The above definition indicates one of the elements of democracy, which is the participation of individuals in the making of decisions concerning their society.<sup>27</sup> The issue of popular participation in decision-making in society, has been the subject of much debate amongst several theorists. Liberal democratic theorists like John Locke, have suggested that individuals in society have to surrender their power to a few individuals who govern and make decisions on their behalf.<sup>28</sup> This

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<sup>26</sup> Nel P S ‘A Critical Overview of the Concepts, Democracy, Industrial Democracy, Participation and Representation’ (1984) 8 (1) *SAJLR* p 4.

<sup>27</sup> Mitchell A ‘Industrial democracy: reconciling theories of the firm and state’ (1998)14 (1) *The International Journal of Comparative Labour Law* pp 15-16 writes that: ‘Broadly, democracy is a theory of government that attempts to link the government to the people. It is based on a belief in the value of the individual human being, and so it demands that the citizen is regarded as the sovereign of the state, and has the right to decide matters of general concern.’

<sup>28</sup> *Ibid* p 18.

limited conception of democracy was also shared by theorists like Dahl,<sup>29</sup> Ekstein,<sup>30</sup> and Schumpeter,<sup>31</sup> who like Locke suggested that democracy should be confined to the national or political sphere. Schumpeter's views will be concentrated upon. Schumpeter's criticism of popular participation in decision-making was that it was based on an empirically unrealistic foundation. For Schumpeter democracy was a process of arriving at political decisions in which individuals acquire the power to make decisions through a competition for the peoples' vote.<sup>32</sup> This approach to democracy confines the participation of the citizens to the voting for leaders and discussion of political issues. Therefore for the liberal democratic theorists, there is no central role for participation in democracy. All that is required is that the populace should elect a few leaders who will make decisions. Schumpeter goes to the extent of saying that the electorate is incapable of action other than a stampede.<sup>33</sup> This conception of democracy undermines the importance of participation as a fundamental democratic principle. Perhaps the most relevant theory of democracy to participation is the radical democratic view. According to the radical view, democracy should not be confined to the political sphere, but should be extended to both the economic and social spheres.<sup>34</sup> This approach to democracy requires the participation of all individuals at all levels. The views of the school of participatory democracy, which includes scholars like Rousseau, Mill and Cole support the radical approach to democracy. For Rousseau the entire political theory of democracy rests on the individual participation of each citizen in the decision-making process.<sup>35</sup> Unlike Schumpeter, Rousseau advocates direct participation of the citizens and a representative system. This participation will ensure that the citizens share the benefits and burdens that confront them, thus contributing to acceptable policy to deal with their concerns. The logic of democratic participation according to Rousseau is that the individual is

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<sup>29</sup> Dahl R A *Preface to Democracy* (1956).

<sup>30</sup> Ekstein H A *Theory of Stable Democracy* (1966).

<sup>31</sup> Schumpeter J A *Capitalism, Socialism and Democracy* (1943).

<sup>32</sup> *Ibid* p 269.

<sup>33</sup> *Ibid* p 283.

<sup>34</sup> Mitchell *op cit* note 27 pp 16-17.

<sup>35</sup> Pateman C *Participation and Democratic Theory* (1970) p 22.

forced to deliberate issues with his will in order to avoid the implementation of inequitable decisions by others.<sup>36</sup> In addition to this approach, Mill specifically points to the integrative function of democratic participation, when he says:

‘Through political discussion the individual becomes consciously a member of a great community and that whenever he has something to do for the public he is made to feel that not only the common will is his will, but it partly depends on his exertions.’<sup>37</sup>

Mill’s main contribution to the participatory theory of democracy is contained in his view that it should also cover industry. He came to see industry as another area where the individual could gain experience in the management of collective affairs.<sup>38</sup> Mill saw some form of co-operation in the workplace as inevitable, particularly as employees acquired more rights. The most significant contribution of the three cited scholars is that of Cole. For him industry held the key to unlock the door to democracy. His theory is based on his view that society is a complex of associations held together by the will of its members and argues that human beings must participate in the organisation and regulation of their associations.<sup>39</sup> According to Cole,<sup>40</sup> the democratic principle must be applied:

‘Not only or mainly to some special sphere of action known as “politics”, but to any and every form of social action, and, in special, to industrial and economic fully as much as to political affairs.’

The liberal and the radical democratic theories explain the characteristics of democracy which constitute the basis for employee participation in decision-making. However, the weakness of representative democracy as advocated by the liberals, is that it ignores the importance of popular participation. Meanwhile the radical and the participatory theories of democracy provide a sufficient philosophical basis for industrial democracy and employee participation in decision-making in the workplace.

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<sup>36</sup> *Ibid* p 25.

<sup>37</sup> *Ibid* p 33.

<sup>38</sup> Mill J S *Collected Works*, Robinson J M ed (1965) p 792 writes: ‘A co-operative organization would lead to friendly rivalry in the pursuit of a good common to all; the elevation of the dignity of labour; a new sense of security and independence in the labouring class: and the conversion of each human being’s daily occupation into a school of the sympathies and the practical intelligence.’

<sup>39</sup> Pateman *op cit* note 35 p 36.

<sup>40</sup> Cole G H D *Guild Socialism Restated* (1920a) p 12.

South Africa being a democratic state is defined as such by her adherence to the above-mentioned principles of democracy. However, South Africa could still be described as a constitutional democracy based on the supremacy of the constitution, as stated in section 2:<sup>41</sup>

‘This constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’

In South Africa it is the constitution which entrenches democratic norms in every sphere of life as evidenced by the preamble to the constitution<sup>42</sup> which states that:

‘We... Adopt this constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental justice.’

It may be fairly concluded that, in line with the radical or participatory theories of democracy, democratic values have to be practised in South African workplaces. Section 23 of the constitution<sup>43</sup> fortifies this view by providing for labour relations rights which will encourage a democratic ethic in workplace relations between employers and employees. Clearly therefore democratic principles in South Africa should permeate every facet of life so that the meaning of democracy is fully realised.

### 2.3 INDUSTRIAL DEMOCRACY

In the workplace, democracy is translated into industrial democracy which Bolweg<sup>44</sup> defines as: ‘[T]he extent to which workers and their representatives influence the outcome of organisational decisions.’

According to Nel<sup>45</sup> this definition has two central elements:

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<sup>41</sup> Constitution of The Republic of South Africa Act 108 of 1996.

<sup>42</sup> *Ibid* ( Preamble).

<sup>43</sup> *Ibid* Section 23 provides that: (1) Everyone has the right to fair labour practices.  
(2) Every worker has the right-  
(a) to form and join a trade union;  
(b) to participate in the activities and programs of a trade union; and  
(c) to strike.

<sup>44</sup> Bolweg J F *Job Design and Industrial Democracy* (1976) p 91.

<sup>45</sup> Nel *op cit* note 26 p 6 writes ‘in a wider sense industrial democracy is practiced where workers voice their opinions and make suggestions to the employer on issues which affect them. The employer gives serious consideration to these opinions and suggestions, but reserves the right to undertake the final decision-making. In the narrow sense, it means that both parties share equally in all decisions which affect the attaining of organizational goals. Workers and employers are then held jointly responsible for the outcome of such decisions.’

(a) the opportunity of employees to influence decisions, which indicates their power within the workplace; and

(b) the impact of employees' involvement in decisions in the workplace, which refers to the number of organizational decisions they exert influence on and their importance from the employees' position.

The concept of industrial democracy is determined by the socio-political and economic environment prevalent in society at a particular time.<sup>46</sup> But one clear consequence it has is the challenge to managements' traditional prerogative to manage and make decisions regarding the workplace and employees.<sup>47</sup> Initiatives to implement industrial democracy have been said to be separated into two groups: 'control through ownership' and 'control against ownership.'<sup>48</sup> Control through ownership, provides for the employees to be joint owners with the shareholders of the company. By so doing the employees are able to have direct control of the workplace.<sup>49</sup> The extent of control that the employees will enjoy depends on the percentage of shares they hold. More shares means more control and fewer shares means less control. Control against ownership, unlike control through ownership, does not accept that shareholders have the right to control the workplace.<sup>50</sup> This initiative extends the right to control the workplace to the employees through disclosure of information, consultation, joint-decision making and the creation of employee forums for this purpose. Another important aspect of this initiative is the level at which employees are to participate in the decision-making process. This level is dependent upon the directedness of the control and the matters on which employees are expected to participate in deciding.<sup>51</sup>

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<sup>46</sup> Bendix S *Industrial Relations* 2ed ( 1992) p 128: 'As a result of the socio-political and economic transition and changes in individual values and attitudes, the labour relationship has come to be viewed not merely as an economic relationship in which one party is an author of decisions and the other the executor of such decisions, but more as a socio-economic partnership where both parties have equal rights, where the decision-making process is shared between managers and employees.'

<sup>47</sup> Mitchell *op cit* note 27 p 5.

<sup>48</sup> *Ibid* p 5.

<sup>49</sup> *Ibid* p 6. Also see Anstey *Worker Participation* (1990) pp 257-269 on the Anglo-American initiative on employee shareholding schemes.

<sup>50</sup> Mitchell *op cit* note 27 p 6.

<sup>51</sup> *Ibid* p 7.

Although industrial democracy is about the sharing of decision-making in the workplace, trade unions were for a long time not intent on sharing this responsibility with management and have constantly challenged it through collective bargaining.<sup>52</sup> South African labour relations has also experienced this undesirable polarisation between labour and capital in particular during the 1980-1993 period, when labour participated extensively in the political upheavals in the country. This obviously impacted on the workplace, as collective bargaining and the freedom to strike were utilized to influence decision-making.

However the importance of industrial democracy has now been translated into legislation through the LRA 66 of 1995, of which section 1 provides:

‘The purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act ...’

It is evident that the LRA seeks to entrench democratisation in the workplace, in particular, by providing for employee participation in decision-making. A comparative study will show that South African labour law compares well with mature democracies. For instance, in Germany the government has legally entrenched joint decision-making at the highest level of the enterprise, as well as participation by employees at the shopfloor. Their system of co-determination and participation is coupled with the constitutional protection of the right to bargain collectively and a highly centralised trade union movement. In Britain, due to her commitment to the European Community, trade unions have moved towards embracing the idea of employee participation in decision-making at the higher organisational level since they see it as inextricably linked to trade unionism.<sup>53</sup> However, there is no constitutional or statutory entrenchment of these values of participation.

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<sup>52</sup> Van Niekerk A *et al* ‘Worker Participation: sharing the right to decide’ (1995) 4 *CLL* p 52 say: ‘For their part, unions often distrust management initiatives in seeking agreement on co-operative processes and are concerned that they will be employed to challenge union power and undermine collective bargaining. They also fear “co-option” by management.’

<sup>53</sup> Prentice D ‘Employee Participation in Corporate Government: A critique of the Bullock Report’ (1978) 56 *The Canadian Bar Review* p 283 writes: ‘[O]ver the last decade there has been a change of attitude by the trade union movement to employee participation in corporate management and in 1973 the Trade Union Congress published a report favoring parity co-determination, that is, that employees should have equal representation with shareholder representatives on company boards. The reasons for this change were probably (i) a feeling that certain corporate decisions of critical importance to employees were not, and probably could not, be covered by collective bargaining; (ii) British entry into the European Economic Community, where co-determination is widespread and accepted by the trade union movements of the relevant member states...’

Clearly therefore, legislation is the means by which countries have opted to promote industrial democracy. Not only is special legislation enacted, there is also a constitutionalisation of industrial democracy as in the case of Germany. Perhaps this indicates the importance that is attached to industrial democracy.

## 2.4 PARTICIPATION

From the discussion of theories of political and industrial democracy two concepts have emerged, namely, participation and representation. Since the thesis is about participation, this concept shall be discussed. However, before defining participation, it is important to indicate the persons entitled to participate in a decision-making process. Mitchell<sup>54</sup> utilizes the ‘all-affected principle’ in outlining the persons who are entitled to participate in decision-making in any society, association and organisation. According to this principle, anyone who will be affected by any decision is entitled to participate in that decision-making process. Since employees are always affected by the decisions that are taken by management on any aspect of the workplace, it follows that they should be entitled to participate in the decision-making process.

Although there has been a brief discussion of participation under political democracy, it is important to define what participation in decision-making at the workplace is. According to Nel<sup>55</sup> participation approached from the point of view of western democracy refers to:

‘[T]he involvement of one group of employees (usually workers) in the decision-making processes of the enterprise which has traditionally been the responsibility and prerogative of another group of employees (usually managers).’<sup>56</sup>

Sawetell<sup>57</sup> also says:

‘[P]articipation is any or all the processes by which employees other than managers contribute positively towards

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<sup>54</sup> Mitchell *op cit* note 27 p 18.

<sup>55</sup> Nel *op cit* note 26 p 8.

<sup>56</sup> For further definitions of employee participation refer to: Chetty T ‘Worker Responses to New Forms of Management’ (1995)15 *IRJSA* p 99. Jain C H *Worker Participation :success and problems* (1980) p 4, Anstey M *Worker Participation* (1990) pp 3-5. Bendix S *Industrial Relations in South Africa* 3 ed (1996) p 130.

<sup>57</sup> Sawetel R *Sharing our Industrial Future?*(1968) p 1.

the reaching of managerial decisions which affect their work.’

In the above definitions of participation there is a recognition of the existence of managers<sup>58</sup> whose role is to control and direct the operations of the workplace. The whole point about industrial participation is that it involves an alteration of the authority structure and the management prerogative in which employees play no part.<sup>59</sup> The International Labour Organisation maintains that the concept of employee participation in the decisions of the enterprise is an appropriate approach, because it has the advantage of giving employees influence in such decisions.<sup>60</sup> According to Nel<sup>61</sup> the concept of participation primarily consists of three interrelated elements, which may be manifested in the decision-making process in the workplace. These elements are :

(a) Influence, which refers to the ability to produce an effect in a direct or indirect way. This effect should result in a decision which reflects the input of all parties involved in the decision-making process, which is of paramount importance in participation;<sup>62</sup>

(b) Interaction, concerns the problem-solving activity of both the employer and employees, which constitutes the crux of employee participation in the decision-making process.<sup>63</sup>

(c) Information sharing, means that if the employer wishes to interact meaningfully with workers, he must make information available to them.<sup>64</sup>

Therefore, a definition of participation should cover the above-mentioned elements as they indicate issues which will be identified in the examination of the extent to which the LRA 66 of 1995 enhances employee participation in decision-making.

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<sup>58</sup> Odaka K *Towards Industrial Democracy* (1975) p 7.

<sup>59</sup> Pateman *op cit* note 35 p 68.

<sup>60</sup> Article 3 of Communications Within the Undertakings Recommendation R129 of 1967.

<sup>61</sup> Nel *op cit* note 26 p 8.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

Participation in industrial relations manifests itself in two different forms: direct participation<sup>65</sup> and indirect employee participation.<sup>66</sup> Indirect participation under the LRA 66 of 1995 would include workplace forums, mandatory consultation, joint decision-making and information disclosure. Sometimes indirect participation is supported by representative participation, which encapsulates collective bargaining.<sup>67</sup> Therefore the most appropriate working definition for this thesis is:

‘Participation refers to influence in decision-making exerted through a process of interaction between workers and managers and based upon information sharing.’<sup>68</sup>

This definition is wide enough to cover an evaluation of the extent to which disclosure of information, consultation during retrenchment, workplace forums, consultation, joint decision-making, and collective bargaining in the LRA 66 of 1995 will enhance employee participation in decision-making.

## 2.5 DECISION-MAKING

Having defined what participation is, it is imperative to briefly outline what decision-making means. Decision-making is a concept that has been analysed in the field of management by scholars like Frederick Taylor, who asserted that management alone had the intelligence and knowledge to organize the work processes in order to obtain maximum productivity.<sup>69</sup> Traditionally decision-making was the responsibility of managers who, according to Henri Fayol, had the right to give orders and the power to require obedience from every employee.<sup>70</sup> Therefore,

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<sup>65</sup> Direct worker participation should include the following: the provision of all information relevant to his job. Consultation particularly about changes that may affect him. A personal involvement in the decisions at his own level’ see Bell D W *Industrial Participation* (1979) p 5. This usually takes place at the lowest level of the workplace particularly concerning the immediate tasks of the employee and is aimed at reducing job alienation.

<sup>66</sup> Indirect employee participation takes place through the existence of various statutory bodies within the workplace. It takes place when in addition to their operational functions within the enterprise, employees represent the labour force for example, in management boards, boards of directors, supervisory boards, works councils and works committees: see Nel *op cit* note 27 p 11.

<sup>67</sup> Representative participation includes collective bargaining through a trade union, joint consultation through works council machineries and worker directors through machineries established by legislation. See Guest D *et al Putting Participation Into Practice* (1979) p 24.

<sup>68</sup> Wall T D *et al Worker Participation: a critique of the literature and some fresh evidence* (1977) p 38.

<sup>69</sup> Bluestone B *et al Negotiating The Future: A labour perspective on American Business* (1992) p 125.

<sup>70</sup> Duncan W J *Management: Progressive, Responsibility in Administration* (1983) p 24.

decision-making in the workplace was based on the right of the managers to manage.<sup>71</sup> Our common law also recognised that one of the defining elements of the employment relationship was the power of control that an employer had over the employee.<sup>72</sup> The Appellate Division had gone so far as stating that the control was not confined to the determination of the product of the employee's labour, but also covered the manner in which the work had to be done.<sup>73</sup> It is, however, doubtful that the position of the AD will still be appropriate in light of the technological developments which encourage specialisation and independence in the performance of tasks.<sup>74</sup> The Industrial Court under the LRA 28 of 1956 could enquire into the exercise of such managerial rights.<sup>75</sup> The fact that the IC could enquire into the exercise of the managerial prerogative shows that there are limitations to it, which call for a clear understanding of the different areas in which

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<sup>71</sup> According to *Bluestone op cit* note 69 p 120, to manage may mean to 'make obedient' or 'to boss'. But managing can also mean 'to guide' or 'to coordinate', implying a more cooperative and even democratic mode of control.

<sup>72</sup> In *Colonial Mutual v Macdonald* 1931 AD p 412 it was held that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling workman under the contract. See also *Mhlongo and Another v Minister of Police* 1978 (2) SA 568 (B-C). *Brassey M S M et al The New Labour Law* (1987) p 74 write that: 'The law gives the employer the right to manage the enterprise. He can tell the employees what they must and must not do, he can say what will happen to them when they disobey. He must, of course, keep within the contract, the collective agreement and the legal rules that govern him. He must, now, also make sure his instructions do not fall foul of the unfair labour practice jurisdiction.'

<sup>73</sup> In *R v A.M.C.A. Services Ltd and Another* 1959 (4) SA 202 (AD) at 212, Schreiner, JA said: '[T]he first test to consider is that which I generally regard as the most important for the purposes of deciding whether a person is a servant at common law, namely, whether the employer has the right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is done.' In the USA the powers of the employer are defined in a limited way compared to the position in our common law. Former USA Supreme Court Justice Arthur Goldberg observed that: '[The right to direct] is a recognition of the fact that somebody must be boss, somebody has to run the plant. People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do. However this right to direct or initiate action does not imply a second class role for the union. The union has the right to pursue its role if representing the interest of the employee with the same stature accorded it as is accorded management. To ensure order, there is a clear procedural line drawn, the company directs and the union grieves where it objects.' Goldberg *A Management's Reserved Rights: A labour law view*, proceedings of the 9th Annual General Meeting of NAA pp 120-121.

<sup>74</sup> Poole M *Towards a New Industrial Democracy* (1986) p 135.

<sup>75</sup> *Clarke v Ninian and Lester (Pty) Ltd* (1988) 9 ILJ 651 (IC) where the defendant submitted that the Industrial Court had very limited powers to interfere with decisions of management, as management alone is entitled to administer the organisation the way it thinks best for the company even if it entails adverse hardship to the employees (654J). De Villiers M did not agree with the foregoing position, because the Industrial Court was empowered to hear matters involving 'managerial prerogative.' The court also endorsed Brassey's description of managerial prerogative (655B-E).

it can be exercised, because each of these areas poses its own limitations.<sup>76</sup>

When employers exercise the management prerogative of decision-making they are involved in the planning process of the workplace, which requires the selection of a course of action from among alternatives. Rue *et al*<sup>77</sup> define decision-making as:

‘A process that involves searching the environment for conditions requiring a decision, developing alternatives, and then selecting a particular alternative.’

In this context, according to Koontz,<sup>78</sup> decision-making might be thought of as premising, identifying alternatives, the evaluation of those alternatives in terms of the goal sought and the choosing of an alternative. It is clear that the decision-making process requires a rational selection of a course of action, which has sometimes been seen as problem-solving.<sup>79</sup> This process requires the parties involved to be aware of their goals, to have information about alternatives and to have a desire to attain a solution. Perhaps an understanding of decision-making which supports the subject matter of this thesis is offered by Bluestone *et al*<sup>80</sup> when they say that decision-making,

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<sup>76</sup> *Checkers SA Ltd (South Hills Warehouse) v SA Commercial Catering and Allied Workers Union* (1990) 11 ILJ 1357 (ARB) where the arbitration concerned a supervisor at Checkers who was dismissed for refusal to obey an instruction. The question was whether the instruction of the employer was lawful and reasonable. Part of the employer’s argument was that the employee should have obeyed the instructions as the employer relied on the company’s prerogative to manage its business (1364 H). In deciding the case Cameron A pointed out that, one must be careful to distinguish between the various areas in which managerial prerogative may come to play. The concept may variously be relevant to business decisions, to discipline or to an individual employee’s ambit of responsibility (1365D). Firstly, management has the prerogative to manage the business, meaning that management has a decisive say over the conduct of the enterprise and over all business and commercial decisions (1365E). Secondly, arising from the foregoing, is management’s prerogative to impose reasonable and fair disciplinary regulations upon its workforce. Two limitations apply here: firstly, management has been subjected to an obligation to enter into negotiations with a representative union, see *SA Chemical Workers Union and Others v Cape Lime Ltd* (1988)9 ILJ 441 (IC) and *Metal and Allied Workers Union v Transvaal Pressed Nuts, Bolts and Rivets (Pty) Ltd* (1988) 9 ILJ 696 (IC). Secondly, the rules laid down or requirements imposed must be both fair and reasonable, see *Ntuli and Others v Litemaster Products Ltd* (1985)6 ILJ 508 (IC) 518 and *Building Construction and Allied Workers Union and Another v E Rogers and C Buchel CC and Another* (1987) 8 ILJ 169 (IC) 172-3. Lastly, managerial prerogative may come into play in the lawful ambit of an employee’s responsibilities. Here management’s prerogative to act unilaterally is considerably more restricted than in the other two areas. This restriction is reinforced by paragraph (d) of the past 1988 unfair labour practice definition (1365 H-I). See also the residual unfair labour practice definition in the LRA 66 of 1995 Schedule 7 item 2.

<sup>77</sup> Rue L W *et al Management: theory and application* (1980) p 50.

<sup>78</sup> Koonitz H *et al Management* 8 ed (1986) p 186.

<sup>79</sup> Bluestone *op cit* note 69 p 131.

<sup>80</sup> *Ibid.*

as opposed to strict bureaucratic control, refers to a limited system of employee participation in decision-making. This system provides for an expansion of channels by which employees can voice their concerns thereby providing a role for employees to play in the decision-making process.

## 2.6 EMPLOYEE PARTICIPATION AND LABOUR RELATIONS THEORIES

The employment relationship is a product of a diversity of factors which are a reflection of the socio-economic and political make-up of society. Therefore, for a proper conceptualisation of employee participation in decision-making, it is imperative to elucidate the dynamics of labour relations. The employment relationship, which is an aspect of societal relations, usually manifests itself as a relationship of power in any socio-economic mode of production and as such are *indicia* of the nature of labour law. Labour law could therefore be understood as a mechanism for the regulation of social power inherent in the employment relationship.<sup>81</sup> In describing the power factor involved in the employment relationship, it is stated that:

‘[O]n the labour side, power is collective power. The individual employer represents an accumulation of material and human resources, socially speaking the enterprise, is itself in the sense collective power....’<sup>82</sup>

What labour law does is determine the terrain within which both employers and employees can coexist in their relationship, without allowing their conflicting interests and power contestation to be an impediment to the socio-economic growth of a society. There are, however, some industrial relations theories that explain this employment relationship, the most salient of which are the Unitary, Pluralist and Radical (Marxist) approaches. These are discussed below.

### 2.6.1 The Unitary Approach

According to this approach employers and employees are said to have the same interests. This emanates from their subscription to similar values of the free market enterprise system, respect for management authority, an emphasis on loyalty and diligence. The ultimate aim of all parties

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<sup>81</sup> Piron J ‘Labour law: a new discipline in South Africa’ (1977)10 *CILSA* p 322.

<sup>82</sup> Kahn-Freund O *Labour and the Law* 2 ed (1977) p 6.

is the accumulation of surplus through greater productivity in order for all to get a share. Bendix<sup>83</sup> states that:

‘[T]he prerogative of management is accepted and managers who adhere to this approach do not regard challenges to their authority as legitimate.’

In South Africa this position was held to be valid until the new trade union movement and judgements of the Industrial Court began to challenge the absolutism of management prerogatives.<sup>84</sup>

Since employee participation is all about the limitation of the management prerogative through for instance consultation, joint decision-making, collective bargaining and other means, this approach does not support the concept. This is particularly so because managers who adhere to this theory see any challenge to their authority as illegitimate. This illegitimacy of employee participation may be founded on the premise that the approach does not acknowledge a diversity of interests between employers and employees.

### 2.6.2 The Pluralist Approach

Contrary to the unitary approach, this approach accepts the conflict of goals between employers and employees, however, it provides a possibility for the achievement of a balance of both interests and power in the employment relationship. Bendix<sup>85</sup> states that:

‘[T]he freedom of association principle, the process of collective bargaining and some measures of joint decision-making are accepted as means by which to achieve a balance of power between the various participants.’

This labour relations theory supports the philosophical validity of employee participation in decision-making as a means to achieve industrial democracy.<sup>86</sup> Although this theory is criticized<sup>87</sup>

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<sup>83</sup> Bendix *op cit* note 46 p 21.

<sup>84</sup> *Ibid*, see also footnote 75 above.

<sup>85</sup> *Ibid*.

<sup>86</sup> Du Toit D ‘Democratising the employment relationship’ (1993) 3 *Stell.LR* p 336 writes that: ‘Pluralism, in other words, does not question the existence of managerial prerogative and its counterpart, the common law subordination of the employee. What it is concerned with is the parameters of that prerogative. Conceived of in these terms the employment relationship must remain adversarial, whether mediated through participatory structures or through collective bargaining.’

<sup>87</sup> Bendix *op cit* note 46 p 21.

for not according real power to employees or trade unions, it still recognizes employee participation in decision-making which accepts a limited managerial prerogative.

### 2.6.3 The Radical or Marxist Approach

This approach rules out any balance of power between management and employees within a capitalist system. According to this school of thought the root cause of the conflict lies in the society that supports the capitalist mode of production. This mode of production results in social, political and legal structures which favour the employer. Bendix,<sup>88</sup> writes:

‘Proponents of this approach regard collective bargaining as an employer strategy aimed at coercing the working class into compliance, and even regards workers’ participation in the decision-making process as an attempt at co-option.’

Clearly under this approach employee participation in decision-making is not seen as beneficial to the struggle of workers, because it supports the capitalist mode of production, which in turn favours employers. According to this approach what is desirable is worker control<sup>89</sup> which can be achieved only after the replacement of the capitalist system by a socialist mode of production.

Having mentioned these theories, it is important to point out that the general approach in countries like Britain, Germany, France and, of late in South Africa, is to opt for a more cooperative relationship between employers and employees. Therefore the law will tend to reflect the interest in cooperative relations between the employer and employees, to the extent to which it is favoured by the prevailing property ideology and the extent to which each group has access to political power.<sup>90</sup>

## 2.7 ARE TRADE UNIONS AGENTS OF EMPLOYEE PARTICIPATION?

The relationship between employees and employers over the years has been defined by the

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<sup>88</sup> *Ibid* p 22.

<sup>89</sup> The application of worker control was well expressed in ‘The Draft Workers’ Charter of the South African Communist Party’ (1990) 14 (6) *SAJLR* p 72, where it is stated that, ‘such control shall be exercised in an over-centralised and commandist way and must ensure active participation in the planning and running of the enterprises by workers at the point of production and through their trade unions.’

<sup>90</sup> Davis D M ‘The Functions of Labour Law’ ( 1980) 1 13 *CILSA* p 214 writes: ‘[T]he role of the law within the above context is essentially that of control and regulation in order to preserve the essential socio-economic structures of society.’

important role of trade unions. The trade unions act as collective representatives of the employees in the collective bargaining process<sup>91</sup> and the question is whether they can effectively promote employee participation in decision-making. This question can be answered by a brief synopsis of what the responsibilities of a trade union are.

Trade unions are representative institutions existing primarily for the purpose of acting on behalf of employees in their dealings with the employer.<sup>92</sup> If trade unions are representative organisations, the employee members have to inform its decisions and if they are to be said to be agents of participation then their members must be able to control the decision-making process within the union. The answer to this lies in the nature of the trade union government. Hawkins<sup>93</sup> writes that union government rests on four principles:

‘First, the rank and file members meet in their branches and elect representatives to an annual conference. Second, the conference decides what the general policy of the union shall be. Thirdly, an elected executive council or committee is responsible for administering the union’s affairs on a day-to-day basis within the policy guidelines laid down by the conference. Finally, a chief executive officer, usually called the general secretary, performs such administrative tasks as are delegated to him by the executive body and supervises the union’s full-time officials.’ The above procedure may not be true for all unions, where instead of the full-time official being elected, such official may be appointed. It is this division of power that has always posed a threat to the full participation of members in the decision-making process within the trade union and militated against trade union democracy.

Since the nineteenth century, the relationship between unions and their members has been a subject of social inquiry.<sup>94</sup> These enquiries are based on the tension that results from collective representation through permanent organisations and the question of representativeness and effectiveness of unions as vehicles for advancing workers’ interests. The starting point for most

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<sup>91</sup> In *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A), Centlivres, J A stated that: ‘ the whole idea underlying the trade union system, which is recognized by the Industrial Conciliation Act, is that the trade union concerned should act as the spokesman of its members whenever a dispute arises between employers and employees.’

<sup>92</sup> Du Toit D *et al The Labour Relations Act of 1995* 2 ed (1998) p 94.

<sup>93</sup> Hawkins K C *Trade Unions* (1980) p 111.

<sup>94</sup> Fosh P *Trade Unions and their members: studies in union democracy and organization* (1990) p1.

discussions is that trade unions, as organisations, develop their own institutional interest which ends up conflicting with the needs of their members. However, there are different schools of thought on this subject. The pluralist, although acknowledging the goal divergence between union leaders and the membership, is much more prepared to acknowledge that unions and their officials genuinely serve the needs of members.<sup>95</sup> The basis for this pluralist position is a conviction that employees need unions to pursue their interests.<sup>96</sup> The Marxists are more radical in their view, because they see trade unions as having been formed by working people to increase their control over the conditions of their working lives. On the basis of this they reject the maintenance of orderly relationships with employers as an overriding priority.<sup>97</sup> The Marxists see the failure of trade unions to represent the interests of employees as based on the fact that once union officials are elected into office they tend to have material interests which differ from those of their members, they become susceptible to gradual capitalist reform programmes and the external forces that determine the priorities of union officialdom.

The foregoing points to the danger posed to employee participation by the use of trade unions in the process. The tendency of trade union bureaucracy is to concentrate power in a minority of union members, mainly the leadership and more often than not resulting in an oligarchy.<sup>98</sup> The law tries to ensure that trade unions honour their duty of fair representation of their members.<sup>99</sup> Over the years the overriding principle of determining the extent to which a trade union represents the views of its members and the extent to which non-union members are bound by their agreements

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<sup>95</sup> *Ibid* p 2.

<sup>96</sup> Webb S *et al Industrial Democracy* (1902) pp 173-4, noted that as part of the pluralist view in meeting the interest of members, union officials may be required to moderate the demands of members in order to increase the chance of obtaining a settlement from the employer and may also be required to demonstrate good faith and enforce compliance once an agreement has been concluded. The search for a settlement in collective bargaining, therefore, can create a divergence of interests between officials and members.

<sup>97</sup> Fosh *op cit* note 94 p8.

<sup>98</sup> Michel R *Political Parties* (1962) writes that there is an irresistible tendency for power to concentrate itself in the upper reaches of every trade union regardless of how democratic its formal constitution may be. The practical need for administrative efficiency must always override the theoretical commitment to popular control.

<sup>99</sup> See further discussion in Chapter 6 below.

has been based on majoritarianism.<sup>100</sup> These problems warrant a critical approach to the analysis of the extent to which the LRA is an answer to employee participation, particularly because there is a great involvement of trade unions in the process.

## 2.8 DECISION-MAKING IN CORPORATIONS

The brief discussion of decision-making in corporations is confined to companies as defined in section 1 of the Companies Act 61 of 1973 which states that :

‘Company means a company incorporated under Chapter IV of the Act and includes any body which immediately prior to the commencement of this Act was a company in terms of any law repealed by this Act.’

The rationale for this limited discussion is that these companies define their interests and have decision-making structures which can limit the achievement of employee participation in workplaces under such corporations.

Rights of corporate control are exercised by the company in a general meeting of members (shareholders), directors through their vote in a board meeting and executive management through the executive power delegated to them. This division of decision-making powers is usually stated in the articles of association of the particular company. However, where equal powers are concurrently assigned to both the meeting of members and the board of directors, it would seem that the final say rests with the members as the superior body.<sup>101</sup> The exercise of this power to control, is an exercise of true property rights to income and capital.<sup>102</sup> Company law recognises the fact that a company is aimed at making profit, hence the joining together of shareholders for their personal gain.<sup>103</sup> However, shareholders are not involved in the day-to-day affairs of a corporation. The task of making decisions for the company rests in the hands of

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<sup>100</sup> *Ibid.*

<sup>101</sup> Cilliers H S *Corporate Law* (1987) p 173 ‘[W]hen a company’s constitution makes no provision for a particular matter the members have inherent power to deal with it. (This is based on the inherent power of a general meeting.)’

<sup>102</sup> Pickering M A ‘Shareholders’ Voting Rights And Company Control’ (1965) *81 LQR* p 248.

<sup>103</sup> Beuthin R C ‘The Range of a Company’s Interests’ (1969) *86 SALJ* p 163 ‘The law it would seem, is content to recognize that a company is in fact an association simply of shareholders who have joined together for their own personal gain. Their target is profit, and it is a target that the directors must constantly set their sights.’

directors who are directly elected or nominated by the shareholders.

The duty of the directors is therefore to make decisions in the best interests of the company which is commonly known as the fiduciary duty of directors.<sup>104</sup> Directors owe the duty to the company alone and not to individual members. Even if appointed by a class of shareholders the directors' duty is to act in accordance with what they consider to be in the best interests of shareholders as a whole.<sup>105</sup> Modern managerial techniques place directors at the hub of the company's business wheels. From this position it is their duty to consider and satisfy not only the interests of shareholders but also those of employees. This therefore means that employee interests could and should be considered in so far as they contribute to the maximisation of the economic interests of the shareholders.

Clearly, therefore, employees are not partners with a company's management in the corporate governance structure. Accordingly their interests and their participation in the decision-making process are necessary to the extent to which they will contribute to the maximisation of profits. However, due to the transformation of society and the advent of labour rights and strong trade unionism, employees have become a very strong voice. Their views impact on the decision-making process of a corporation, so that neglect of them may result in employees lawfully withdrawing their services, thus halting the production of a company. However, Prentice<sup>106</sup> says: '[A]ny proposal designed to give employees an effective voice in corporate management, will radically alter these rights and will transform the prevailing legal relationship between shareholders and the board, and between the board and corporate management.'

Furthermore, giving employees an effective voice in management will severely curtail the ownership rights of shareholders and they (employees) will become theoretical owners of the company.

According to South African company law, as in most western capitalistic societies, the law

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<sup>104</sup> *Robinson v Randfontein Estates* G. M. 1921 AD 168 - according to this case, a director is suppose to act in the best interest of the company and is not to act in conflict to the such interests. This is because he stands in a fiduciary relationship to the company.

<sup>105</sup> Pickering *op cit* note 102 p 254.

<sup>106</sup> Prentice *op cit* note 53 p 284.

recognises and entrenches the power of shareholders to make decisions particularly in sections 179 and 180 of the Companies Act.<sup>107</sup> Employees can exercise such power if they are also shareholders.<sup>108</sup> Sections 179 and 180 deal with the annual general meetings of the company. Section 179(2) in particular deals with these meetings and states that:

‘The general meeting of a company shall deal with and dispose of matters prescribed by this Act and may deal with and dispose of such further matters as are provided for in the articles of the company and subject to the provisions of this Act, any matters capable of being dealt with by a general meeting.’

Although the general meeting has powers to determine the affairs of the company, this power is usually exercised by directors, who are appointed by the general meeting.<sup>109</sup> Generally these powers can also be established in the articles of association of that company. Therefore, even in South African company law, employees are not regarded as part of the company’s management structure. Their interests are attended to by company directors under their broader mandate to manage the company in its best interest. Clearly this requires a new definition of a company’s interests to encompass the interests of workers and structural re-organisation of corporations in order to make employees part of a company’s management structure.<sup>110</sup>

## 2.9 CONCLUSION

The philosophical concern of political and industrial democracy, and the different approaches to labour relations, clearly define the different dynamics surrounding the genuine potentiality of employee participation in decision-making. Furthermore, company law is an important factor in evaluating whether the LRA 66 of 1995 will achieve employee participation in decision-making. While labour law is changing and encouraging employee participation in decision-making, it is

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<sup>107</sup> Companies Act 61 of 1973.

<sup>108</sup> An example can be made of ‘The Anglo American Groups’ Employee Shareholding Scheme’ see Fletcher C in Anstey *Worker Participation* (1990) p 257.

<sup>109</sup> Section 208 (1) provides for the appointment of directors of a public company.

<sup>110</sup> Mitchell *op cit* note 27, p 22 writes that: ‘ The limitations which courts have begun to place on property may indicate an acknowledgment that property can no longer be regarded as an inalienable right. The complexities of modern market economies and corporate structures and the difficulties associated with large numbers of individuals living in close proximity require that property rights be respected where beneficial to society as a whole, and limited where limitations are justified in the interest of society as a whole. Accordingly, democratic principles may require limits to be imposed on property rights.’

important to reform the interests of a company and its structural organisation. This will ensure that obstacles to employee participation in such companies are minimised. Another critical point is the effectiveness of involving trade unions in promoting employee participation in decision-making. If democracy prevails within trade unions then they will be good agents of employee participation. However, if they fail to fairly represent the interests of employees and also allow undemocratic tendencies to prevail within the union structures, they will surely be a threat to employee participation in decision-making.

## **CHAPTER 3**

### **THE JURISPRUDENTIAL UNDERPINNINGS OF EMPLOYEE PARTICIPATION IN DECISION-MAKING IN THE LRA 66 OF 1995**

#### 3.1 INTRODUCTION

The LRA is one of the earliest legislative products of South Africa's constitutional democracy.<sup>111</sup> Therefore, the promulgation of the LRA can be partly attributed to the interim constitution<sup>112</sup> which ushered in a new set of constitutional values impacting on every area of the legal system. However, the LRA should be viewed within its broader historical context, and the present context is defined by the fact that South Africa's priorities have shifted from the struggle for political power to economic and social upliftment of the majority of the people of South Africa. The success of the foregoing is partly dependent upon curing the chronic malfunctioning of the country's economic performance. Labour relations, being one of the most essential components in the improvement of the country's economic performance, has to be transformed. It is within this context that the Labour Relations Act 28 of 1956 and other labour relations statutes had to be repealed. However, the contribution of the previous regime of labour legislations to the understanding of employee participation in decision-making cannot be ignored.

In analysing the jurisprudential background to employee participation under the LRA 66 of 1995, the following matters are covered: the historical developments of our labour law; employee participation under the LRA 28 of 1956 (where the contribution of industrial councils; works councils; works committees; bargaining outside statutory forums; the duty to bargain and good faith bargaining, are considered). The analysis also covers the contribution of: the NEDLAC negotiations; the constitution; international labour law standards and the RDP, to employee

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<sup>111</sup> Du Toit D *et al The Labour Relations Act 1995* 2 ed(1998) p 3 'The Labour Relations Act 66 of 1995 marks a major change in South Africa's statutory industrial relations system. Following the transition to political democracy, the Act encapsulates the new government's aim to reconstruct and democratize the economy and society in the labour relations arena. It therefore introduces new institutions that are intended to give employers and workers an opportunity to break with the intense adversarialism that has characterized their relations in the past. These institutions aim to promote more orderly collective bargaining and greater cooperation at the workplace and industrial level, and to provide a pro-active and expeditious dispute resolutions system.'

<sup>112</sup> The Interim Constitution of the Republic of South Africa Act 200 of 1993.

participation under the LRA. In order to place the jurisprudential background into context, it is essential to outline the mechanisms through which the LRA will enhance employee participation.<sup>113</sup>

### 3.2 HISTORICAL DEVELOPMENTS

The sources of South African labour law are based on the legal precepts of common law under the *locatio conductio operarum*,<sup>114</sup> the British model of trade unionism, conventional labour practices as applied in free market economies and political ideologies applied by successive governments of South Africa.<sup>115</sup> From 1652 when the first European settlers arrived, the South African economy was dominated by agriculture until 1870.<sup>116</sup> Domestic workers and agricultural workers constituted the majority of the labour force.<sup>117</sup> Disputes were not infrequent and common law proved inadequate for the task, thus legislation had to be passed in 1841 to regulate relations between masters and servants.<sup>118</sup>

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<sup>113</sup> The purpose of the LRA creates a clear understanding of its historical underpinnings. Section 1 states: The purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are:

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the constitution (being the interim constitution which has been superseded by section 23 of the new constitution.)
- (b) to give effect to obligations incurred by the Republic as a member state of the ILO
- (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can:
  - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
  - (ii) formulate industrial policy
- (d) to promote:
  - (i) orderly collective bargaining;
  - (ii) collective bargaining at sectoral level;
  - (iii) employee participation in decision-making in the workplace; and
  - (iv) the effective resolution of labour disputes.

<sup>114</sup> *Locatio conductio operarum* was defined in *Smith v Workmen's Compensation Commission* 1979 (1)SA 51 at 556-57 as a consensual contract whereby a labourer, workman or servant as employee undertook to place his personal services for a certain period of time at the disposal of an employer, who in turn undertook to pay him wages or a salary agreed upon in consideration of his services.

<sup>115</sup> Wiehahn N E *The Complete Wiehahn Report* (1982) at xvii-xxvii.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

Apart from accelerating economic development, the discovery of gold brought about a dramatic change in industrial relations and exposed the weakness of the system. The workers who flooded the mines between 1890 and 1913 came mainly from Britain, bringing with them the British experience of trade unionism. These workers put their experience of trade unionism to work in their endeavour to protect their skills and trades against a lowering of standards at the workplace. Consequently the early individualistic labour laws proved inadequate for the regulation of the more complex and collective relationships which had resulted from the surge in industrial development. Thus new legislation<sup>119</sup> had to be enacted which accommodated aspects of the social and economic problems associated with the process of industrialization.

Several amendments and laws on employment followed in ensuing years, resulting in a network of South Africa's family of industrial legislation. However, three of these Acts are of particular importance for the present day understanding of the development of employee participation in decision-making in South Africa-these are: the Industrial Conciliation Act 11 of 1924; the Black Labour Relations Act 48 of 1953; and the Industrial Conciliation Act 28 of 1956.

### 3.2.1 Industrial Conciliation Act no.11 of 1924

This Act was a response by the government to the Rand Revolt of 1922 by white mine workers. Its main contribution was the introduction of collective bargaining, a system of dispute settlement and the regulation of industrial action. It was the same statute that provided for the registration of employers' organisations and trade unions. The Act did not provide for a statutory duty for both workers and employers to bargain, which would have paved the way for a legally prescribed employee influence in decision-making at the workplace. However, the Act promoted voluntary collective bargaining through industrial councils, which only allowed workers to influence employers on decisions concerning distributive issues. The greatest weakness of this Act was the promotion of a racially designed system of industrial relations.

### 3.2.2 Black Labour Relations Act no.48 of 1953

The exclusion of black workers from the Industrial Conciliation Act 11 of 1924, prompted the

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<sup>119</sup> Some legislative products of this era were: Transvaal Industrial Disputes Act of 1909, Mine and Works and the Native Labour Regulation Act of 1911 and Workmen's Wages Protection Act of 1914.

Nationalist Party government to create a separate regime for blacks, being the Act under discussion. In fact, this Act was a product of the Botha Commission of Enquiry appointed in 1948, which recommended the division of unions along racial lines. What is of paramount significance to employee participation in this Act is that it provided for the establishment of workers' committees.<sup>120</sup> Although the committees established by the Act could have provided a sound foundation for employee participation, the problem is that they were confined to reporting and dispute settlement functions and were operating under intensive government control.<sup>121</sup> Consequently these forums were a failure because of the racial motivation for their establishment and the fact that they were seen as substitutes for trade unions.<sup>122</sup>

### 3.2.3 Industrial Conciliation Act no. 28 of 1956

Three years after the Black Labour Relations Act, the Industrial Conciliation Act 28 of 1956 was promulgated. It fundamentally maintained the format of the Industrial Conciliation Act of 1924. Although this Act broadened its scope through the inclusion of coloured workers, it still entrenched the racial divide as did its predecessor.<sup>123</sup> However, it was the uprising in 1973 of unorganised African workers that saw the gradual collapse of the racially exclusive labour relations system. This further entrenched the adversarialism that characterised industrial relations during and after the 1970s. This adversarialism militated against effective participatory structures

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<sup>120</sup> Bendix W 'Workplace Forums: Shadows of a shady past or beacons for reform?' (1995) 15 *IRJSA* p113 '[T]his Act bears some resemblance to the Works Constitution Act passed in the post-Second World War Europe.'

<sup>121</sup> Du Toit *et al op cit* note 111 p 7.

<sup>122</sup> Bendix *op cit* note 120 p 113 writes that: 'Whereas, however, works councils/committees in these western European systems formed the lower tier of two-tier systems, the tier granting employees the right to representation, but not collective bargaining, workers' committees in South Africa acquired the character of a trade union substitute for blacks, and this with an evasion by negative definition and omission of bestowing collective bargaining rights. The two-tier principle, and as such the functional separation between trade unions and workers' committees, became somewhat distorted in its transfer to South African conditions.'

<sup>123</sup> Du Toit *et al op cit* note 111 p 8 'However, the system contained seeds of its own destruction. Its success owed much to an unjust and repressive political dispensation which increasingly used force to maintain stability. Burgeoning African nationalism and political opposition during the 1950s were suppressed for a time with the banning of the African National Congress and other organisations in 1961. Independent unions of African workers effectively ceased to operate when many of their leaders and members were arrested or went on exile.'

in the management of the workplace.<sup>124</sup>

It was not until the reform period in 1977 that the government appointed the Wiehahn Commission of Enquiry to look into the state of labour law. This commission reported in 1979. The most important recommendations, which were enacted into law in 1981, were: (i) that African workers be allowed to join registered trade unions and be directly represented on industrial councils or conciliation boards; and (ii) the protection of individual and collective rights through the new Industrial Court via the unfair labour practice concept.

The above recommendations were enacted into the Labour Relations Act 28 of 1956. It was the legislation of collective rights like freedom of association; the introduction of the Industrial Court; and the unfair labour practice principle, which was to strengthen collective bargaining and establish a foundation for employee participation in decision-making. However, it must be stressed that the 1956 LRA did not expressly provide for employee participation in the making of production related decisions.

### 3.3 EMPLOYEE PARTICIPATION UNDER THE LRA NO.28 of 1956

The Act provided for a mixed system of both central and plant-level bargaining forums in the form of industrial councils and works councils. These forums were also supported by non-statutory forums, which employers and employees formed voluntarily. Each of the bargaining forums is briefly discussed below. The contribution made by the Industrial Court jurisprudence surrounding retrenchment to employee participation, will however be discussed in Chapter 5.

#### 3.3.1 Industrial Councils

Section 23 of the Act created Industrial Councils. These councils enjoyed jurisdiction over all employers and employees in the areas and interests for which they were registered. For their establishment they had to be sufficiently representative of the employers and employees in their respective sectors.

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<sup>124</sup> *Ibid* p 9.

According to section 24(1) a council's first duty was to work to keep industrial peace. This it did principally through the negotiation, supervision and enforcement of broad-ranging industrial agreements. The range of matters over which the councils had jurisdiction included: (i) minimum rates of remuneration and methods of calculating them; (ii) prohibitions of deductions from remuneration or set off debts; (iii) rules relating to piece-work; and (iv) the establishment of pension, sick, medical, employment, and provident funds. The councils also played an important dispute-resolution role in addition to the regulatory function. It is important to note the divergent reasons between employers and employees for committing to the industrial councils.<sup>125</sup> The councils were formed on a voluntary basis, particularly where employer organisations and union representatives saw the benefit of regulating mutual needs at this level. Ideally the parties were supposed to enjoy equal representation on these forums, however, the Act did not provide for this and the matter was left to be decided by the parties when negotiating the council's constitution.

The contribution of industrial councils to employee participation in decision-making was that they provided a forum for the interaction between employers and employees at a central level. This ensured that employees could utilize their collective force to influence decisions at an industry-wide level. It was also the binding force of the industrial council agreements that enhanced the influence of employees in the decision-making process.<sup>126</sup>

### 3.3.2 Works Councils

The Act also provided for the creation of works councils in section 34A(2), which stated that works councils:

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<sup>125</sup> Cameron E *The New Labour Relations Act* (1989) p 10 writes that: '[F]rom a trade union perspective, the chief attraction of an industrial council is self evident...industrial councils constituted the only forums wherein absent an accommodating employer, bargaining relationships could be developed on an enduring basis.' Meanwhile the intentions of employers are reflected by Thompson C 'On Bargaining and Legal Intervention' (1987) 8 *ILJ* at 5 who writes, 'They do not negotiate actual wage levels at the council's forum and their main interest in proceeding there, is to ensure that broadly oligarchic conditions are maintained in the industry.'

<sup>126</sup> *SAAME v Pretoria City Council* 1948 (1) SA 11 (T) at 17, Dawling J said: 'The so-called industrial agreement is not really an agreement or contract, but a form of permitted domestic legislation by which the will of a statutory body is by a majority vote imposed on all the members of a designated group of employers and employees, irrespective of any actual concurrence by the individuals affected, and notwithstanding any positive disapproval by any such individual.'

Shall perform such functions as may be agreed upon by the employer and employees concerned.<sup>127</sup>

This provision was a relic from the Black Labour Relations Act 48 of 1953, wherein provision was made for the establishment of liaison and works committees in respect of black workers. Works councils were clearly the only plant-level bargaining forums which were expressly recognised in the Act and could be set up by agreement. The composition of the councils was to be constituted by an equal number of both employer and employee<sup>128</sup> representatives. This provided for a proper forum wherein employers and employees could negotiate matters.

However, given the vacuous nature of the provision it had no significant impact in shaping labour relations, particularly employee participation in decision-making. In contrast, in countries like France, works councils have been utilized to enhance employee participation in decision-making. The failing in South Africa's case was due to the fact that the Act allowed employers and employees to decide on whether they wanted to constitute a works council or not. Furthermore, jurisdiction for these councils was not clearly outlined. There was nothing to make the works councils better than the industrial councils and the non-statutory forums whose agreements could be made binding. The adversarial nature of collective bargaining at the time also militated against the success of these forums for which co-operative employment relations were required.

### 3.3.3 Works Committees

Works committees were usually constituted in workplaces that employed more than 20 employees and where there was no works council in existence. Although the LRA did not provide for the establishment of works committees, there was no prohibition against their formation. Both employees and employers could initiate them and they were to be composed of not less than three and not more than twenty members. Their functions were to: (a) bring to the attention of the employer the wishes, desires and needs of the employees, and (b) in the absence of a works council, to negotiate agreements with the employer in respect of wages and other employment conditions but, if there was such a council, to make recommendations concerning employees'

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<sup>127</sup> Some of these functions included: (a) negotiating and concluding agreements with the employer in respect of wages and employment conditions. (b) negotiating about matters of mutual importance to the employer and employees.

<sup>128</sup> See *Mlozana v Faure Engineering (Pty) Ltd* 1987 ILJ 432 (IC) in which it was held that the representatives of employees on a works council must indeed be representative of employees.

needs.

Although works councils and works committees were voluntary forums, they could acquire legal personality at common law and were able to conclude legally enforceable agreements concerning employment conditions.<sup>129</sup>

### 3.3.4 Bargaining Outside Statutory Forums

Perhaps non-statutory bargaining forums provided more fertile ground for employee participation in decision-making. These forums were formed voluntarily by agreement between the employer and employees, and they could exist both at plant and industry level.<sup>130</sup>

The process of initiating non-statutory bargaining, commenced with the recognition of a trade union as a representative of the employees of the employer. It was important at that stage for the trade union to exhibit its support amongst the employees in the workplace. If the employer was satisfied that the union was indeed representative, recognition was granted. Sometimes employers refused to recognise a union as a representative of the employees. Since the right of a representative union to be recognised flowed from the concepts of freedom of association and the right to bargain, the Industrial Court could be approached for an appropriate order.<sup>131</sup> In line with the spirit of the Act on collective bargaining, voluntarism in the process was undercut by the introduction of the unfair labour practice doctrine. This ensured that collective bargaining could be required and institutionalized where this would further the broader objectives of the statute.

Having entered into a recognition agreement which ensured the possibility of employees as a

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<sup>129</sup> *Morrison v Standard Building Society* 1932 (A) 229.

<sup>130</sup> Grogan J *Collective Labour Law* (1993) p 21 writes; 'For various reasons, many employers and trade unions prefer to engage in collective bargaining outside the machinery provided by the LRA. In practice, there are many examples of private bargaining systems at plant, enterprise and industry level, the biggest of which is that adopted by the mining industry and automobile manufacturers.' See also examples of such forums in Anstey M *Worker Participation* (1990) pp 213-289.

<sup>131</sup> *Black Allied Workers Union (SA) v Pek Manufacturing Co. (Pty) Ltd* (1990) 11 ILJ at 1100B-C stated that: '[B]ecause of its unfair labour practice provisions, the Act compels employees and employers in certain circumstances to bargain collectively...It further compels employers to recognize representative unions by entitling them to represent such members in such collective bargaining.'

collective to influence the decision-making process, the following usually formed part of the agreement: (i) a union's rights to represent employees; (ii) procedures for periodic negotiations; (iii) union's rights of access to the employer's premises; (iv) stop-order facilities; and (v) the rights and duties of shop stewards. These were the rights which trade unions enjoyed in the workplace. It is interesting to note that in workplaces where employees and management had a well-established collective bargaining relationship, these rights enabled the parties to form participative structures of decision-making.<sup>132</sup>

### 3.4 DUTY TO BARGAIN

Having recognised a trade union, the question whether or not employers were under a duty to bargain with employees was persistently asked. In particular, the question was whether the Industrial Court could compel an employer to negotiate with his employees.<sup>133</sup> Through the unfair labour practice jurisdiction, the Act prescribed negotiations between employers and employees in certain circumstances. In fact, the Act merely introduced procedural safeguards to limit potential industrial strife and enhance the employees' prospects of influencing decisions that would affect their material and psychological well-being. Although there was a school of thought<sup>134</sup> that had denied the existence of a duty to bargain, the school that supported the existence of such a duty finally triumphed.<sup>135</sup>

While the courts had finally decided that there was indeed a duty to bargain, there was still a need to enhance the balance of power between employers and employees in the bargaining relationship.

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<sup>132</sup> There is evidence of such participative structures for instance the 'Volkswagen Holistic Approach To Worker Participation' and 'Toyota's Total Worker Involvement' in Anstey *op cit* note 130 pp 225-255.

<sup>133</sup> *Stocks and Stocks Natal (Pty) Ltd v Black Allied Workers Union* (1990) 11 ILJ 369 at 374 (G-H) 'The Industrial Court in a number of decisions has been called upon to deal with disputes where there had been some form of undertaking to negotiate...The Industrial Court has at first faintly, but later with greater clarity, recognized that there was a general duty to negotiate to resolve a dispute of interest.'

<sup>134</sup> In deciding that there was no duty to bargain, in *BCAWU v Johnson Tiles* (1985) 6 ILJ 210 (IC) at 213, Erasmus AM stated that, 'under these circumstances I am not prepared to hold that these cases are authority for the proposition that the court can be expected to make an order that a party is to negotiate in good faith.'

<sup>135</sup> *Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC); *Food and Allied Workers Union v Speckenham Supreme* (2) (1988) 9 ILJ 628 (IC); *Stocks and Stocks Natal (Pty)Ltd v Black Allied Workers Union and Others* ( *supra*); *Radio and Television Electronic and Allied Workers Union v Tedalex (Pty) Ltd and Another* (1990) 11 ILJ 1272.

This is where the freedom to strike was important under the Act.<sup>136</sup> It is a fact that there could be no equilibrium in industrial relations without the freedom to strike. Therefore it was in part due to the freedom to strike that employees were able to influence the decision-making process in the workplace.<sup>137</sup> Thus the right to strike was a sanction in collective bargaining. In fact, section 65 of the Act contained both absolute and conditional prohibitions on strikes and lock-outs.

The duty to bargain obviously provided for limited participation in decision-making particularly on distributive matters. This would therefore not be consistent with employee participation which also entails the ability to influence decisions on production, management and financial affairs at the workplace. However, it is possible to argue that there was beginning to be participation in matters which were subject to bargaining apart from distributive matters.<sup>138</sup>

### 3.5 GOOD FAITH BARGAINING

In order to ensure that the duty to bargain provided an opportunity for the employer and employees to bargain constructively, good faith bargaining was adopted to reinforce the process.<sup>139</sup> Although good faith bargaining is said to have evolved from the collective bargaining jurisprudence of the USA and Canada, in our jurisdiction it could be inferred from the unfair labour practice definition in section 1 of the LRA 28 of 1956. Conduct which unfairly affected or disrupted the employer's business or detrimentally affected the employer-employee relationship

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<sup>136</sup> Cameron *op cit* note 125 p 31 writes that: 'management's power to implement its decisions unilaterally with or without the lock-out weapon, is the ultimate moderator of union demands, the unions' ability to inflict losses upon the enterprise is what impels the employer to improve its offer.'

<sup>137</sup> *SA Chemical Workers Union v SASOL Industries (Pty) Ltd and another* (1989) 10 ILJ (IC) at 1046 (I-J), Bulbulia, M said, ' Lord Wright found that, the right of workman to strike is an essential element in the principle of collective bargaining. Kahn-Freund argued that if the workers could not, in the last resort collectively refuse to work, they could not collectively bargain.'

<sup>138</sup> *Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) at 493 (F-I) Ehlers, P stated that, ' an employer can be expected to consult with a representative trade union or other representatives of employees in circumstances where the employer is contemplating retrenchment of his workers.' In fact in *Hooggenoeg Andolusites (Pty) Ltd v National Union of Mine Workers and Others* (1992) 13 ILJ 87 (LAC) at 93 (H-I), the court stated that an employer was expected to have made a comprehensive and complete disclosure of the state of affairs of the company before effecting retrenchment. The court went on to state that workers should be allowed to suggest alternatives and participate in the decision-making process at this level.

<sup>139</sup> Thompson C *et al South African Labour Law* vol 1 (1998) A1-186 ( in footnote73).

was considered as constituting an unfair labour practice.<sup>140</sup> Furthermore, section 47 of the LRA 28 of 1956 allowed the Industrial Court to make an order as to costs if any party did not take reasonable steps and did not endeavour, in good faith, to settle the dispute in question. According to Rycroft,<sup>141</sup> the duty to bargain in good faith has two principal functions:

- (a) the duty reinforced the obligation of an employer to recognize the bargaining agent; and
- (b) the duty fostered rational, informed discussion thereby minimizing the potential for necessary industrial conflict.

Unilateral management action was considered to be a breach of good faith bargaining.<sup>142</sup> Consequently, managements were encouraged to involve employees in decision-making by also recognising their representatives. The Industrial Court acted decisively to protect the integrity of the collective bargaining process by striking down as unfair any action which pre-empted good faith bargaining. In *FAWU v Kellogg SA*<sup>143</sup> it was held that it has never been the object of the LRA to encourage unilateral action before collective bargaining, conciliation or discussion of the matter had taken place. The Industrial Court even went further to hold that, even without an element of bad faith, unilateral action was unfair.<sup>144</sup> Therefore, good faith bargaining to a certain extent also encouraged employee participation in decision-making, and of particular relevance to this thesis, in regard to good faith bargaining, are the following: sham bargaining and disclosure of information.

### 3.5.1 Sham Bargaining

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<sup>140</sup> Section 1 (1)(ii) and (iii) of the LRA 28 of 1956.

<sup>141</sup> Rycroft A 'The Duty to Bargain in Good Faith' (1988) 9 *ILJ* at 202.

<sup>142</sup> Cox A 'The duty to Bargain in good faith' (1958) 17 *Harvard Law Review* p 1413 writes that in *NLRB v Montgomery Ward and Co.* [133F.2d676 (9th Circ.1943)] where seven meetings were held between the management and the certified representatives of two different unions the unions read and explained the proposed contracts all of which were rejected by the Ward. The disagreement covered matters normally settled in routine fashion as well as more substantive issues. The NLRB held that the Ward had not bargained in good faith saying that the duty to bargain in good faith is an 'obligation....to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement.' Not only must the employer have 'an open mind and a sincere desire to reach an agreement but a sincere effort must be made to reach a common ground, but it need make no concessions and may reject any terms it deems unacceptable.

<sup>143</sup> (1993) 14 *ILJ* 406 (IC) at 413B.

<sup>144</sup> *NUM v Goldfields of South Africa* (1989) 10 *ILJ* 86 (IC).

Sham bargaining refers to engaging in the bargaining process without any good faith but merely going through the motions of the process. The Industrial Court endeavoured to foster rational engagement in the process of bargaining, according to which each party was expected to advance motivations for any position they adopted and further to provide responses to the representations of other parties. Simply approaching the bargaining process with a closed mind which resulted in imposing a decision, was considered to be contrary to good faith bargaining.<sup>145</sup>

Although agreement was not prescribed, good faith defined the extent to which employers were expected to involve employees in the decision-making process. In *MAWU v Natal Die Casting*<sup>146</sup> Fabricius, AM provided a checklist for good faith bargaining as follows: (i) did one party merely go through the motions without real intent of arriving at an agreement?; (ii) were concessions made which are indicative of good faith bargaining?; (iii) were proposals made which are indicative of good faith bargaining?; (iv) were dilatory tactics used?; (v) were onerous or unreasonable conditions imposed by a party?; (vi) were unilateral changes in conditions made?; (vii) was a representative by-passed?; and (viii) was sufficient information provided upon request? This checklist shows that when parties engage in collective bargaining, according to good faith bargaining the ultimate objective should be an agreement where possible. The preparedness of employers to engage in a process of negotiations with an open mind to suggestions by employees, created the opportunity for employees to contribute to the decision-making process. This may have also contributed to the evolution of principles of employee participation in decision-making.

### 3.5.2 Duty to Disclose Information

Employers were expected to disclose information to make the process of negotiation or consultation, particularly on retrenchment, meaningful. It was suggested that the duty to disclose information was to be co-extensive with the duty to bargain.<sup>147</sup> All information which was reasonably relevant to advance a particular position or refute other claims in the negotiations

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<sup>145</sup> *SAEWA v Goedeheop Colliery (Amcoal)*(1991)12 ILJ 865 (IC) at 860J-861A, where it was stated that: ‘Good faith bargaining requires that negotiators should keep an open mind on all representations made. While parties are not compelled to compromise, a willingness to do so could be evidence of good faith bargaining.’

<sup>146</sup> (1986) 7 ILJ 520 (IC) at 542 B-E.

<sup>147</sup> *Thompson C et al op cit* note 139 A1-196.

process, was to be disclosed.<sup>148</sup>

Clearly, therefore, good faith bargaining discouraged unilateral decision-making, sham bargaining, and encouraged disclosure of information. Therefore good faith bargaining was one of the foundations for the evolution of employee participation in decision-making.

A fair conclusion on the contribution of the LRA 28 of 1956 is that employee participation in decision-making through, collective bargaining under the Act, was very restrictive and both employers and employees did not see the value of co-operation in this process. Hence the Act was a mix of voluntarism and extensive legal intervention in the bargaining process. Furthermore, the freedom to strike was a mechanism which was used more often than not to solicit attention from employers, simultaneously entrenching adversarialism which affected production negatively. It seems therefore that several factors militated against employee participation under the old Act. Included amongst these was the lack of readiness amongst employers and employees to co-operate in the running of the workplace. It would have also been unreasonable to expect an ill-equipped workforce to properly engage with management in production-related matters and worse still on major policy issues concerning the running of the workplace. All the foregoing factors should be viewed within the context of the socio-political and economic dispensation at the time.<sup>149</sup>

### 3.6 NEDLAC NEGOTIATIONS AND EMPLOYEE PARTICIPATION

Employee participation in decision-making under the LRA 66 of 1995 was shaped by the negotiations that ensued at NEDLAC.<sup>150</sup> The mandate of the Ministerial Legal Task Team to draft

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<sup>148</sup> *Burmeister v Crusader Life Assurance Corporation* (1993) 14 ILJ 1504 (IC): also see further discussion in Chapter 4 below.

<sup>149</sup> Anstey *op cit* note 130 p 23-clearly reflected are the obstacles: autocratic management styles, union suspicion and resistance, racial attitudes, educational levels, inadequate basic wages and conditions of employment, ideological differences, the absence of shared values, the volatile socio-political context, the role dilemmas for the parties and the sharing of strategic information are all cited as problems.

<sup>150</sup> NEDLAC refers to the National Economic Development and Labour Council, a body which is responsible for the development of legislative policies between government, employers and employees.

the LRA was guided amongst other things by the interim constitution,<sup>151</sup> the government's Reconstruction and Development Programme and the relevant International Labour Organisation conventions. All these sources laid out principles which provided the foundation for employee participation in decision-making. Several submissions were made by different parties, but the main ones were from Business South Africa (BSA) and trade union federations like, the Congress of South African Trade Unions (COSATU), National Congress of Trade Unions (NACTU) and the Federation of South African Labour Unions (FEDSAL). On the subject of employee participation in decision-making BSA and the trade unions differed, with BSA demanding that all employees should be able to participate in the workplace forums, while the trade unions wanted a union-centred system of participation.<sup>152</sup> However, after much negotiation, business and employees agreed on the present form of workplace forums as a means of achieving employee participation in decision-making.<sup>153</sup>

### 3.7 THE CONTEMPORARY CONTEXT AND THE CONSTITUTION

According to section 1(a) of the LRA 66 of 1995 one of the principal purposes of the Act is to give effect to fundamental rights in the constitution. This reflects the extent to which the constitution influenced the Act.<sup>154</sup> Although the LRA was enacted under the interim constitution, the new constitution of the Republic of South Africa Act 108 of 1996 still provides for labour rights in section 23. What is clear, is that to the extent that the constitution protects property rights, freedom of economic activity and labour relations rights, the constitution defines the

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<sup>151</sup> The Interim Constitution of the Republic of South Africa Act 200 of 1993.

<sup>152</sup> Du Toit *et al op cit* note 111 p 29 write: 'Another issue that proved to be contentious was the structuring of the statutory employee participation (workplace forums) provided for in the draft bill. BSA supported the principle of employee participation in the workplace but wanted the participatory process to be open to all employees and separate from collective bargaining including, a prohibition on strikes over participatory issues. The union federation fearing the potential of participatory structures to undermine union organization, proposed a union-based system of participation, whereby the composition of the workplace forum shall be the shop stewards committee. Trade union officials should, furthermore be entitled to attend meetings of a workplace forum.'

<sup>153</sup> *Ibid* p 32.

<sup>154</sup> Cheadle H *et al Current Labour Law* (1994 ) p 94, state that: 'the chapter of fundamental rights in our constitution is going to have profound effect on all aspects of the law in particular labour law.'

parameters for employee participation in decision-making. Anstey,<sup>155</sup> states that:

‘[W]hile it is silent on the issue of worker participation, the boundaries of control or co-determination are to some extent implicit in these rights. In effect the rights of shareholders are protected but the manner in which these are exercised is constrained, in part through labour organisations’ powers of bargaining and rights to fair labour practices.’

In section 3(b) the LRA provides that in the interpretation of the Act there should be compliance with the constitution. This creates the constitutional context within which the LRA will be interpreted to establish the extent to which it promotes employee participation in decision-making.

### 3.8 INTERNATIONAL LABOUR STANDARDS

Since South Africa is now a full member of the ILO, it is expected that she will adhere to the standards set by the organisation. It is therefore no surprise that such standards have been incorporated into the LRA. Evidence of this is that, according to section 1(b) and section 3(c) one of the objects of the LRA is to give effect to the obligations incurred by South Africa as a member of the ILO. What is envisaged is the bringing of the labour laws of South Africa into line with the various relevant conventions of the ILO. The ILO in the Co-operation at the level of the Undertaking Recommendation 94 of 1952 states that appropriate steps should be taken by member states to promote consultation and co-operation on matters of mutual interest not within the scope of issues usually dealt with through collective bargaining. Although this is a recommendation and therefore non-binding, it is significant as a standard. This demonstrates that the concept of employee participation in decision-making, also finds expression in international law and may have influenced the drafters of the LRA 66 of 1995, and will influence the courts’ interpretation thereof.

### 3.9 RECONSTRUCTION AND DEVELOPMENT

The importance of rebuilding the country’s economy and developing manpower for this process was expressed in the Reconstruction and Development Programme (RDP). Part of the programme was aimed at democratising the state and society. As part of the democratisation process, labour law had to be reviewed to provide equal rights for employees so that they could

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<sup>155</sup> Anstey M ‘ Can South African Industrial Relations Move Beyond Adversarialism? Some comparative perspectives on the prospects of workplace forums in South Africa’ (1995)19(4) *SAJLR* p 4.

participate in decision-making in the workplace. Evidence of this is that Part 4 of the RDP document at paragraph 4.8.9 states that:

‘Workplace empowerment: Legislation must facilitate worker participation in decision-making in the world of work. Such legislation must include an obligation on employers to negotiate substantial changes concerning production matters or workplace organisation within a nationally negotiated framework, facilities for organisation and communication with workers on such matters, and the right of shop stewards to attend meetings and training without loss of pay as well as to address workers.’<sup>156</sup>

In line with the preceding policy position at 4.8.10 it is stated that in addition to the reform of labour law, company and tax law must be amended in order to facilitate, for example, access to company information. It could thus be said that employee participation in the LRA was partly born of the principles of the RDP.

### 3.10 EMPLOYEE PARTICIPATION UNDER THE LRA 66 of 1995

The LRA 66 of 1995 clearly seeks to augment collective bargaining and enhance employee participation in decision-making. The preamble of the Act states:

‘To change the law governing labour relations and for that purpose....to promote employee participation in decision-making through the establishment of workplace forums.’

The meaning of the foregoing is further expressed in section 1(d)(iii), which stipulates that one of the principal purposes of the Act is to promote employee participation in decision-making in the workplace. A purposive interpretation<sup>157</sup> of the Act would support the fact that employee participation will not only be promoted through workplace forums, but collective bargaining and consultation prior to dismissal for operational requirements, will achieve this purpose. After all, collective bargaining is also recognised as an aspect of employee participation<sup>158</sup> and Anstey writes

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<sup>156</sup> RDP, Part 4, (<http://www.polity.org.za/govdocs/rdp/rdp4.html>).

<sup>157</sup> Jammy P ‘Interpreting the new Act: Getting down to business with the Labour Appeal Court’ (1997) 18 *ILJ* at 914-915, ‘The better view, it is suggested, is to adopt the approach of the Labour Appeal Court in the *Ceramic Industries* judgement. The court recognized a need for a two-stage inquiry, firstly into the purpose of the Act and secondly into the purposes of the particular section. The second inquiry may as well qualify the first, in the sense that a proper analysis of the section concerned might identify which of the Act’s purposes that section was designed to further.’

<sup>158</sup> Van Niekerk A *et al* ‘Worker Participation - sharing the right to decide’ (1995) 4 (6)*CLL* p 52, write that: ‘worker participation is widely defined to include all processes and techniques by means of which a business is run.’ See discussion in chapter 2 above.

that collective bargaining is the form of participation most evidenced internationally.<sup>159</sup>

Clearly, therefore, the Act reflects a pluralistic approach to employee participation through adversarial collective bargaining, co-operative interaction through workplace forums, disclosure of information and consultation prior to dismissal for operational requirements.

### 3.10.1 Statutory Forms of Employee Participation

#### (a) Disclosure of information

The right to disclosure of information is provided for in sections 16, 89 and 189(3) and (4). The importance of this right can never be overemphasized, as it constitutes the foundation for the other forms of participation. If parties to either consultation, joint decision-making or collective bargaining are ignorant of the relevant facts to a matter in issue, there will be no proper interaction. Thus the LRA supports employee participation by encouraging disclosure of information.

#### (b) Consultation prior to dismissals for operational requirements

Section 189 provides for dismissal on the grounds of operational requirements. Its relevance to employee participation in decision-making, is the extensive consultation necessary for a fair dismissal and the contribution of the retrenchment jurisprudence to the concern of this thesis.

#### (c) Collective Bargaining

Collective bargaining is provided for under the LRA-of particular relevance to employee participation are the principles that shape collective bargaining. Although the LRA does not provide for an express duty to bargain, through the strike provisions under section 64, employee participation in distributive matters<sup>160</sup> is going to be strengthened.

#### (d) Workplace Forums

Chapter 5 provides for workplace forums through which employee participation in production-

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<sup>159</sup> Anstey *op cit* note 130 p 5.

<sup>160</sup> Section 64(2).

related matters will be expressly promoted by the Act. The workplace forums are able to achieve this through consultation,<sup>161</sup> joint-decision making<sup>162</sup> and disclosure of information.<sup>163</sup> Although workplace forums are new structures in our labour dispensation, in other jurisdictions<sup>164</sup> similar forums have been used to enhance employee participation in decision-making.

### 3.11 CONCLUSION

The jurisprudential history of our labour law shows that employee participation in decision-making was indirectly facilitated through collective bargaining in the regulation of industrial relations. From the body of statutes considered in this chapter, it is clear that the legislature tended to opt for collective bargaining as the only way through which employees could influence the decisions of employers. However, over the years due to the militancy of the labour force, particularly of African trade unions, the legislature had to amend the law in order to deal with this antagonism and the constant disruption of production. Consequently there was provision for the establishment of forums like works councils, works committees and non-statutory forums. These forums never achieved the promotion of employee participation but pointed towards the need for co-operative relations between employees and employers. Perhaps the most significant foundation to employee participation was the enactment of the unfair labour practice jurisdiction, which gave birth to concepts like the duty to bargain, good faith bargaining, disclosure of information, and consultation prior to dismissal for operational requirements. It can thus be said that under the LRA 28 of 1956, the Industrial Court developed the principles which would later constitute the foundation for employee participation in decision-making. Furthermore, the Constitution of the Republic of South Africa, International Labour Law standards and the principles of the Reconstruction and Development Programme, have all shaped the concept of employee participation in the LRA 66 of 1995.

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<sup>161</sup> Sections 84 and 85.

<sup>162</sup> Section 86.

<sup>163</sup> Sections 89 and 91.

<sup>164</sup> In Germany and the Netherlands, works councils which are the equivalent of workplace forums, are utilised for the promotion of employee participation.

## **CHAPTER 4**

### **DISCLOSURE OF INFORMATION**

#### **4.1 INTRODUCTION**

Disclosure of information is one of the means through which employee participation in decision-making can be enhanced. For participation, either through collective bargaining, workplace forums or consultation prior to dismissal for operational requirements, to be a rational process it is necessary for the parties to be informed of the facts surrounding any particular proposal.<sup>165</sup>

In examining the contribution of information disclosure to participation, the following matters are covered: the rationale for disclosure, jurisprudence of disclosure in South Africa, disclosure of information under the LRA 66 of 1995, limitations to disclosure, sufficiency of disclosure and disputes regarding disclosure.

#### **4.2 RATIONALE FOR DISCLOSURE**

The rationale for disclosure of information is divided into two: the employee-centred aim and the company-centred aim.<sup>166</sup> Employees deem it essential to have information in order to assess positions they can adopt and to evaluate those which have been adopted by the employer, as well as the ability of the employer to meet their demands. Employers on the other hand regard the requirement for disclosure as a further opportunity to increase their influence and control in the workplace.<sup>167</sup> Like any initiative to involve employees in the decision-making process, some employers view disclosure as a limitation to the management prerogative and fear that it may raise

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<sup>165</sup> Du Toit D *et al The Labour Relations Act 1995* 2 ed (1998) p 158.

<sup>166</sup> Landman A 'Labour's Right to Employer Information' (1996) 6 (3) *CLL* p 22: 'Parliament believes that employees and their agents will be able to perform their monitoring functions, exert influence on managerial discretion and make decisions on a higher and more informed perhaps even rational basis if they are provided by employers with the relevant knowledge and information.' Grossett M 'Management Perceptions of The Effect of The Disclosure of Company Information to Employees: results of an empirical study' (1997) 21 (3) *SAJLR* p 37 writes that: 'employee centered aims are based on more "ethical" considerations such as the organization's responsibility to keep its employees informed and the desirability of employee representatives to be given information to support their role in joint consultation and other forms of participation in decision-making.'

<sup>167</sup> Grossett *ibid* writes that: 'company centered aims are based on the desire to reinforce management's influence and control within the organization... achieved by increasing employee involvement in and identification with the interests of the organization.'

the demands made by employees. Research,<sup>168</sup> however, has shown that some employers realise the benefits of information disclosure. The benefits are: (i) improved employee cooperation as information enhances the employees' understanding of the organisation and decisions made within it; (ii) improved collective bargaining by reducing conflict resulting from different information sets being made available to negotiating parties; (iii) increased employee involvement in decision-making because employees have access to the relevant information; and (iv) increased levels of job satisfaction. The overall significance of information disclosure to both employers and employees is that it may promote goal congruence as employees will understand how their goals and those of their employer relate.<sup>169</sup>

South Africa is not alone in her choice to introduce disclosure of information in the collective bargaining and consultation process.<sup>170</sup> In Britain it has been recognised that disclosure of information is an integral part of collective bargaining. Lack of information has been shown to handicap the ignorant party when it comes to agreement in the bargaining or consultation process.<sup>171</sup> In Germany and the Netherlands disclosure of information has been opted for in particular when it comes to works councils, which are utilised to promote employee participation in decision-making. Furthermore, the International Labour Organisation has also recognised the importance of disclosure of information in the process of collective bargaining.<sup>172</sup>

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<sup>168</sup> Grossett *ibid* p 38-39.

<sup>169</sup> *Ibid* 37.

<sup>170</sup> Brand *J et al* 'The Duty to Disclose - a pivotal aspect of collective bargaining' (1980) 4 *ILJ* p 250 write that: 'The progress of collective bargaining in the United States and Europe has been characterized by the move away from uninformed and irrational bargaining towards sophisticated and intelligent bargaining. In the USA this process has been facilitated by a recognition that, integral to the duty to bargain is the requirement that an employer furnish relevant information in its possession to the union. The purpose of this is to enable the union to bargain intelligently, to understand and discuss issues raised by the employer's opposition to union's demands, and to administer a contract.'

<sup>171</sup> Jordaan B 'Disclosure of Information in Terms of The Labour Relations Act' (1996) 6 (2) *LLN* pp 1-2, quoting from an information paper issued by ACAS (the Advisory, Conciliation and Arbitration Service) in the UK writes: 'Employers, trade union representatives, and employees have much to gain from a voluntary and well designed system of disclosure of information. The availability of relevant information can be mutually beneficial in the achievement of objectives, and the satisfactory conclusion of collective bargaining.'

<sup>172</sup> The ILO Collective Bargaining Standards Recommendation 163 of 1981 Article 7 (1) states: 'Measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.' See also Gavin W 'The Disclosure of Information' (1992) 2

In this chapter the focus will be on the disclosure of information based on section 16. Sections 89 and 189(3), dealing with information disclosure are discussed under the chapters on workplace forums (Chapter 7) and consultation prior to dismissal for operational requirements (Chapter 5), respectively, for a better understanding of disclosure in those circumstances.

### 4.3 JURISPRUDENCE OF DISCLOSURE IN SOUTH AFRICA

Although many of the principles of information disclosure in labour law have been developed under the LRA 28 of 1956, the doctrine of discovery<sup>173</sup> and the constitution have also contributed to the culture of disclosure.<sup>174</sup> Johannessen *et al*<sup>175</sup> although writing about the rationale of access to information under section 23 of the Constitution of the Republic of South Africa Act 200 of 1993, refer to the important theories behind access to information in a democracy. Since disclosure of information to employees is an aspect of industrial democracy, these theories may be valid also in the context of employment. They identify four rationales supporting legislation facilitating access to information: (i) access to information is a right identified in the chapter on fundamental human rights in the constitution<sup>176</sup> and is as such a part of the human rights culture of South Africa. It is also significant that the right of access to information applies in horizontal relationships and is no longer confined to relations with the State;<sup>177</sup> (ii) allowing people to obtain information is essential for full democratic participation,<sup>178</sup> and the free flow of information

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(5) *LLN* p 2.

<sup>173</sup> *Crown Cork and Seal v Rheem SA (Pty)Ltd* 1980 (3) SA 1093(WLD) and *Moulded Components v Coucourakis and Another* 1979 (2) SA (WLD) 466: where there is a consideration of the how confidentiality should be applied as a limitation to disclosure of information.

<sup>174</sup> Devenish GE *A Commentary on the South African Constitution* (1998) p 80, writing about section 32 (Access to information) of the Constitution of the Republic of South Africa Act 108 of 1996 states that: ‘ Its inclusion endorses the pervasive theme of accountability and transparency of government and administration that runs like a golden thread through the entire Constitution and forms part of a new political morality.’

<sup>175</sup> Johannessen L *et al* ‘A Motivation for the Legislation on Access to Information’ (1995) 112 *SALJ* p 45.

<sup>176</sup> *Ibid* p 46: see also section 32 of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>177</sup> Perhaps the horizontal application of this right was the motivation for a proactive step to encourage disclosure of information between employers and employees.

<sup>178</sup> Johannessen *op cit* note 175 p 47.

supports the participatory form of democracy; (iii) access to information encourages accountability;<sup>179</sup> and (iv) access to information encourages better administrative decisions.<sup>180</sup> The foregoing rationales for access to information, reflect the importance of information disclosure in any constitutional democracy. It can therefore be said that disclosure of information in the LRA is an extension of these constitutional principles into the employment relationship.

In South African labour law the right to disclosure of information has developed through the principle of good faith bargaining and the decisions regarding retrenchment.<sup>181</sup> Under the LRA 28 of 1956 the unfair labour practice jurisdiction of the Industrial Court was utilised to induce parties to the bargaining process to engage in meaningful bargaining. Through this, the Industrial Court was able to order access to an employer's premises and the disclosure of relevant information, and could check hasty and arbitrary action. Therefore disclosure of information constituted one of the rules for bargaining conduct.<sup>182</sup> Gavin,<sup>183</sup> writes that the Industrial Court is on record as stating that disclosure of relevant information is an integral part of good faith bargaining. In *SACCAWU v Southern Sun Hotel Corporation (Pty) Ltd*<sup>184</sup> the court stated that: '[A]n unconditional refusal to negotiate or to disclose relevant information is subversive of industrial peace; and the subversion of rational collective bargaining will have one or more of the effects referred to in the definition of an unfair labour practice in the Act.'

However, the Industrial Court decisions tended to be protective of employers.<sup>185</sup> In an attempt

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<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid* p 48.

<sup>181</sup> *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1995) 1 BLLR 1 (AD).

<sup>182</sup> Kahn-Freund O *Labour and The Law* 2 ed (1977) p 210 states that: 'Negotiation does not deserve its name if one of the negotiating parties is kept in the dark about matters within the exclusive knowledge of the other which are relevant to the agreement.'

<sup>183</sup> Gavin *op cit* 172.

<sup>184</sup> (1992) 13 ILJ 132 (IC) 151 (C); see also *MAWU v Natal Die Casting (Pty) Ltd* (1986) 7 ILJ 520 (IC) at 543D-F; and *CWIU and others v Indian Ocean Fertilizer* (1991) 12 ILJ 822(IC) at 826-7.

<sup>185</sup> *DIMES v Tongaat Town Board* (1993) 2 LCD 54 (IC) De Kock SM at 55 said: 'The facts and information on which the policy decision was based need not be disclosed save where the employer's bona fides or want of commercial rationale was questioned and then only to the extent necessary to explore the challenge.'

to clarify the instances when an employer was expected to disclose information, Thompson *et al*<sup>186</sup> suggested that the duty to disclose information should be co-extensive with the duty to bargain or consult in the retrenchment context.<sup>187</sup> There was, however, a realization that the uncertain disclosure practices were reflective of the level of employer-employee participation at the time and that judicial intervention could not necessarily help the process.<sup>188</sup> It was felt that the disclosure of information should be achieved through policy development enshrined in legislation.<sup>189</sup> The Labour Relations Act 66 of 1995 attempts to address this.

#### 4.4 DISCLOSURE OF INFORMATION UNDER THE LRA

In line with the purpose of the Act to promote orderly collective bargaining and employee participation, disclosure of information is provided for under section 16.<sup>190</sup> According to section 16(1) only a majority union can claim the right to disclosure of information. However, minority unions may act together in order to attain such majority in a workplace<sup>191</sup> and thereby be entitled to exercise the right to disclosure. Section 16(2) requires an employer to disclose to a trade union representative all relevant information, but it is not clear whether the employer has to disclose at the request of the trade union or voluntarily. If one were to apply the principle of good faith bargaining, parties to the bargaining process would need to be upfront in disclosing information

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<sup>186</sup> Thompson C *et al South African Labour Law* vol.1 (1998) p A1-196 *NUMSA v Metkor Industries* (1990) 11 *ILJ* 1116 (IC) at 1124A said: '[I]t seems to me to be lawful, just and equitable that management should be obliged to disclose only such information as would reasonably enable employees to consider the consequences that the information held for them.'

<sup>187</sup> The views of Thompson *et al* have been fortified by Maytham AM in *National Union of Metalworkers of South Africa and Others v Uniross Batteries (Pty) Ltd* (1996) 17 *ILJ* 175 (IC) at 182 A-B where it is stated that: 'where a company finds itself in a situation where there is a likelihood that its future or that of the employees will be adversely affected, there is a duty upon it to make a disclosure of relevant information to employees. Without such disclosure the employees are unfairly faced with a virtual *fait accompli* if a time arises where their future earnings or employment becomes threatened.'

<sup>188</sup> Thompson *et al op cit* note 186 p A1-198.

<sup>189</sup> *Ibid.*

<sup>190</sup> Sections 189 (3) on disclosure under dismissal for operational requirements and sections 89 to 91 on disclosure in workplace forums, will be discussed below in their respective chapters.

<sup>191</sup> The effect of the LRA granting more rights to majority unions and its impact on employee participation in decision-making, will be discussed further in Chapter 6 below.

in order to facilitate proper bargaining.<sup>192</sup> This means that the employer would have to disclose information to the trade union without being requested. In *National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd*<sup>193</sup> Fagan DJP said in the retrenchment context:

‘Generally speaking, however, it would appear to us that fairness requires that an employer should be open and helpful in meeting requests for information.’

The above statement suggests that employees have to request the information from the employer, however, this does not in anyway stop the employer from disclosing without being requested to. Although some employers may not be readily forthcoming with information it is significant for employee participation that employers are expected to be helpful and open about disclosure. In the United Kingdom there is a statutory obligation to disclose on request.<sup>194</sup> However, the ideal position is for employers to be upfront with information and not wait until employees have requested disclosure.

#### 4.4.1 Relevant Information

Everingham<sup>195</sup> suggests that information disclosure targeted at employees should cover the following information: (i) the financial status of the organisation; (ii) the employees’ information needs on absenteeism, industrial relations and productivity; and (iii) the employees’ contribution to planning the organisation’s future. Although this list provides an idea of information that may be relevant, it appears to be too limited in scope. A comprehensive list is provided by Grossett<sup>196</sup> who draws his conclusions from prominent research in the field of information disclosure to employees. He suggests that the following information should be disclosed: productivity information; information on morale; information on wages and benefits; safety information; information on employee development; demographic information; information on company

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<sup>192</sup> *Burmeister v Crusader Life Assurance Corporation* (1993) 14 *ILJ* 1504 (IC).

<sup>193</sup> (1993) 14 *ILJ* 642 (LAC) at 652 (B).

<sup>194</sup> Employment Protection Act of 1975, section 17(1) (a).

<sup>195</sup> Everingham GK ‘Financial Reporting to Employees’ (1991) August, *Accountancy South Africa*, p 217.

<sup>196</sup> Grossett *op cit* note 166 pp 39-40.

performance; information on wealth sharing; and information on the organisation's future.<sup>197</sup> This is a rather comprehensive list which may accord with the requirements of section 16. However, whether or not information is relevant under section 16 is a question of fact to be determined with reference to the circumstances of every case. Furthermore, the relevance of the information must be determined by the purpose for which it is sought and it must be pertinent to the issues in hand.

According to section 16(2) the information must be relevant to the duties to be performed by a trade union representative or shopsteward, according section 14(4) which are: representing employees in grievance and disciplinary proceedings; monitoring the employer's compliance with provisions of this Act and any collective agreements; contravention of the workplace-related provisions; and to perform any other functions agreed to by the trade union representative and the employer. Furthermore, the information must allow the trade union to engage effectively in consultation or collective bargaining.<sup>198</sup> In the retrenchment context, the Labour Appeal Court recognised relevant information as that which concerned the retrenchment process.<sup>199</sup> In the collective bargaining context, Du Toit *et al*<sup>200</sup> write that:

‘[I]n the collective bargaining arena relevant information includes all information necessary to adduce, defend or refute negotiating claims.... information that might, but not necessarily must, advance the other party's case should be disclosed.’

Unfortunately our jurisprudence does not provide us with a test for relevance. However, a more purposive approach to disclosure in line with ensuring a more participative process of bargaining is desirable.<sup>201</sup> Rycroft,<sup>202</sup> wrote that in the United States the relevance of information is determined in two ways namely: the presumptive relevance rule or the substantiation relevance rule.

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<sup>197</sup> The value of this list is just to illustrate the thinking around the nature of information which is relevant to meet employees' needs, based on research.

<sup>198</sup> Section 16 (3).

<sup>199</sup> *National Union of Metal Workers of SA v Atlantis Diesel Engines* (LAC) *supra* note 194.

<sup>200</sup> Du Toit *et al op cit* note 165 p 151.

<sup>201</sup> See the approach of the Labour Court to disclosure in the retrenchment context in *NUMSA and Others v Comark Holdings (Pty) Ltd* (1997) 5 BLLR 589 at 597F-H.

<sup>202</sup> Rycroft A ‘The Duty to Bargain in Good Faith’ (1988) 9 *ILJ* p 202.

(i) Presumptive Relevance Rule

Initially, according to this rule the trade union had to demonstrate that the requested information was necessary for it to bargain intelligently over specific matters arising during the course of negotiations. However, this formulation was departed from in *NLRB v Yawman and Erbe Mfg Co*<sup>203</sup> where it was stated that the employer had an affirmative statutory duty to supply relevant information. The employer's refusal to disclose the information should not be based on the trade union's failure to prove relevance of the information.<sup>204</sup> The court said this kind of disclosure was similar to that governing discovery procedures, where information must be disclosed unless it plainly appears irrelevant. According to this test, the employer is expected to disclose relevant information even if the employees are unable to prove relevance. This approach is based on the notion that according to the requirements of good faith bargaining, parties to the process are expected to enter into the process with an open mind and with the purpose of reaching agreement.

In South Africa there seems to be a move towards embracing the presumptive relevance rule. In *National Workers Union v Department of Transport*<sup>205</sup> the issue concerned a disciplinary hearing and the union asked to see a management report to assist it in representing a member at a pending disciplinary hearing. The union relied on section 16(2) for the request of disclosure. In summarising and giving an opinion on this decision Cheadle *et al*<sup>206</sup> stated that:

'The commission somewhat generously accepted the union's argument that the report in question (the result of a preliminary investigation into the alleged offence) could be relevant even though the union was unaware of its actual contents. The employer was not present at the arbitration proceedings, and hence could not raise any counter-arguments. The employer was ordered to make available the report.'

From the above statement, it is clear that as the union was not aware of the contents of the report, it was in no position to prove relevance. In spite of this lack of proof of relevance, the commissioner ordered disclosure. This is in line with the presumptive relevance rule and the

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<sup>203</sup> 187 F 2d 947 (2d Cir 1951).

<sup>204</sup> *Ibid* p 949.

<sup>205</sup> (KN913, 29 August 1997).

<sup>206</sup> Cheadle H *et al Current Labour Law* (1997) p 15.

commissioner adopted a generous approach in accepting the union's argument of possible relevance of the information. It can be argued that relevance should not be given a restrictive but purposive interpretation.<sup>207</sup> Such an interpretation could promote orderly collective bargaining<sup>208</sup> and employee participation in decision-making.<sup>209</sup>

#### (ii) The Substantiation Relevance Rule

This rule is based on the *NLRB v Truitt Manufacturing Co.*<sup>210</sup> case where the US Supreme Court ordered the employer to allow the union's certified public accountant to examine the company's books and other financial data which the employer had said was irrelevant. The court held that the employer's refusal to substantiate its claim of inability to pay constituted bad faith bargaining.<sup>211</sup> The position in this case means that once the employer enters into bargaining with the trade union, all information which concerns the issues under discussion must be disclosed to substantiate a claim. The substantiation rule seems to have also found a place in our labour law. In *Construction and Allied Workers Union v Avbob Funerals*<sup>212</sup> where the employer having recognised the union for collective bargaining purposes, refused to divulge any financial information to back its claims of inability to pay more to the employees. In ordering the employer to disclose to the union its income statement and balance sheet the commissioner said:

'An employer cannot come to the bargaining table and then simply refuse to make a counter offer on the basis of poverty without justifying that response and providing relevant information to back up this position.'

Disclosure will be denied in the case of absolute irrelevance and the substantiation rule means

<sup>207</sup> See a discussion of the purposive approach to interpreting provisions of the LRA by Jammy P 'Interpreting the New Act: getting down to business with the Labour Appeal Court' (1997)18 *ILJ* 910.

<sup>208</sup> Section 1(d) (i).

<sup>209</sup> Section 1(d) (iii).

<sup>210</sup> 351 US 149 (1956).

<sup>211</sup> *Ibid* p 153 Justice Black stated that: 'Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.' Also see *Labour Board v Jacobs Mfg. Co.* 196 F.2d 680.

<sup>212</sup> (CCMA EC903, 11 June 1997).

relevance is to be determined by the propositions being made by the employer. Under this rule therefore, once the employer adopts a certain position in the consultation or bargaining process, such employer is expected to provide relevant information to substantiate his claims.

In the United Kingdom the ACAS(Advisory, Conciliation and Arbitration Services) code on 'Disclosure of Information to Trade Unions for Collective Bargaining Purposes' at paragraph 10 states that:

'To determine what information will be relevant negotiators should take account of the subject-matter of the negotiations and the issues raised during them, the level at which negotiations take place, the size of the company, and the type of business the company is engaged in.'

The UK position is very similar to that in the LRA, where relevance is determined by the subject matter of the negotiations.

Although section 16(2) and 16(3) provide an idea of what relevant information could be, a comparative analysis provides one with further rules for determining the relevance of information. There is a method already being used by arbitrators in making their decisions. It is, however, not clear whether the arbitrators are persuaded by the US developed principles in their decisions. The interesting point with regard to the US developed tests of relevance is that they are not dependent on the employees discharging the onus of proving relevance, but they require of the employer to be upfront with relevant information. If a combination of the criteria of determining relevance as stated in section 16(4) and the presumptive relevance and substantiation relevance rules is adopted, the scales of justice will be in favour of promoting disclosure and hence informed employee participation in decision-making.

#### 4.4.2 Limitations to Disclosure

According to section 16(5) the employer is not required to disclose information that is legally privileged; that cannot be disclosed without contravention of law or an order of court; that is confidential; and private and personal information unless the employee consents to such disclosure.

##### (i) Legally Privileged Information

The general rule regarding legally privileged information according to the Appellate Division as stated in *Bogoshidi v Director for Serious Economic Offences*<sup>213</sup> is that only confidential communications between attorney and client made for the purpose of obtaining legal advice, are privileged. However, Jordaan, suggests that in labour law:

‘[I]ndustrial relations advice as well as information obtained for example for collective bargaining strategy purposes, should also be considered to be legally privileged.’<sup>214</sup>

It is clear that this limitation refers only to information concerning the strategies to the bargaining process and not necessarily the information constituting the basis for the process of bargaining and consultation.

#### (ii) Prohibitions Imposed on the Employer by any Law or Order of Court

This refers to information that is prohibited by law from disclosure. For example, certain information that may harm national security if disclosed. This would apply more in the defence industry where information on production and finance related matters may obviously affect national security. For instance the Companies Act 61 of 1973 section 15A(1) provides that:

The Minister may-

(a) by notice in writing prohibit any company from disclosing or from stating on or in any document of the company;

(b) on the written application of a company to the Registrar, exempt it, subject to such conditions or restrictions as the Minister may deem fit, from the obligation to disclose, or to state on or in any document, particular information or a particular fact concerning the affairs or business of the company, or that of any of its subsidiaries, which the company would otherwise be required under this Act to disclose or to state on or in any document.<sup>215</sup>

Furthermore, where there has been an order of court prohibiting disclosure based on the right of a third party, to do the contrary would constitute contempt of court. This accords with the usual limitations to disclosure of information which are not confined to labour law.

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<sup>213</sup> 1996 (1) SA 785 (A). See also Hoffman LH *et al The SA Law of Evidence* 4 ed (1988) pp 248-251.

<sup>214</sup> Jordaan *op cit* note 171 p 3.

<sup>215</sup> Meskin MP *Henochsberg on the Companies Act* 5 ed (1994) p 32 writes that: ‘This section was introduced concomitantly with the repeal of section 310. The national or public interest, or the company’s own interests, may justify the preservation of confidentiality about particular matters pertaining to a company’s undertaking.’

(iii) Private Personal Information

This refers to information pertaining to a particular individual in his or her private capacity which is not related to the employment relationship and is not public knowledge. This is based on the right to privacy protected by the constitution of the Republic of South Africa.<sup>216</sup> An example of information that would fall into this realm would be a person's medical records but not, it is suggested, a person's salary.<sup>217</sup> After all, information on salaries would appear in the financial records of a company. However, if the employee consents to the disclosure then such information may be disclosed. This makes the provision a reasonable limitation.

(iv) Confidential Information that may cause Substantial Harm to an Employee or Employer

The disclosure requirement is not open-ended. Firstly, according to section 16(4) the employer must notify the trade union representative or the trade union in writing if any information disclosed in section 16(2) and 16(3) is confidential. Secondly, according to section 16(5)(c) an employer is not required to disclose confidential information which may cause substantial harm to an employee or employer. What is envisaged concerning information about an employee, may be similar to the information that is private and personal to the employee. However, in so far as harm to the employer is concerned, guidance may be sought from the British ACAS code.<sup>218</sup> At paragraph 15 it is stated that substantial injury may occur if, for example, certain customers would be lost to competitors, or suppliers would refuse to supply necessary materials, or the ability to raise funds to finance the company would be seriously impaired as a result of disclosing certain information.

The issue of confidentiality highlights the conflict of interests between employees and employers, where the former asserts its right to know and the latter the protection of its property right in the

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<sup>216</sup> The Constitution of the Republic of South Africa Act 108 of 1996, section 14.

<sup>217</sup> Grogan J 'Equal Justice: union access to executive hearings' (1997) 13 *EL* p 79 writes that: 'section 79 is likely to give impetus to union demands for access to information to which none but senior managers were previously privy. And of such information, none is likely to be more fiercely disputed than information pertaining to themselves. Their salaries and perks are obvious examples.'

<sup>218</sup> Brand *op cit* note 170 p 253.

information.<sup>219</sup> Principles regulating the disclosure of confidential information can be traced back to the doctrine of discovery of documents in particular in the United Kingdom. In circumstances where one party requires the discovery of certain documents and the other argues that the information is confidential. There are two principles in conflict: the party claiming confidentiality relies upon the fact that it has a property right in the confidential documents. The information is confidential in the sense that a reasonable businessman might wish to keep it to himself and that it should not be available to a competitor for possible misuse and that its proprietary rights should be protected. The party claiming discovery relies upon the principle that no limits should be placed upon their procedural rights to make full use of information in the other's possession in order to present their case without being hampered at all.<sup>220</sup>

Disclosure of information in labour relations is not unlike discovery in the context of litigation. South African cases on discovery which also refer to the principles governing disclosure could therefore be apposite. In *Crown Cork and Seal v Rheem SA (Pty) Ltd*<sup>221</sup> the issue was whether a court may place limitations upon a litigant's ordinary rights of untrammelled inspection and copying of documents discovered by his opponent. The applicant claimed that the documents contained trade secrets which may be misused. In answering this question Schultz AJ<sup>222</sup> stated that:

‘[A]lthough the approach of the court will ordinarily be that there is a full right of inspection and copying, I am

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<sup>219</sup> Parkinson CN *et al Communicate: Parkinson's formulae for business survival* (1977) p 72 suggest that the arguments against providing full information fall into two broad categories. First, the possible leakage of confidential information may endanger the competitive position of the enterprise, and second, information is a source of power - providing unlimited information to workers and the trade union may undermine management's position in collective bargaining.’

<sup>220</sup> For instance in *Warner-Lambert Co v Glaxo Laboratories Ltd* 1975 RPC 354, where the plaintiff had sued for alleged infringement of two patents relating to steroid compounds and their manufacture. The defendant claimed secrecy in the alleged infringing process. The Court of Appeal resolved the conflict of interests of the parties by ordering a controlled measure of discovery to selected individuals upon terms ensuring that there should neither be use nor further disclosure of the confidential information to the prejudice of the defendant, and yet so that the plaintiffs would have a free full degree of disclosure as would be consistent with adequate protection of any trade secrets of the defendant. This case elaborates on the balancing act which the courts have had to play in the determination of confidentiality disputes. See also Lord Denning MR in *Dick v Rid Thames Board Mills* (1977) 3 All ER 677 (CA) p 687D-E.

<sup>221</sup> 1980 (3) SA 1093 (WLD).

<sup>222</sup> *Ibid* 1100 A-C.

of the view that our courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made... but it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial....'

This case affirms an earlier position within the same jurisdiction by Botha J<sup>223</sup> where he stated that the court should try to strike a proper balance between the conflicting interests of the parties. Although the principles on disclosure here apply to the process of discovery in litigation, there appears to be no reason why these principles cannot apply to the duty to disclose information in collective bargaining and consultation. The *National Union of Metalworkers v Atlantis Diesel Engines* case<sup>224</sup> provides an indication of how the matter of confidentiality in labour law may be handled. In that case it was stated that the employer was not expected to disclose information that was confidential and which may harm the employer's business interests, for instance trade secrets.<sup>225</sup> What this means is that confidential information may be disclosed, but if such information will cause harm to the employer's business interest, the employer is not expected to disclose. This approach to the handling of confidential information points to the relationship between section 16(4) and 16(5), which is that although confidential information may be disclosed under subsection (4), confidential information that may harm the employer's interest or an employee cannot be disclosed.

The above jurisprudence indicates that section 16(4) and 16(5) are a codification of the balancing of interest theory of disclosure. However, unlike the case where the employer can withhold the confidential information, the employer is still required to disclose the information but notify the trade union representative in writing that it is confidential. Clearly, however, the trade union representative or trade union may not disclose the information to the world at large. A breach of confidentiality, may result in the withdrawal of the right to disclosure of information in that workplace.<sup>226</sup> This presents a problem in employee participation in decision-making, because trade

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<sup>223</sup> *Moulded Components v Caucourakis and Another* 1979 (2) SA (WLD) p 466 C-G.

<sup>224</sup> (1993) 14 ILJ 642 (LAC).

<sup>225</sup> *Ibid* at 652 C.

<sup>226</sup> Section 16(14).

unions are under a duty of fair representation in relation to their members.<sup>227</sup> The question is whether disclosing information to general members of the trade union will amount to a breach of confidentiality. It is suggested that trade union members should also have access to the information as they are the trade union and not a different constituency from their representatives. What is critical is that the trade union as a whole should not use the information to harm the interests of the employer.<sup>228</sup>

#### 4.5 SUFFICIENT DISCLOSURE

Section 16(2) and 16(3) together with the limitations in subsection (5) define the parameters for sufficient disclosure under section 16. It would seem that even in the *Atlantis Diesel Engines* case<sup>229</sup> the LAC utilized the limitations to determine sufficiency of disclosure. In an attempt to define what sufficient disclosure is, Roth AM observed that:

‘It seems to me to be lawful, just and equitable that management should be obliged to disclose only such information as would reasonably enable employees to consider the consequences that information held for them.’<sup>230</sup>

Du Toit *et al* criticised the foregoing statement for not being in line with the purposes of the new LRA, when they wrote:

‘With respect, the learned member has stated the test too conservatively. The policy of the new law stretches beyond this cautious reticence. The effective interaction required by section 16 must be construed in light of the Act’s objectives to promote orderly collective bargaining and employee participation in decision-making in the workplace. Goals of this kind aim not only at employee equity and benefits but also at enhancing efficiency and the promotion of common interest through joint problem solving. The narrowly formulated test of the learned member overlooks these considerations. Besides the greater the extent of discussion, the greater the prospects of a harmonious and efficient workplace.’<sup>231</sup>

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<sup>227</sup> See discussion in Chapter 6 below.

<sup>228</sup> See *Yakima Frozen Foods case* ( 1961)130 NLRB 1269 - where in an attempt to ensure confidentiality, the employer would only release financial information to a certified accountant not in the union’s employ but to be selected by the union. The board held this to be reasonable and that it did not constitute bad faith bargaining.

<sup>229</sup> *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (LAC) *supra* note 181.

<sup>230</sup> *NUMSA v Metkor Industries (Pty) Ltd* (1990) 11 ILJ 1116.

<sup>231</sup> Du Toit *et al op cit* note 165 p 150.

Clearly, therefore, in determining the sufficiency of disclosure the purposive interpretation of the LRA will be very crucial and the objectives of the Act extend the boundaries more than ever before. This is fundamental to making the processes of collective bargaining and consultation meaningful and hence supporting employee participation in decision-making.

#### 4.6 DISPUTES REGARDING DISCLOSURE OF INFORMATION

Disputes about the disclosure of information are to be referred to the CCMA for conciliation<sup>232</sup> failing which the dispute should be resolved through arbitration.<sup>233</sup> According to section 16(10) the commissioner must first determine if the information in issue is relevant or not. This brings about the issue of the onus. The trade union party will usually have to prove the relevance of the information while the employer may plead either irrelevance or limitation of disclosure on any of the grounds stated in section 16(5).<sup>234</sup> If the commissioner decides that the information is relevant and that it is information contemplated in subsection (5)(c) and (d), the employer must balance the interest of disclosure of information and the likely harm that might ensue. This is called the balance of harm test, which finds its origins in the jurisprudence of discovery. In determining the appropriateness of disclosure, the courts would strike a proper balance between the conflicting interests of the parties concerned. Jordaan<sup>235</sup> states that:

‘[T]his balance of harm test involves a weighing up by the commissioner of the harm which disclosure is likely to cause to the employer, against the ability of the shop steward to perform his or her duties in terms of section 14 (4) or the ability of the union to engage effectively in consultation.’

If the commissioner decides that the balance of harm favours the disclosure of information, such could be on certain conditions designed to limit the harm likely to be caused to the employee and employer.<sup>236</sup> In making a decision on the basis of subsection 12, the commissioner may take into account any past breach of confidentiality at the workplace and may on the basis of this assessment refuse disclosure of the information stated in the arbitration award. Although section

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<sup>232</sup> Section 16(8).

<sup>233</sup> Section 16(9).

<sup>234</sup> Refer to discussion on rules of determining relevance in paragraph 4.4.1 above.

<sup>235</sup> Jordaan *op cit* note 171 p 4.

<sup>236</sup> Section 16(12).

16(5) may appear to provide protection for employers, close analysis reveals that in fact it provides employees with grounds to challenge the employer's refusal to disclose information. If an employer refuses to disclose information because he claims that such information is protected from disclosure according to section 16(5), section 16(6) gives the employees an opportunity to prove the relevance of the information and challenge the basis upon which the employer seeks to protect the information under section 16(5). Employees' right to challenge a refusal to disclose information indicates that section 16 is consistent with the aim of ensuring that employees are not in the dark when they participate in the decision-making process. Clearly, employers have limited grounds upon which they can refuse to disclose information which can be seen as a limitation on management prerogative in favour of employee participation in decision-making.

#### 4.7 CONCLUSION

It is interesting to note that there may be other additional mechanisms to section 16, which may be utilized to obtain information from the employer. For instance, the Constitution of the Republic of South Africa Act 108 of 1996 provides for a right of access to information at section 32(1)(b)<sup>237</sup> which may be sought to exercise the right to engage in collective bargaining in section 23(5) of the constitution.<sup>238</sup> Other channels would include using information available to shareholders which can be obtained by an astute trade union. However, section 16 and other provisions of the LRA limit and regulate the right to information and the Labour Courts may not readily use procedural sections and other laws to extend the rights to disclosure.

It is very significant that the right to disclosure of information has been provided for in the Act,

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<sup>237</sup> Section 32(1)(b) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that everyone has the right of access to information that is held by another person and that is required for the exercise or protection of any right.

<sup>238</sup> In *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (TPD) at 848 (A-C) where the issue concerned access to information which could be obtained through discovery. The applicant sought to obtain the information by relying on section 23 of the Interim Constitution of the Republic of South Africa Act 200 of 1993. The respondent advanced the ground that applicant was not entitled to information in terms of s 23 because she could obtain the information through discovery (848D). Cameron J stated that respondent's argument was an unacceptable constriction upon the operations of section 23 and concluded that the applicant could rely on section 23. Although this case involved an organ of the state, its significance to the issue under discussion is that, when section 32 comes to force, the courts may be willing to grant an employee's right to access to information in the hands of the employer without having to rely on the LRA.

because it will ensure that employee participation in decision-making is set on the right foundation. All the other mechanisms of participation which are provided for, rest on the availability of information which will empower employees to participate constructively in the decision-making process. It must be remembered that in labour relations perceptions play a vital role. Employees may not trust the employer's position because the employer is perceived to have all the information about the establishment at his disposal. Disclosure is therefore vital if the perceptions of mistrust are to be reduced so that collective bargaining and consultation are not delayed by perceptions founded on ignorance. This also implies that it will be important for employers to be forthcoming with information, if information disclosure is indeed going to support employee participation in decision-making. A study done by Grossett<sup>239</sup> in 1997 reveals very interesting trends on the perceptions of management to disclosure of company information to employees. The aim of the research was to investigate the implications of disclosure of company information to employees and establish the extent to which the LRA would meet its main objectives of facilitating collective bargaining and promote employee participation in decision-making. The research reveals that information which is viewed as sensitive<sup>240</sup> by management is poorly disclosed while less sensitive information<sup>241</sup> was well disclosed. It is interesting to note that the study reveals that employers are not prepared to disclose information on remuneration received by directors.<sup>242</sup> The reasons apparently are that such information is sensitive and may be misinterpreted and that issues on remuneration are private and will serve no purpose if revealed to the public. The reluctance to disclose such information, which is usually at

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<sup>239</sup> Grossett *op cit* note 166 p 40 the research was based on a sample of 1475 firms whose population consisted of organizations listed and non-listed, employing in excess 200 people. It covered the chambers of commerce of Gauteng, Durban, Port Elizabeth and Cape Town, 310 of them returned usable responses.

<sup>240</sup> *Ibid* p 53, information on directors' shareholding; mergers and take overs; and closures and changes in location of the workplace are considered as sensitive information that would hold very negative outcomes for the organization if disclosed to employees.

<sup>241</sup> *Ibid* pp 51-52, information which would yield positive results for the organization according to management and also promote employee participation in decision-making includes: information on manpower (number of employees, categories of employees, recruitment policy); remuneration (total wage bill, ability of employer to meet wage demands); financial position of the company; performance and competitive situation (productivity and efficiency data, details of major competitors); structure and organization of the company; plans and prospects of the organization (investment and expansion plans); and social involvement in the organization (involvement in community affairs).

<sup>242</sup> *Ibid* p 47.

the centre of the financial viability of a company, points to the problem of perceptions that has to be overcome by both employers and employees. Clearly, employers will have to learn to utilize the statutory limitations to disclosure instead of reluctance based on their own perception of what is good and not good to disclose. Employers are also said to be reluctant to disclose information on mergers and take-overs. This is ironic because employees are to be consulted on these matters under section 84(1)(d).

Employees on the other hand are said to have a problem of not understanding the information disclosed and this is largely blamed on the high level of illiteracy amongst them.<sup>243</sup> It is hoped that the Employment Equity Act 55 of 1998<sup>244</sup> will assist in the acquisition of skills by employees, which will help them to understand information disclosed. Furthermore, this poses a challenge to trade unions to train their members for employee participation and, after all, nothing stops the employees from employing the services of an expert to assist them in analysing the information. In spite of the factors which may militate against ready disclosure of information on the part of employers and the risk of information being misinterpreted by employees, the disclosure of information will result in improved industrial relations and hopefully translate into employee participation in decision-making.

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<sup>243</sup> Tyson H 'Disclosure of Financial Information to the Workforce' (1993) February, *Accountancy South Africa*, p 4. Foley B *Accounting Information and Collective Bargaining* (1979). The problem of lack of capacity amongst employees to utilize the participatory mechanism was identified in COSATU's September Commission <http://www.cosatu.org.za/congress/sept-ch6>. In chapter 6 paragraph 2.4 it was stated that: 'But even where unions have won rights to consultation, signed agreements, and established new forums for consultation and participation, they have found it very difficult to make use of these gains in practice....The reason for these problems are two fold: in the first place, the unions often lack a vision or clear policies on what to do with their new influence. In the second place, they lack the capacity to use the forums and agreements effectively.'

<sup>244</sup> Section 15(2)(d)(ii) provides that 'Affirmative action measures implemented by a designated employer must include, subject to subsection (3), measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament for providing skills development.'

## **CHAPTER 5**

### **CONSULTATION PRIOR TO DISMISSALS FOR OPERATIONAL REQUIREMENTS.**

#### **5.1 INTRODUCTION**

Amongst the three grounds for dismissal, none is as relevant to employee participation as the dismissal for operational requirements. Section 189 of the LRA regulates the dismissal for operational requirements sometimes known as retrenchment. This section provides for extensive consultation before such dismissal may be effected and it is the extensive consultation which makes retrenchment relevant to employee participation in decision-making. Another reason for its relevance may be found in the rationale for the extensive consultation of employees on dismissal based on operational requirements and not in the other kinds of dismissals. The first aspect of this rationale is that one of the purposes of the LRA is to promote employee participation in decision-making in the workplace<sup>245</sup> and retrenchment is one of those subjects for which workplace forums are to be consulted on.<sup>246</sup> The second lies in the nature of this type of dismissal, section 213 defines operational requirements as:

‘[R]equirements based on the economic, technological, structural or similar needs of an employer.’

From the above definition it is clear that this dismissal is based on the economic needs of the employer and not on the fault of the employee.<sup>247</sup> This raises a threat to the job security<sup>248</sup> of

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<sup>245</sup> Section 1(d)(iii).

<sup>246</sup> See sections 84(1)(e) and 189(1)(c).

<sup>247</sup> In *Hendry v Adcock Ingram* (1998) 19 ILJ 85 (LC) at 90D-F, Revelas J states that: ‘proper and exhaustive consultation in respect of the retrenchment seems to form the very basis of the principles applying to fairness. Because employees are dismissed due to no fault of their own (during) a retrenchment exercise, and because the termination of their services can be attributed or ascribed to an economic rationale beyond their control, the retrenchment process must be complied with as set out in the Act.’ See also *Van Rensburg v Austen Safe Co.* (1998) 19 ILJ 158 (LC) at 168 C.

<sup>248</sup> The issue of job security is linked to the right to a job. In explaining the link between this right and the viability of a business Landman J in *SA Chemical Workers Union v Afrox* (1998) 19 ILJ 62 (LC) at 66 A-C states that: ‘Although we may speak of the right to a job, this right is itself dependent, at least in the private sector, on the existence in economic terms of the enterprise. The enterprise which provides the employment must maintain its way, grow and prosper for the right to a job to have meaning. If it fails then the right to a job fails with it. This basic economic premise has been incorporated in the Act by way of the exception permitting dismissal for

employees which has to be balanced with the right that employers have to dismiss for operational requirements.<sup>249</sup> Since employees have been granted protection against unfair labour practices by the constitution,<sup>250</sup> consultation becomes important in ensuring fairness in retrenchment.<sup>251</sup> As it was succinctly put by Smalberger JA, consultation promotes industrial peace.<sup>252</sup> In fact, it was through the retrenchment jurisprudence developed under the LRA 28 of 1956 that most of the principles of employee participation were developed, emphasising the relevance of this enquiry.

In examining the relevance of consultation prior to dismissal for operational requirements, the following matters are discussed: the nature of consultation under section 189; commencement of consultation; sufficiency of consultation; parties to be consulted; substantive fairness and topics for consultation; and disclosure of information.

## 5.2 NATURE OF CONSULTATION UNDER SECTION 189

Consultation under section 189 has its foundation in the jurisprudence developed under the LRA 28 of 1956. Section 46(9)<sup>253</sup> gave the Industrial Court the power to make determinations arising out of unfair labour practice disputes.<sup>254</sup> It was on the basis of the unfair labour practice

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operational requirements.’ In fact, an employee does not have a right to indefinite and permanent employment with a particular employer: see *Hendry v Adcock Ingram (supra)* at 92 A-C and *Visser v South African Institute For Medical Research* (1998) 9 BLLR 979 (LC) at 980G.

<sup>249</sup> Grogan *JWorkplace Law* 3 ed (1998) p 159 writes: ‘ while employers have an undoubted right to do so for economic, technical or structural reasons, this form of termination, generally known as retrenchment has the same social and economic ill-effects as other dismissals, often on a greater scale. In addition, dismissal on the ground of the employer’s economic needs differs...in the sense that employees affected are economically active and may have impeccable service and are still able to do so.’

<sup>250</sup> Section 27(1).

<sup>251</sup> Landman A ‘Unfair Dismissal: The new rules for capital punishment in the workplace’ (1996) 6 *CLL* p 52.

<sup>252</sup> *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1995) 1 BLLR 1 (AD) at 5 A where it was stated that: ‘[C]onsultation satisfies principle because it gives effect to the desire of employees who may be affected to be heard,....where retrenchment looms employees face the daunting prospect of losing their employment through no fault of theirs. This can have serious consequences and threaten industrial peace. Proper consultation minimises resentment and promotes greater harmony in the workplace.’

<sup>253</sup> LRA 28 of 1956.

<sup>254</sup> Section 1 (1)(i) of the LRA 28 of 1956 provided for a definition of unfair labour practice and the termination of an employee’s employment for operational requirements was deemed to be unfair unless such

jurisdiction that the Labour Appeal Court pronounced on the nature of consultation in retrenchment where in *National Union of Metal Workers of SA v Atlantis Diesel Engines (Pty) Ltd*<sup>255</sup> the court said the following:

‘It simply means that an employer who senses that it might have to retrench employees in order to meet operational objectives must consult with the employees likely to be affected at the earliest opportunity in order to advise them of the possibility of retrenchment and the reason for it. The employees or their representatives must then be invited to suggest ways of avoiding termination of employment, and should be placed in a position in which they are able to participate meaningfully in such discussions. The employer should in all good faith keep an open mind throughout and seriously consider the proposals put forward.’

The foregoing view of what consultation under retrenchment means, was later endorsed by the Appellate Division in *Atlantis Diesel Engines v National Union of Metal Workers of South Africa*.<sup>256</sup> Section 189 may therefore be seen as a codification of the interpretation of consultation under the foregoing cases. However, consultation required under section 189 has been interpreted as going further than what was stated in the *Atlantis Diesel* cases. In *Chemical Workers Industrial Union v Johnson and Johnson (Pty) Ltd*<sup>257</sup> Zondo J said:

‘Whatever the legal position was under the old Act before and after *Atlantis Diesel Engines*, I am of the opinion that the duty to consult under the new Act quite clearly goes beyond an employer simply having to give employees or a representative trade union an opportunity to make representations which the employer is free to accept or reject with or without proper consideration and with or without good reason. In my view this conclusion is inevitable if one has regard to the specific provisions of section 189(6) in general but those of s189(1), (2), (5) and (6) in particular.’

The nature of consultation in this section therefore seems to require both the employer and

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employee was consulted. Through this provision the Industrial Court developed guidelines which helped in the evaluation of the fairness of retrenchment: see *Shezi and Others v Consolidated Frame Cotton Corporation* (1984) 5 ILJ 3 (IC), *National Union of Textile Workers and Others v Sea Gift Surfware Manufacturers* (1985) 6 ILJ 401 (IC). These guidelines were developed through South African practice and comparative labour law, including that of the UK. The principal English case in this regard is *Williams v Compair Maxam Ltd* [1982] IRLR 83 where the court pointed out that the employer was to consult with employees or unions in case of redundancies so that the best means by which the management result can be achieved can be found. This also accords with Article 13 paragraph 1 of the Termination of Employment Convention 158 of 1982 which requires an employer to consult when considering termination of employment on the basis of operational requirements.

<sup>255</sup> (1993) 14 ILJ 642 (LAC) at 650 A-C.

<sup>256</sup> (1994) 15 ILJ 1274 (A) at 1252 C-D where the Judges of Appeal said: ‘[C]onsultation requires more than merely affording an employee an opportunity to comment or express an opinion on a decision already made. It envisages a final decision being taken by management only after there has been consultation in good faith.’

<sup>257</sup> (1997) 9 BLLR 1186 (LC) at 1201D-E.

employees who will be affected to seriously engage each other on the decision to retrench, particularly because this process has to be exhaustive.<sup>258</sup> This is a further inroad into managerial prerogative and a recognition that employee participation in decision-making is important in retrenchment.<sup>259</sup>

### 5.3 COMMENCEMENT OF CONSULTATION

Section 189 (1) states that when an employer contemplates dismissing one or more employees, consultation must commence. The stage at which employees are involved in decision-making is very important in determining the effectiveness of consultation. According to the Act, consultation should take place before a final decision is taken.<sup>260</sup> The LC has provided an indication of when consultation is to begin in two recent decisions, in *Ellias v Germiston Uitgewer (Pty) Ltd t/a Evalulab*<sup>261</sup> where the applicant had been dismissed by the respondent without timeous consultation as required by section 189, thereby denying applicant an opportunity to make

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<sup>258</sup> See *Chothia v Hall Longmore and Co (Pty) Ltd* (1997) 6 BLLR 739 at 741E-F and *Ellias v Germiston Uitgewers (Pty) Ltd t/a Evalulab* (1998) 19 ILJ 314 (LC).

<sup>259</sup> In *UPUSA and Others v East Rand Proprietary Mines Ltd* (1996) 1 BLLR 108 (IC) at 119 I-J to 120 A the court said: ‘ as labour law has become more refined and socialised, so have greater inroads been made into the concept of managerial prerogative. It is now recognized that management may not merely make decisions which will impact upon the lives of employees without taking into account the effect that such decisions would have on its employees, and not at least without consulting with affected employees with regard to the effect that such decisions might potentially have...this is not to say, however, that management has to take into account the effect such decision might have on its employees and to act accordingly, and always in a fair and reasonable manner.’

<sup>260</sup> The employer has a duty to consult with a union the moment it becomes apparent that a proposed re-organization may result in retrenchment and in the case of an individual employee, when it becomes apparent that the proposed re-organization may adversely affect the employee’s job - *Reckitt and Colman (SA) (Pty) Ltd v Bales* [1994] 8 BLLR 32 (LAC). However, the issue of when consultation was to commence has been the subject of much debate, as Van Niekerk SM *et al* in *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1992) 13 ILJ 405 (IC) adopted a two stage approach to retrenchment, the first consisting of the actual decision to retrench which was for management only and the second which was the implementation of management’s decision at which consultation is necessary. However, Fagan DJP in the LAC in *NUMSA v Atlantis Diesel Engines supra* note 255 rejected the two-stage process, because to him there was no dividing line between the decision to retrench and the implementation of that decision. according. In fact the AD in *Atlantis Diesel Engines supra* note 252 stated that once the possible need for retrenchment is identified and before a final decision to retrench ( being when an employer perceives or recognises that the business is falling or ailing, considers the need to remedy the situation, identifies retrenchment as one possible remedy) consultation should commence. The impression is created that the employer’s perception should be established on a ‘subjective’ basis. However, there is clearly a need for prompt notice which cannot be served by a subjective evaluation which is not limited by some objective standard of reasonableness.

<sup>261</sup> (1998) 19 ILJ 314 (LC).

suggestions on means to avoid or provide alternatives to dismissal. On the issue of procedural fairness the court referred to decisions based on the LRA 1956, and particularly to the decision of the AD in *Atlantis Diesel Engines* case which emphasized the need for consultation once the possible need for retrenchment was identified and before the final decision to retrench was taken. The court decided that the respondent had failed to consult timeously with the applicant as was prescribed by section 189. A case which provides a test for when consultation should commence is *Opperman v Speck Pumps SA (Pty) Ltd.*<sup>262</sup> There the applicant had been retrenched after respondent had decided to out-source some of its production activities. Applicant attacked some of respondent's production activities and his retrenchment on the basis that a proper procedure had not been followed. In deciding that the dismissal was procedurally unfair, Revelas J<sup>263</sup> said: 'Section 189 (1) of the LRA requires the employer to consult with an employee when he or she "contemplates" retrenching that employee. To determine at what stage the decision to retrench was taken or when it was contemplated, is indeed a difficult task and I do not believe that the test to determine that question is a subjective one. I believe it is an objective test.'<sup>264</sup>

It is evident that management is still expected to exercise its management prerogative of initially evaluating and deciding what options they have. However, the decision whether to opt for retrenchment is not entirely theirs, because as soon as the option of retrenchment becomes relevant, it is obligatory to involve employees in the decision-making process through consultation until the final decision is taken. Even if there is no agreement, the very fact that employees are involved in exploring some options is very significant in limiting the management prerogative and enhancing participation in decision-making in the workplace. A case in point in this regard is *MCI Staff Committee and Others v Midland Chamber of Industries*,<sup>265</sup> where the respondent, a service organisation registered as a section 21 company, made an application for the winding-up of its

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<sup>262</sup> (1998) 4 BLLR 414 (LC).

<sup>263</sup> *Ibid* at 418 B-C.

<sup>264</sup> In the UK the Employment Protection Act 1975, section 99 requires that the employer must disclose information and engage in consultation with the trade union representatives prior to the specific cases of proposed collective redundancies. This section gives the impression that the employer is expected to consult before there is specific identification of employees to be dismissed. It is important to note that just like the LRA, the UK position deems the appropriate point to commence consultation as being when the idea of dismissal seems to be a possibility and not when it has been adopted.

<sup>265</sup> (1996) 4 BLLR 521 (IC).

operations as their books showed a deficit. They were then duly liquidated. The respondent thereafter informed the affected employees that retrenchment was unavoidable and requested the affected employees to appoint a committee to represent them during the consultation process. Eleven meetings were held after which retrenchments were effected. One of the points raised in the application was that their retrenchments were unfair because the respondent had failed to hold *bona fide* consultations. The court held that, the retrenchments of the individual applicants were unfair in that the respondent failed to give proper notice of the impending retrenchments, to involve it in the consultation prior to the decision to liquidate, and to pay severance benefits. Passing judgment, the presiding officer Brand SM<sup>266</sup> commented on when consultation should begin and what constitutes sufficient notice to commence consultation:

‘The question of when notice should be given or should have been given by the employer must therefore be determined not only by a subjective interpretation of the employer’s perception which is not limited by some objective standard of reasonableness..... It would therefore not be fair to judge the sufficiency of the notice without referring to the extent and scope of the consultation process. Management and the workforce should put their heads together before retrenchment becomes a reality because that is the best time to address the reasons for possible retrenchment and to seek alternatives to it.’

In this case the employees were only involved in the consultation process after the decision to retrench had already been taken and as such this affected the fairness of the consultation process. Early involvement of affected employees before retrenchment becomes a reality, is the correct point to commence consultation.

#### 5.4 SUFFICIENCY OF CONSULTATION

It is important to state from the outset that section 189 establishes a relationship of rights and duties, where employees have a right to be consulted and the employer a duty to consult.<sup>267</sup> This clearly spells out that consultation under this section cannot be circumvented under any

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<sup>266</sup> *Ibid.*

<sup>267</sup> *NEWU and Others v Mintroad Saw Mills (Pty) Ltd* (1998) 2 BLLR 159 (LC) at 162 (G-H), Grogan AJ accepted that before an employer dismisses employees for operational requirements it is under a duty to comply with provisions of sec. 189, and that the employees or their representatives have a corresponding right to be so consulted.

circumstances.<sup>268</sup> A case that can illustrate this point is *Van Der Merwe and Others v McDuling Motors*<sup>269</sup> where the applicants, complained that they were unfairly dismissed in the sense that they were retrenched from their employment with the respondent and that the procedures required by the LRA were not complied with. Although the respondent had been aware of the duty to consult with the representative trade union prior to retrenching its employees, it had merely written to the trade union to inform it of its intention to do so, and had not replied to its request for information. It then entered into private negotiations with its employees, including the applicants, and purported to conclude an agreement with them. In his judgment, Landman J stated that:

‘I think I should say at the outset, as I said in the case of *Anna Bekker (Vogel) v National Air* (1998)2 BLLR (LC), that situations can be envisaged where a short cut can be taken and where an employer and employees who are going to be subject to retrenchment may simply agree that this is the end of the matter, that it is a foregone conclusion and simply reach a settlement agreement. However, as was said in that case, the court is reluctant to come to such a conclusion, particularly where section 189(1)(c) of the Act requires there to be proper consultation between the employer and the union representing employees who may well be retrenched; where that section requires information to be discovered in writing; where it requires representations to be considered, and if retrenchment cannot be avoided, for it to be effected according to agreed criteria or where they have been agreed by fair and objective criteria.’<sup>270</sup>

Landman J elaborated on the aims of the LRA in relation to consultation, when he stated that:

‘The aim of the LRA is to protect the rights of *inter alia* employees and to ensure that fair labour practices are followed. One of the ways of ensuring this is by seeing to it that employees are properly represented at grievance procedures, at disciplinary inquiries and in potential retrenchment situations. I am convinced that had the applicants been properly represented by the union they may have negotiated better packages than these that were paid to them.’<sup>271</sup>

Therefore, employers and employees are expected to consult unless employees waive their right

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<sup>268</sup> In the UK although an employer is expected to consult with employees to be affected by possible retrenchment, employers can circumvent consultation based on what is called the ‘special circumstances’ defence. According to this defense the employer is expected to show that circumstances rendered it not reasonably practicable to consult. In *Clark of Hove Ltd v Bakers’ Union* [1978] IRLR 366 at 369 Geoffrey Lane LJ explained that ‘ It will depend entirely on the cause of the insolvency whether the circumstances can be described as special or not. If, for example, sudden disaster strikes a company, making it necessary to close the concern, then plainly that would be a matter which is capable of being special circumstance; and that so whether the disaster is physical or financial.’ There is no similar defence provided for in the LRA.

<sup>269</sup> (1998) 3 BLLR 332 (LC).

<sup>270</sup> *Ibid* at 332 I-333A.

<sup>271</sup> *Ibid* at 333 C-D.

to be consulted.<sup>272</sup>

In determining the sufficiency of consultation, there should be a preference for a purposive interpretation of section 189, which requires constructive participation in consultation and mutual respect from both employees and employers *inter se*.<sup>273</sup> This approach stems from section 189 which states that the consulting parties must attempt to reach consensus. This section requires both parties to make an effort to reach an agreement where possible, which shows that sufficient consultation should be a two-way process.<sup>274</sup> The two-way approach was adopted in *Benjamin and Others v Plessey Tellumat SA Ltd*<sup>275</sup> where in deciding that the dismissal was procedurally and substantively fair, the presiding officer noted that the employee representatives had adopted a negative attitude towards consultation, as they did not put forward any counter-proposals on the application of the selection criteria. In this regard Basson J stated that:

‘Consultation, of course, remains a two-way street where both parties must give their full cooperation in the quest for consensus on these very sensitive matters. After all, section 189(2) of the Act makes it clear that both consulting

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<sup>272</sup> In *Keller v Transnet* (1998)1 BLLR 62 (LC) at 67 A-B, Revelas J stated that: ‘by merely negotiating a package and not discussing alternatives to avoid retrenchment, simply because this was not raised by the applicant (the employee) is by no means a waiver of the applicant’s right in terms of section 189 which I believe are fundamental to a retrenchment exercise. The respondent had a duty to follow the procedures set out in section 189.’

<sup>273</sup> This approach has been adopted by the LAC in *Ceramic v NACBAWU and Others* (1997) 18 ILJ 671 (LAC) where the court recognised a two-stage inquiry, firstly into the purposes of the Act, and secondly into the purposes of the particular section ( 675 G-H). This approach is supported by the minority judgement of Nicholson JA in *Business South Africa v COSATU and NEDLAC* (1997) 18 ILJ 474 (LAC), where he sought to emphasize the different purposes behind the Act, including the advancement of economic development, social justice, labour peace and the democratisation of the workplace. The indication is that in the determination of whether there has been sufficient consultation, the circumstances of the case have to be observed to determine whether the purposes of the Act have been achieved. This gives the process meaning because the conduct of the parties will indicate whether they have behaved in a manner that promotes the objective of democracy, labour peace and social justice in the workplace. The majority judgement underlined the importance of being responsible in exercising rights in the LRA by stating that, while one of the purposes of the Act was to grant protection to those exercising their statutory rights, in order to enjoy that protection the Act requires the exercise of the rights in a responsible manner (479B-D). See also *Van Rensburg v Austen Safe Co.* (1998) 19 ILJ 158 (LC) at 169C, where the court stated that: ‘the court must also be cautious when evaluating procedural fairness as to whether the requirements of section 189 of the Act have been complied with, in respect of directors and managers...an unduly formalistic approach to section 189 may lead to abuse of the consultation process.’

<sup>274</sup> Grogan *op cit* note 249 p 162 writes: ‘it is to be noted that section 189 requires all parties to attempt to reach consensus on the various matters specified. Consultation is therefore not simply one-sided, and an employer cannot be expected to consult with a union that unreasonably evades it or seeks to delay it.’

<sup>275</sup> (1998) 19 ILJ 595 (LC).

parties must attempt to reach consensus on matters such as the method for selecting employees to be dismissed.<sup>276</sup> If any party fails to participate constructively in the two-way process of consultation, that party has itself to blame for the outcome.<sup>277</sup> All that this shows is that the consultation process must be goal-oriented and that co-operation must be more prominent in the process although a little dose of adversarialism should not be ruled out. Certainly in these circumstances employee participation is going to thrive.

The question therefore is when can an employer decide that sufficient consultation has been reached, particularly if there is no agreement in the consultation process after several attempts at reaching consensus. This can be answered through an analysis of the most recent decisions of the Labour Court on this matter.

In *Chemical Workers Industrial Union v Johnson and Johnson (Pty) Ltd*<sup>278</sup> where respondent, a subsidiary based in South Africa, faced stiff competition from other competitors in the market. Management consequently conducted a study which indicated that they had to utilize better technology and stop production of one of their products. As such a number of their employees had to be retrenched. Management then commenced consultation with the applicant union. Initially applicant was requested to consider the implications of the state of affairs of respondent. Several meetings were held in an attempt to commence consultation, but applicant insisted on being given an opportunity to consult its constituency in order to obtain a mandate to be part of the consultation process. After several requests by the respondent for the consultation process to proceed, applicant wrote a letter to respondent requesting financial information. This information was made available for inspection by a party agreeable to both parties and the report was thereafter accepted by both parties. The applicant then requested that there be a moratorium on retrenchment, which respondent rejected. From that point on there was no consultation with the respondent. Seeing that applicant was insisting on the moratorium on retrenchment and refused to consult further, respondent proceeded to select the employees to be retrenched and decided

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<sup>276</sup> *Ibid* at 599 I

<sup>277</sup> *SACWU and Others v Afrox Limited* (1998) 2 BLLR 171 (LC) at 183 B-C.

<sup>278</sup> (1997) 9 BLLR 1186 (LC).

on the severance package and the timing for the dismissal.

The issue before the court was that the dismissal of applicant's members constituted an unfair dismissal as per section 185 of the LRA 66 of 1995. The basis for this was that respondent had failed to follow a fair procedure before dismissing the workers. According to the applicant, respondent failed to consult with the applicant on the selection criteria as well as on the severance pay.

In his judgment Zondo AJ endeavoured to explain what consultation under section 189 means. The judge was of the view that the provisions of section 189(1) should not be read in isolation but must be read together with the rest of the subsections. Section 189(2) is important in relation to what the duty to consult prior to retrenchment entails.<sup>279</sup> The court then held that, since respondent had not consulted the applicant on the selection criteria and severance payment, it had failed to discharge its duty to consult. On the issue of sufficient consultation Zondo AJ said:

'I am of the view that an employer must endeavour to reach consensus with the other consulting party as to when the consultation would begin and by when it should have been completed so that everyone knows the time frame. In the end the employer is the party that drives the consultation process because it knows by when the business would be seriously prejudiced if neither a viable alternative to retrenchment nor the retrenchment was implemented. For that reason the final decision as to when the consultation process ends rests with the employer if no agreement has been reached on that. But in that event, it is incumbent on the employer to take necessary steps to leave the other consulting party in no doubt as to when the employer intends to make all decisions that need to be made to deal with the financial or economic situation or survival of the enterprise so that should the other consulting party fail to utilise the opportunity prior the deadline, it cannot later complain if the employer proceeds to make those decisions without its input.'<sup>280</sup>

In this case Zondo AJ shows that sufficient consultation means the holistic application of section 189, so that failed consultation on other aspects (for instance the selection criteria and severance package in this case) of the section may result in failure to consult. However, if the affected employees refuse to proceed with consultation because they feel that retrenchment can be avoided, while the employer feels otherwise, the employer can continue with the retrenchment

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<sup>279</sup> *Ibid* p 1199 J.

<sup>280</sup> *Ibid* p 1207 H-J.

process. In these circumstances the employer is expected to keep the employees informed about the unfolding process and the door open in case the employees wish to return to the consultation process.

This seems to have been the case in *National Education Health and Allied Workers Union v University of Fort Hare*<sup>281</sup> where there was an urgent application for an interdict on the basis that the respondent had not complied with the provisions of section 189(1) to 189(4) read with section 16 of the LRA 66 of 1995. The facts in this case are that respondent found itself in financial difficulties which threatened its very survival. Realizing this, the respondent gave workers on its campus an invitation to come and discuss the restructuring process of the respondent. Representatives of applicant in the first meeting requested to consult with its constituency to obtain a mandate. At the next meeting after consultation with the constituency, there was no discussion on substantive matters of the retrenchment process, as the parties disagreed on who was to chair the consultation process. Applicant told the respondent in no uncertain terms that if there was no agreement on the chairperson, then it would not participate in the consultation process. Although respondent attempted to persuade the applicant to return to the consultation process several times, this was not to be. Respondent then proceeded with the consultation process together with the other employees who were not members of applicant. One distinguishing factor from the *Johnson and Johnson* case is that respondent in the present case informed the applicant of the unfolding process which adhered to section 189(2) in that all the issues in this subsection were to be discussed. Furthermore, the respondent was committed to disclosing information to the applicant upon request in terms of section 189(3) read together with section 16.

The court then held that since the respondent was in serious financial problems and that it was imperative that the process of restructuring be started and be finalised in the shortest possible time, in the circumstances, it had discharged its duty to consult. In this case, as in the *Johnson and Johnson* case, the workers had not participated in the decision on the selection criteria and severance payment. The distinguishing point is that the workers were kept informed of the

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<sup>281</sup> (1997) 8 BLLR 1054 (LC).

decision the employer was making on every matter for consultation. The opportunity was open to them to participate in the consultation process and they chose not to. As was stated by Zondo AJ in *Johnson and Johnson* case, the employees only have themselves to blame if they do not participate in the consultation process when given an opportunity.

In this case Zondo AJ suggested that sufficient consultation may be achieved even where employees refuse to be party to the consultation and the employer simply outlines the process in compliance with the provisions of section 189(1) to 189(4). What is important is that the employer must address all the matters outlined in section 189(2).

In *United People's Union of South Africa and Others v Grinakers Duraset*<sup>282</sup> the applicant alleged that the respondent did not comply with section 189 because it did not honour a collective agreement, and failed to consult with the first applicant or with the employees about the retrenchment in general or the selection criteria in particular. It was further argued by the applicant that the employer had no good reason to retrench the applicant members, and failed to comply with a further agreement that it would re-employ them as and when jobs became available. One of the bases for this application was that the respondent failed to consult over the selection criteria and the severance pay. From the facts it is clear that there was mention of the LIFO principle in the meetings that the parties held although, ultimately the respondent decided without the applicant on the selection criteria. Grogan AJ in distinguishing this case from the *Johnson and Johnson* case says that the employer was in that case taken to task on the very same issue as was before this court. The difference as he observed was that the respondent in this case ultimately decided to apply a retrenchment procedure that had been given to the first applicant. Grogan AJ proceeded to state that once the employer has consulted as required by the law, the ultimate decision to retrench falls within the competence of management. One interesting point that Grogan AJ makes is that both parties to the consultation process must attempt to reach consensus on the various matters enumerated under section 189(2). This dispels the one-sided notion that it is the employer who has to meet the needs of the employees. In fact in his judgment Grogan

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<sup>282</sup> (1998)2 BLLR 190 (LC).

AJ<sup>283</sup> went on to say:

‘[T]he obligation to consult placed on the employer by section 189 places a correlative duty on the other consulting party to co-operate in the attempt to reach consensus before the employer exercises its right to take the final decision.’

This confirms the view by Zondo AJ that when employees are given an opportunity to consult by an employer according to section 189 and they refuse to participate, and the employer then makes the final decision, they have themselves to blame for not participating in that decision.

From these decisions it becomes apparent that sufficient consultation is achieved if the employer consults in accordance with section 189(1) to 189(4) read together with section 16. Where there is disagreement leading to employees refusing to consult, the employer can proceed with the retrenchment process without the employees. But it is important that the employees be informed about the process and decisions being taken and that the door be left open for the employees to return to the consultation process. This is in line with the exhaustive nature of consultation required under section 189. Clearly, therefore, employees have an obligation to co-operate as much as possible in the consultation process. This should not suggest that adversarialism is not to be expected. However, employees should guard against engaging in dilatory tactics which usually result in employees having to accept decisions which are very detrimental to them.

## 5.5 PARTIES TO BE CONSULTED

Section 189(1) clearly identifies the parties to be consulted in a hierarchical order with each excluding its successor if it is applicable.<sup>284</sup> Section 189(1)(a) provides that the employer is required to consult any person in terms of a collective agreement and section 213 defines a collective agreement as:

‘[A] written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions.’

Furthermore section 23(1)(a) grants collective agreements legal force in so far as parties to it are concerned. It follows then that the entity to be consulted under a collective agreement is almost inevitably the trade union party to the agreement. A case in point here is *SA Polymer Holdings*

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<sup>283</sup> *Ibid* at 204 D.

<sup>284</sup> Grogan *op cit* note 249 p 165.

*(Pty) Ltd t/a v Llale and Others*<sup>285</sup> where the question was raised by the appellant's counsel, as to whether an employer who consults or negotiates with the union recognised as the representative of a bargaining unit over a pending retrenchment also needs to consult with individual members who are not union members within that unit.<sup>286</sup> The court ruled that the employer was only duty bound to give notice to the non-union members at risk of retrenchment and that these employees should be offered an opportunity to make whatever representations could have been made on their behalf to avert the decision. This position does not seem to accord with section 189(1)(a) if given a literal interpretation. However if a purposive interpretation is adopted, such employees may be consulted since one of the purposes of the Act is to promote employee participation in retrenchment proceedings. Therefore the views expressed by the Judge in the *SA Polymer Holdings* case, should be preferred as they make consultation necessary of non-unionised employees who might be affected by retrenchment. Although the LRA is based on the principle of majoritarianism<sup>287</sup> the unfairness that may result from the non-consultation of the employees who are not union members is limited by the purposive interpretation of the Act which amongst other purposes seeks to promote employee participation in decision-making.

Section 189(1)(b) provides that in the absence of a collective agreement, the employer must consult a workplace forum and this is also supported by section 84(1).<sup>288</sup> However, the workplace forum must be consulted if the workers likely to be affected are employees as defined

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<sup>285</sup> (1994) 15 *ILJ* 277 (LAC).

<sup>286</sup> *Ibid* at 279 (A).

<sup>287</sup> See further discussion of majoritarianism in Chapter 6 below.

<sup>288</sup> The requirement that the employer must also consult with a workplace forum is in line with the position under European Community Law. This may be illustrated by the *Renault* case discussed by Labor P ‘Renault Case: the European Works Council Put to Test’ (1997) *International Journal of Comparative Labour Law and Industrial Relations*, p 135. The facts of this case are that on 27 th February 1997, the French motor manufacturer group Renault, without warning announced its decision to close its Vilvade factory in Belgium in order to relocate it in Spain, thus leading to the potential collective dismissal of more than 3000 employees over the summer of 1997. The management neither informed nor consulted the appropriate representative body. The judge ruled that the application of the 1994 Directive on European Works Councils, in particular article 13 which is transposed into article 8 of the National Act required that the employees’ representatives should have been consulted. Thus the court ruled that the employer had committed a breach of an obligation to consult. Although the works council under discussion operated at a regional level, what is important is that E.C. law requires employers to consult with any representative body of employees (like works councils which are the equivalent of workplace forums).

by section 78(a).<sup>289</sup> Section 79(a) provides that the forums must seek to promote the interests of all employees in the workplace. Although the workplace forums should serve the interests of all employees in the workplace, there is always a possibility of the forum being dominated by the majority trade union which initiated it, thus practically ensuring that only their members benefit from the consultation process.<sup>290</sup> This would create a problem particularly where a minority trade union has a collective agreement with the employer, according to which they would have to be consulted as per section 189(1)(a). Du Toit *et al* point out to the anomaly that may be caused by this section, when they write:

‘While the intention to give primacy to collective bargaining is commendable, the section may lead to anomalous results. For example, in a workplace with a workplace forum there may be a minority trade union which is entitled to be consulted in terms of a collective agreement. Section 189(1) can be interpreted to mean that consultation with a minority trade union will be sufficient because the duty to consult with the workplace forum arises only in the absence of a collective agreement. In terms of section 84(1)(e), however, the workplace forum is in any event entitled to be consulted about proposals relating to retrenchments. The letter of the statute may seem to require the employer to go through two separate consultation exercises. In practice, this may be unworkable and a joint consultation process with union representatives together with the workplace forum should be sufficient.’

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The above statement may also provide an answer to the fate of senior managerial employees who do not fall within the scope covered by workplace forums, in that they would have to be consulted jointly with the workplace forum if they are also to be affected.

In the absence of a workplace forum section 189(1)(c) provides that an employer must consult any registered trade union whose members are likely to be affected by the proposed dismissal. From this provision it does not appear that any degree of representativity is required before consultation can commence, the only requirement apart from registration is that members of the union must be affected.<sup>292</sup> According to this section, in the absence of a workplace forum, the

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<sup>289</sup> Section 78 (a) states that: ‘Employee means any person who is employed in a workplace, except a senior management employee’.

<sup>290</sup> See further discussion in Chapter 7 below.

<sup>291</sup> Du Toit D *et al* *The Labour Relations Act 1995* 2 ed (1998) p 403.

<sup>292</sup> However, an employer is obliged only to consult with a majority union prior to retrenchment- *see Mtuzimele v Coverland Roof Tiles* [1996] 7 BLLR (IC).

employer must consult not just with any trade union but one whose members are likely to be affected by the proposed dismissals. This interpretation raises a problem because, how is 'affected' to be interpreted. It is possible that a trade union may advance its own reasons to prove that its members will be affected. After all the employer will not know exactly who will finally be affected until the consultation process has begun and alternatives discussed. So that until the consultation process has begun, all employees may claim that they will be affected.

Section 189(1)(d) states that in the absence of a trade union,<sup>293</sup> the employer must consult employees likely to be affected or their representatives nominated for that purpose. The only difficulty with this section is the unqualified use of the term 'representative', the question being whether a legal representative is included in the definition. The Eastern Cape Division of the Supreme Court attempted to answer this question in *Ibhayi City Council v Yantolo*.<sup>294</sup> The court in this case dealt with a certain clause in staff regulations which was to the effect that an employee, at a disciplinary enquiry, had the right to be heard 'either personally or through a representative'. Concerning the meaning of representative, the following was stated:

'[A]s there was no rule of natural justice or rule of practice in labour matters that determined that the word representative where it was not qualified, had to be interpreted to mean lay representation only, there was no reason so to restrict the meaning of the word as it was used in the staff regulations'.<sup>295</sup>

However, upon further reading of the Act, the following are representatives under section 189 (1) (d) a legal practitioner, a co-employee, a member or an office-bearer of that party's trade union. After all, what is important is that the representative must have been nominated for that purpose and must have been authorized to represent that employee specifically in the retrenchment proceedings.

There appears to be uncertainty when it comes to the application of section 189(1). For instance, subsection (1)(a) does not specify whether the employer is also required to consult with affected employees who are not covered by a collective agreement. Likewise, a similar question arises in

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<sup>293</sup> The trade union referred to here, is the one whose members may be affected by the proposed dismissal as provided in section 189 (1) (c).

<sup>294</sup> (1991) 12 *ILJ* 1005 E.

<sup>295</sup> *Ibid* at 1006 B-F.

respect of subsection (1)(c) as to whether the employer who consults the trade union must also consult with non-unionised employees likely to be affected by the proposed retrenchment. However, since the Act is very clear on the fact that all dismissals must be fair procedurally and substantively, a purposive interpretation should dictate that all employees likely to be affected must be consulted.<sup>296</sup> The purposive interpretation of the duty to consult with all employees who may be affected by the retrenchment gives meaning to the fairness which consultation is supposed to achieve. Therefore, if section 189(1) is to enhance employee participation in decision-making, this interpretation should be adopted. In fact, in the UK, an employer is expected to consult representatives of each recognised union according to section 188 of the Employment Protection Act of 1975 and it applies whether an employee is a union member or not.<sup>297</sup>

## 5.6 SUBSTANTIVE FAIRNESS AND TOPICS FOR CONSULTATION

The procedural fairness of a dismissal for operational requirements is linked to the substantive fairness of such decision.<sup>298</sup> The link is a further motivation for the parties to the consultation process to consult properly. In fact the employer has all the more reason to seek the participation of the employees in the decision to retrench. The LAC has long shown that the court can inquire into the fairness of a dismissal.<sup>299</sup> This is in part due to the recognition of technological

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<sup>296</sup> To support this position Marais P *et al* 'The New Labour Relations Act: Retrenchment' *Woza* 25 June 1997, p2 (<http://www.woza.co.za>) write that: 'Regardless of the interpretation of the Act employers contemplating retrenchment are urged, for the sake of fairness and industrial peace, to consult with all groups affected thereby. See also in *Rickitt and Colman SA (Pty) Ltd v Bales* (1994) 15 *ILJ* 782(LAC) at782I-J where it is clearly stated that:

'An employer has a duty, at the very least to consult with both a trade union when it becomes apparent that a proposed reorganisation of the employer's business may result in the retrenchment of employees represented by the trade union and with an individual employee when it becomes apparent that the proposed retrenchment may adversely affect that employee's job. That duty includes not only the selection of the employee as a candidate for the retrenchment but also the possible alternative to the termination of employment.'

<sup>297</sup> See *Northern Ireland Hotel and Catering College and North Eastern Education and Library Board v NATFHE* [1995] IRLR 83.

<sup>298</sup> *Steynberg v Coin Security Group (Pty) Ltd* (1998) 19 *ILJ* 304 (LC) at 306 I where Basson J made the point that: '[T]he procedural fairness of a dismissal for operational requirements is inextricably linked with the substantive fairness of a dismissal. The complete failure of the procedures in terms of the Act in *casu* therefore impacts negatively on the respondent's duty to prove that the reason for the dismissal was a fair reason based upon the employer's operational requirements (in terms of section 188(1)(a)(iii) of the Act, which deals with substantive fairness.' See also *Visser v South African Institute for Medical Research* (1998) 9 *BLLR* 979 (LC) at 980 (E-F).

<sup>299</sup> *National Union of Metal Workers of SA v Atlantis Diesel Engines Ltd* (LAC) *supra* note 255.

advancement, the development of employee participation and other policies in the workplace which favour greater democratisation in the workplace.<sup>300</sup> There is also a realisation that employees have a lot to contribute particularly in the termination of their employment, in *CWIU v Sopellog*<sup>301</sup> the court held that while it was not unfair for an employer to conclude that retrenchment was *prima facie* necessary, it should not take a final immutable decision to retrench and thereby close its mind on the question prior to consultation. The purpose of consultation is to explore options identified by the employer, to solicit further options from the employees and their representatives, and to consider them seriously. Failure to consult properly may lead to failure to canvass the need or reasons to retrench and to substantiate the fact that there was a reason to retrench. The fact that substantive fairness of retrenchment is linked to the consultation process is another indication of the importance of employee participation in decision-making. The link between substantive fairness and procedural fairness is further established by the topics for consultation.

Section 189(2) provides for the topics for consultation. This section indicates that employers and employees are given an opportunity to engage in exhaustive consultation which may result in the retrenchments not being carried out or if carried out, that better packages for employees may be negotiated. The importance of this section is that it indicates the nature of the decisions which employees have to participate in, demonstrating the real extent of employee participation in decision-making.

#### 5.6.1. Appropriate means to avoid dismissals (s 189(2)(a)(i))

The Act grants an opportunity for both employers and employees to seek solutions which will result in the avoidance of dismissals.<sup>302</sup> In this regard workers are expected to make representations regarding alternatives to the employers' proposals. This ensures that an employer does not consult with a resolve that retrenchment is definitely going to happen. Rather there is

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<sup>300</sup> Du Toit *et al op cit* note 291 p 401.

<sup>301</sup> (1994) 15 ILJ 90 (LAC), see also *Food and Allied Workers Union and Others v National Sorghum Breweries* (1998) 19 ILJ 613 (LC).

<sup>302</sup> *Sharpe v New ware Surfing Promotions CC t/a Island Style* [1994] 10 BLLR 149 (IC) where it was stated that an employer is obliged to consider alternatives to avoid retrenchment.

an expectation that the employer should keep an open mind and seek ways with employees to avoid retrenchment. This gives a very strong focus to the consultation process, as it militates against the notion that the employer has the right to make the final decision to retrench based on his subjective assessment of the state of the company.<sup>303</sup>

#### 5.6.2 Appropriate measures to minimise the number of dismissals (s189(2)(a)(ii))

If the alternatives of the employees are not acceptable, there should be means to minimize the number of dismissals. This may result in a decision to dismiss an absolute minimum of employees. The significance of this section (189(2)(a)(ii)) is that even if the workers cannot agree with the employer on avoiding the dismissals, they could still be influential in ensuring that as few workers as possible are dismissed. After all there is a general duty on an employer to minimize the possible termination of employment.<sup>304</sup>

#### 5.6.3 Appropriate measures to change the timing of the dismissals (s 189(2)(iii))

When the employer initiates consultation with employees, an indication of the timing of the dismissals will be reflected. It should be possible for the timing of dismissals to be changed so as to allow suggestions of alternatives and analysis of information made available to the employees in the consultation process. Thus the employees may request an alteration in the timing of the retrenchment. It may well be the case that the change in timing provides for extensive consultation which may result in a solution to the dismissals, thereby saving workers their jobs or there being a positive change in the success of the business. In employee participation timing is very important, because it may allow genuine consultation to take place and for greater influence on the employer's decision.

#### 5.6.4 Appropriate measures to mitigate the adverse effects of the dismissals (s 189(2)(a)(iv))

This provision presupposes that at the point that retrenchment is seen to be the inevitable option both employers and employees should attempt to secure means which will mitigate the adverse

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<sup>303</sup> *CWIU v Lennon Ltd* [1994] 10 BLLR 1 (LAC) where it was expressed that the employer is entitled to decide whether alternatives proposed are viable with the sole issue being whether it bona fide considered the proposals and not whether it was right or wrong in rejecting specific proposals.

<sup>304</sup> *Môrester Bande (Pty) Ltd v NUMSA and Another* (1990) 11 ILJ 687 (LAC).

effects on the employees. These may include alternative employment and a right of preferential recruitment when suitable vacancies arise.<sup>305</sup> This kind of an agreement is buttressed by item 2(1)(d) of Schedule 7, which provides that it would be a residual unfair labour practice for an employer who fails or refuses to reinstate or re-employ a former employee in terms of any agreement.

The section further provides for consultation on the method for selecting the employees to be dismissed section 189(2)(b) and the severance pay for dismissed employees section 189(2)(c).

The Act, through the above topics, gives meaning to the consultation process ensuring that substantive issues are negotiated and employees are able to influence the decision-making process on a range of issues which go to the core of dismissal for operational requirements. Therefore, according to section 189(2), before the employer could finally decide on retrenchment, his decision would have been affected by the input of employees which is ideally supposed to be the consequence of employee participation in decision-making.

## 5.7 DISCLOSURE OF INFORMATION

Disclosure of information has already been discussed under chapter 4 and most of the comments made on the subject apply in this context. However, section 189(3) provides for disclosure of information under dismissal for operational requirements.<sup>306</sup> This section provides that the employer must disclose in writing to the other consulting party all relevant information and goes on to outline the following specific information which must be disclosed: the reasons for the proposed dismissals; the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives; the number of employees likely to be affected and the job categories in which they are employed; the proposed method for

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<sup>305</sup> *National Automobile and Allied Workers Union v Borg-Warner SA (Pty) Ltd* (1994) 15 ILJ 509 (AD).

<sup>306</sup> In explaining the importance of disclosure in the retrenchment context, Grogan *op cit* note 249 p167 writes that: 'There can be no question of adequate consultation over a proposal if one of the parties is left in the dark about the reasons for and the facts which justify it. In the retrenchment context, employees or their representatives will clearly not be able to make sensible suggestions about the matter over which the LRA enjoins consultation unless they have sufficient information to appraise or challenge the employer's proposals or to formulate alternatives.'

selecting which employees to dismiss; the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed; any assistance that the employer proposes to offer to the employees likely to be dismissed; and the possibility of the future re-employment of the employees who are dismissed. This section goes to prove that the employer's reasons for proposing retrenchment must be evaluated in order to establish substantive fairness of the dismissal.

In the first instance, the information to be disclosed must be in writing.<sup>307</sup> This means that mere verbal disclosure will not suffice. Although the section outlines the information to be disclosed, it does not necessarily limit disclosure to that information. For a proper understanding of section 189(3) it must be read with section 16(3) and section 16(5). The employer is entitled to decline disclosure of the following categories of information: legally privileged information, confidential information likely to cause substantial harm,<sup>308</sup> private and personal information relating to an employee and information which may not lawfully be disclosed.

#### 5.7.1 The appropriate standard of relevance

It has to be acknowledged that even in the absence of bad faith on the part of the employer, the information it selects to disclose may not support a different conclusion from the one to which it arrived at prior to consultation. Consultation based on information supplied by one party will only motivate that particular party's point of view whereas a general disclosure of information may yield a different result. In articulating what relevant information is under retrenchment Mlambo AJ in *NUMSA and Others v Comark Holdings (Pty) Ltd*<sup>309</sup> observes that:

'Because an employer is always privy to all necessary and relevant information it should not only disclose information which it deems relevant. It should disclose all information requested by the consulted party subject to the limitations enunciated. To enable employee representatives to fulfill their duty to seek alternatives through

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<sup>307</sup> *NEWU and Others v Mintroad Saw Mills (Pty) Ltd supra* note 268 at 166J-167A-C, Grogan AJ states that this requirement does not mean that the employer must also physically deliver over all supporting documents of which the other party may demand sight.

<sup>308</sup> *Ibid* at 167B, Grogan AJ states: 'To my mind, disclosure of potentially confidential documents on the employers' premises and subject to the condition that copies can only be made with permission satisfies sec.189(3), as read with section 16.'

<sup>309</sup> (1997) 5 BLLR 589 (LC) at 597 F-H.

meaningful and effective consultation, it is necessary to give them an opportunity to consider not only the information which, in the employer's view, supports the view that no alternatives to retrenchment exists, but also other information which the employer has not considered to be relevant but which might be....'

A certain degree of specificity in the request for information by employees is expected, as employees cannot make a generalised request for information as was stated by Grogan AJ in the *United People's Union of South Africa* case.<sup>310</sup>

The principle of determining relevance of information in retrenchment allows an exploration of economic alternatives which are less harmful to employees. Such information should be determined according to whether it is relevant to establishing the need for retrenchment as per conception of need accepted by either party, but subject to the limitations stated in section 16 (5).<sup>311</sup> A union cannot however claim a right to information unreasonably in order to delay a *bona fide* retrenchment exercise as was the case in *NEHAWU v University of Fort Hare*.<sup>312</sup>

#### 5.8 WHO MAKES THE FINAL DECISION?

Section 189(5) and 189(6) further define the content of the duty to consult in retrenchment, in terms of which the employer must allow the other consulting party an opportunity during consultation to make representations. The employer is expected to consider and respond to the representations, even if it does not agree and reasons for so deciding must be provided. These sections support the position that in spite of the strong sense of purpose in insisting on consultation, it is evident that the ultimate decision will be taken by the employer.<sup>313</sup>

Management still has the right to make the final decision after having consulted, clearly preserving some management prerogative. The Act seems to suggest that as soon as the

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<sup>310</sup> *Op cit* note 282 at 200 F.

<sup>311</sup> For limitations on disclosure see Chapter 4 above.

<sup>312</sup> *Op cit* note 281.

<sup>313</sup> *Atlantis Diesel Engines* case (AD) p 2 C-D *supra* note 252 where the AD correctly stated that: 'consultation was aimed at explaining the reasons for the proposed retrenchment, hearing representations concerning possible ways of avoiding retrenchment or softening its effects and discussing alternatives, consultation does not however, require an employer to bargain and the ultimate decision to retrench was the responsibility of management.'

consultation process has been completed in good faith and the employer still remains convinced that retrenchment is the option, the employer can take the decision. However, if the decision of the employer is unfair the Labour Court can enquire into both the substantive and procedural fairness of the decision.

### 5.9 CONCLUSION

An analysis of the whole of section 189 shows that the LRA has provided another opportunity for employees to participate in the decision-making process. Although consultation under the section clearly does not require agreement, it is very important to note that the position of the employees in this process is strong because they have a right to be consulted. Unless they clearly waive that right to be consulted, the employer has a duty to consult them. To make the consultation process more focussed and meaningful, it has to be exhaustive and the employer has to keep an open mind throughout the process. Since employee participation in decision-making requires co-operation between the parties, employees are also expected to adopt a constructive approach to the consultation process because it is not a one-sided affair. Employees only have themselves to blame if they adopt a destructive attitude to the process. That substantive fairness of the decision to retrench also depends on procedural fairness, provides another motivation for employers to support employee participation in decision-making. Employers are not only expected to consult with the employees, but are also required to disclose information in the consultation process, which eliminates the unnecessary problems of consultation based on positions which are ill-informed. To the extent that the employer is expected to give reasons for rejecting the alternatives suggested by the employees, the LRA gives strong support for the development of employee participation in decision-making.

However, the employer still makes the final decision as part of his management prerogative. But in doing so, the employer should have provided enough opportunity for the employees to consult so that his decision may not be attacked for reasons of unfairness. After all it is impossible for the employer's decision not to reflect the effect of the extensive consultation with the employees.

All the above provides clear evidence that consultation prior to dismissal for operational requirements may lead to the achievement of employee participation in decision-making. An

analysis of the whole of section 189 shows that the LRA has generously provided the opportunity for employees to participate in decisions to retrench. To the extent that the employees will be able to influence the employer's decision, employee participation in decision-making is enhanced.

## **CHAPTER 6**

### **COLLECTIVE BARGAINING AND EMPLOYEE PARTICIPATION**

#### **6.1 INTRODUCTION**

Collective bargaining<sup>314</sup> is the oldest form of employee participation in decision-making the world has known,<sup>315</sup> although based on adversarialism which is supported by power relations.<sup>316</sup> It is because of the adversarial nature of collective bargaining that there is a school of thought which holds that collective bargaining has limitations and should be supplemented with more participative processes in order to achieve real employee participation.<sup>317</sup> However, theories of collective bargaining can clarify the relationship between collective bargaining and employee participation.

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<sup>314</sup> Grogan J *Workplace Law* 3 ed (1998) p 222 writes that: 'Collective bargaining may be defined as the process in terms of which employers and employee collectively seek to reconcile their conflicting goals through a process of mutual accommodation. Its dynamic is demand and concerns, its objective agreement.'

<sup>315</sup> 'Collective bargaining represents an important, perhaps the most important, means of participation in industrial life for many employees. It also carries with it seeds for more sophisticated and participatory forms of workplace and social regulation...It also serves to broaden and reinforce the base of democratic pluralism':see Thompson C *et al South African Labour Law* vol. 1 (1998) p A1-1.

<sup>316</sup> In *Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) at 493 H-I: '[T]o bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take...'

<sup>317</sup> Du Toit D *et al The Labour Relations Act 1995* 2 ed (1998) p 251.

Firstly, according to the marketing theory,<sup>318</sup> the relationship between the employer and employees is regulated by a collective agreement. The employees supply their labour power in terms of the agreement. This means that employees sell their labour through a common agent being the trade union and terms and conditions of employment are worked out collectively by the employees and employers. This turns collective bargaining into a sale of a commodity being labour power.<sup>319</sup>

The weakness of this theory is that it does not address the continuing relationship between the employer and employees. It would seem after the conclusion of the agreement the parties then disperse. However, another way of understanding this theory is that the collective agreement is taken as a contractual agreement that will regulate the terms of the employment relationship and will be binding for a certain period. If the agreement expires the parties can renegotiate a new agreement which will also cover new situations as they arise. Since the collective agreement will operate in an institution, continuous interaction between the employer and employees is necessary to address problems that may arise from the terms of the collective agreement. Usually this institutional dynamic of collective bargaining is addressed by the creation of joint management and employee committees, where shop stewards and employers meet to discuss matters of mutual interest which are covered by the collective agreement. These structures which regulate the dynamic nature of collective bargaining and joint discussion of matters of mutual interest which are expressed in collective agreements, explain the relevance of employee participation in decision-making.

Secondly, according to the constitutional government theory, a collective agreement is the constitution of the industrial government (constituted by both employers and employees) and governs the territory which is the workplace covered by the collective agreement. This theory views collective bargaining as the process of writing the constitution. Accordingly the constitution conforms to the doctrine of separation of powers in which the legislature is the shop

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<sup>318</sup> Piron J *Collective Bargaining in South African Labour Law* (1976) p 4.

<sup>319</sup> *Ibid* Piron writes that this theory has its origin in the history of the United States labour, when the price list took the place of collective agreements. This list contained the price to be paid for different jobs.

and grievance committees. These forums attend to the day-to-day affairs of the workplace and make decisions which are valid to the extent to which they are consistent with the collective agreement. Management operates as the executive arm of the government, since it has the right of initiative. This means that management can change methods of production and personnel related regulations within the framework of the collective agreement. The judiciary becomes the joint tribunals and arbitration forums. This provides for a forum wherein the employees can table their grievances in case their rights are infringed. This elevates the workplace into a semi-state.<sup>320</sup>

This theory conforms with the self-government concept which legislators have opted for when it comes to industrial relations. The weakness of the theory is that it creates the impression that management has an extensive prerogative to take decisions unilaterally. However, in practice management has the right to make decisions but employees have to be consulted and in some instances joint decision-making is necessary on matters of mutual interest.

Finally, according to the joint-management theory, collective bargaining is a method of joint decision-making. Employees share the management power in the areas which are covered by collective bargaining. Although management still has the power to manage the establishment and issue orders, employees have to be consulted and in some instances joint decision-making is required. This theory reflects the commonality of interests between employers and employees. Employee participation, in the form of consultation, information-sharing and joint decision-making, falls within the scope of this theory. The weakness of this theory is that it does not give enough cognisance to the divergent interests of the parties. These divergent interests limit collective bargaining from achieving employee participation, hence the reason why collective bargaining is characterised by adversarialism.

The foregoing theories summarise the participation element in collective bargaining. The golden thread that runs through these three theories is the fact that management and workers have to engage each other in decision-making, one way or another. This creates an opportunity for employees to influence the decisions of the employer. It may be the power element which is used

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<sup>320</sup> *Ibid* p 142.

for achieving agreements in collective bargaining that negates the co-operative element that is characteristic of employee participation.

In analysing the contribution of collective bargaining to employee participation in decision-making under the LRA the following matters are covered: centralised bargaining; majoritarianism; the role of trade unions and the duty of fair representation; voluntarism, bargaining units; bargaining levels and the duty to bargain.

## 6.2 CENTRALISED BARGAINING AND EMPLOYEE PARTICIPATION

In order to understand the relevance of collective bargaining to employee participation, it is important to highlight the fact that the LRA shows a preference for centralised bargaining through the attempted separation of bargaining structures and participation structures. This is evident from the purposes of the Act, which state that it is to promote collective bargaining at sectoral level<sup>321</sup> and employee participation in decision-making at plant-level.<sup>322</sup> It is therefore important to understand why the drafters preferred this structure if the contribution of collective bargaining to employee participation is to be understood.<sup>323</sup>

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<sup>321</sup> Section 1(d)(ii).

<sup>322</sup> Section 1(d)(iii).

<sup>323</sup> The drafters of the Act in the Explanatory Memorandum Government Gazette No.16259 of 1995 p 121 explained the problem when they wrote: ‘ The fundamental problem with the existing law is the lack of conceptual clarity as to the structure and functions of collective bargaining. The LRA, since its inception as the Industrial Conciliation Act in 1924, has favoured a majoritarian system of industrial-level bargaining in the form of industrial councils. In the past this policy has been undermined by the exercise of the Minister’s discretion and the Industrial Court’s jurisprudence. The lack of commitment to an orderly system of industry level bargaining is also reflected in the patchwork registration of industrial councils. There are councils that span more than one industry, others that cover only part of an industry, some a single employer. The exclusion of black workers from the industrial bargaining system for the past 55 years of this dispensation spanned a separate tradition of bargaining at the level of the workplace, a development that the LRA did not address except through the resort of the unfair labour practice jurisdiction of the Industrial Court. The result of these developments is that there is no existing statutory framework which can properly accommodate and facilitate an orderly relationship between bargaining at the level of industry and at the level of the workplace.’ The foregoing statement points out that the system of collective bargaining prior to the LRA was not clearly defined and as such resulted in no clear jurisdiction for industrial-level forums and plant- level forums. Such a system was not supportive of employee participation in decision-making, as the agenda for cooperative management and for the adversarial was mixed up. If an orderly system of bargaining was to be achieved the collective bargaining agenda had to be separated into plant- level matters and a centralised system of collective bargaining.

A clear understanding of how centralised bargaining is relevant to employee participation may also be obtained from understanding the arguments for and against it. In the drafting of the LRA, trade unions showed a strong preference for centralised bargaining, Du Toit *et al* write that :  
 ‘The unions argue that centralised bargaining: (i) is the best means of establishing industry-wide minimum and fair standards; (ii) allows for an effective use of skilled union and employer negotiators; (iii) leads to one collective agreement in each sector concluded by skilled negotiators, avoiding a plethora of poor quality collective agreements with potential for litigation; (iv) strengthens the capacity of bargaining agents; (v) develops social benefit funds that are meaningful and cost effective; and (vi) leads to a proactive style of unionism in which common employer-employee interests are advanced, as opposed to a narrow, defensive and reactive approach.’<sup>324</sup>  
 The union arguments were ideologically motivated, as workers saw a voluntarist system, with a weak preference for centralised bargaining, as based on the capitalist mode of production which benefits the wealthy in society. Workers see centralised bargaining as offering an opportunity for them to act together in influencing the decisions of employers in order to increase their benefits.<sup>325</sup>

Employers on the other hand rejected the very notion of centralised bargaining as they argued that it promotes strikes and undermines economic growth. In articulating the views of employers Patel<sup>326</sup> writes:

‘The second set of employer arguments challenge the operations of centralised institutions. Those arguments contend that: (i) centralised bargaining removes negotiations from the key actors at plant level, namely the shopstewards and managers; (ii) it denies access to the bargaining forum for trade unions which have strong plant representation but lack an industry majority; (iii) it lacks flexibility in that disputes are often declared for an entire industry and strikes take place even when the more profitable sectors of the industry are able and willing to pay

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<sup>324</sup> Du Toit *et al op cit* note 317 p154, see also Patel E ‘The Case for Centralized Bargaining’ (1990) 15 (4) *SALB* at 50.

<sup>325</sup> Appolis J ‘The New Labour Relations Bill and Centralized Bargaining’ (1995) 19 (2) *SALB* pp 47-48 writes: ‘a voluntarist collective bargaining system is premised on the capitalist law of the jungle where the strongest will triumph. The consequence of this approach is that only the workers who are strategically located within the labour process and who are well organized stand a chance of enforcing and maintaining a bargaining arrangement with employers... collective bargaining is one of the ways the unions can ensure that workers’ living standards are maintained and advanced. Through centralized bargaining unions can also ensure that wage rates and minimum conditions are standardized and extended to other workers within the industry or sector....capitalist competition for profit means competition between workers for wages. For workers, one advantage of centralized bargaining is that competition between workers is minimized. The lack of compulsory centralized bargaining will force wages down.’

<sup>326</sup> Patel *op cit* note 324 p 51.

more than the average offer of the employers; and (iv) the tendency to dual bargaining exposes employers to a double risk of strike action.’

The views of employers present a strong preference for a plant-level system which would allow them to determine what happens in their workplaces together with their employees. This will protect the employers from the collective force of employees at central level which may limit the scope of the employers’ decision-making capacity.

Although opting for a centralised system of collective bargaining, the drafters ensured that they maintained the voluntarist principle, by making the formation of bargaining councils<sup>327</sup> voluntary but offering inducement for centralised bargaining.<sup>328</sup> The participation agenda is not lost because collective bargaining will continue at plant-level and workplace forums will engage in both consultation and joint decision-making with the employer at plant level. The centralised bargaining element of the LRA will provide supporting force to employee participation in decision-making at the workplace, as it allows employees to jointly influence the decisions of employers at industry-wide level.<sup>329</sup> This is clearly a plural model of achieving employee participation since both collective bargaining at central level and workplace forums in the workplace, seek to achieve a limitation of unilateral management decision-making and the maximisation of the employees’ benefits. South Africa is not alone in this plural approach to employee participation in decision-making, as countries like Germany and Sweden have similar models.<sup>330</sup>

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<sup>327</sup> See discussion below.

<sup>328</sup> Du Toit *et al op cit* note 317 p 155.

<sup>329</sup> In Chapter 7 it will be shown that bargaining councils will also influence the agenda of workplace forums.

<sup>330</sup> Summers C ‘Workplace Forums from a Comparative Perspective’ (1995) 4 *ILJ* p 807 makes a comparative analysis with the German and Swedish models which are nearly identical with the South African model, when he says: ‘In Germany economic terms are bargained at the industrial or sectoral level. Bargaining may be bitter and end in strikes, but neither plant level managers nor plant representatives...are involved in the confrontational bargaining. The adversarial bargaining of the collective agreement leaves little or no residue of hostility to undermine cooperation at the plant level. The same is true in Sweden. Collective agreements establishing economic terms are centrally negotiated. Workplace problems are resolved by local management and local union officers. The antagonism generated by bargaining do not carry over to the day-to-day discussion of workplace issues.’ In contrast the United States maintains collective bargaining at plant-level. The same management and workers who negotiate collective bargaining must deal with production related matters like plant safety and product quality. Adversarialism is thus carried over to daily plant relations.

The prevalent approach seems to be that countries, in an effort to enhance employee participation in decision-making, combine collective bargaining and co-operative processes like consultation and joint decision-making. The issue is not whether collective bargaining can achieve participation or not, but in which level certain issues may best be solved to enhance participation. Perhaps one major concern with this approach is the ability of the system to maintain a separation of matters for centralised bargaining and plant-level bargaining. However, it is fair to say that indeed, collective bargaining is a form of participation with an adversarial approach and this is supported by the approach of the South African LRA, as well as German and Swedish models.

### 6.3 THE RELEVANCE OF MAJORITARIANISM

Collective bargaining under the LRA is also underpinned by the principle of majoritarianism. Unions which represent a majority of employees enjoy more rights.<sup>331</sup> The Act also provides certain rights for sufficiently representative unions.<sup>332</sup> However, there is no doubt that a majority unions will be in a better position to influence the employer than minority unions.<sup>333</sup>

The question in relation to employee participation in decision-making is, what is the position of minority unions and their members? The Act adopts a plural approach in this regard by also providing that minority unions can act together in order to become a majority or sufficiently representative and thereby enjoy more rights.<sup>334</sup>

Majoritarianism has been criticised for many reasons, particularly that it limits the right of an individual employee to bargain with the employer as such,<sup>335</sup> is disruptive of ordinary collective

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<sup>331</sup> The following are the rights they enjoy: to elect shop stewards (sec.14); the disclosure of information (sec.16); to conclude agency shop and closed shop agreements (sections. 25 and 26).

<sup>332</sup> For instance sections 12 and 13.

<sup>333</sup> They can initiate the establishment of a workplace forum (sec. 80), they can conclude collective agreements which can bind non-union members (sec. 23(1)(d)(iii) and section 18 on the setting of thresholds of representativeness.)

<sup>334</sup> For instance section 14(1).

<sup>335</sup> *Radio Television Electronic and Allied Workers Union v Tedalex (Pty) Ltd and Another* (1990) 11 *ILJ* 1272 (IC). See also Grant B 'In defense of Majoritarianism: Part 1-Majoritarianism and collective bargaining' (1993) 14 *ILJ* 305.

bargaining relations; will encourage union rivalry<sup>336</sup> and that it is an infringement of freedom of association.<sup>337</sup> The foregoing reasons are an indictment on the choice for majoritarianism. However, there are jurisprudential reasons in our labour law justifying the preference for majoritarianism. Firstly, the notion of an individual right to negotiate has been rejected in our law because it lacks authority and is regarded as unenforceable even at common law.<sup>338</sup> Secondly, freedom of association only protects the rights of an individual employee to belong to a trade union but does not entail freedom to bargain.<sup>339</sup> What this means is that collective bargaining contemplates individuals acting together.

The relevance of the majoritarian system to employee participation is that it will encourage minority unions to mobilize employees in order to be influential and the competition it provides between rival unions will ensure that unions do not lose sight of their immediate goal of representing the interests of employees.<sup>340</sup> The fact that the employer is not compelled to bargain with a minority union after bargaining with a majority trade union<sup>341</sup> does not mean that its members will not benefit from agreements concluded, because such collective agreements can be extended to bind even non-parties. Although it may seem that for employee participation to succeed there must be maximum participation even of minority unions, practical considerations dictate that majoritarianism is preferable. Collective bargaining as a method of joint decision-making warrants some practical system to decide which unions are to be involved in negotiations and which are not.<sup>342</sup> Although majoritarianism may limit the number of trade unions that will be engaged in employee participation through collective bargaining, it will ensure an orderly system

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<sup>336</sup> *Ngiba and Others v Van Dyck Carpets (Pty) Ltd and Another* (1988) 11 ILJ 453 (IC) at 456 A.

<sup>337</sup> *National Banking and Allied Workers Union v BB Cereals (Pty) Ltd* (1989) 10 ILJ 870 at 873 I-J.

<sup>338</sup> *SA Reserve Bank v Photo Craft (Pty) Ltd* 1969 (1) SA 610 (C) at 613 H and *Putco Ltd v TV and Radio Guarantee Co. (Pty) Ltd* 1985 (4) SA 809 (A) at 813 F.

<sup>339</sup> Grant B 'In defense of Majoritarianism: Part 2 -Majoritarianism and Freedom of Association' (1993) 14 ILJ at 1145.

<sup>340</sup> Hepple B 'The Role of Trade Unions in a Democratic Society' (1990) 11 ILJ 645 at 649.

<sup>341</sup> *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llala and Others* (1994) 15 ILJ 277 (LAC) at 280, *TAWU v Motorvia (Pty) Ltd* (1996) 9 BLLR 1189 (IC).

<sup>342</sup> *Cele v Bester Homes* (1990) 11 ILJ 521 (IC).

of collective bargaining and also limit union proliferation. This shows the need for a balancing act in the competing objectives of the LRA.

#### 6.4 TRADE UNIONS AND EMPLOYEE PARTICIPATION

The philosophical appropriateness of involving trade unions in employee participation was discussed in Chapter 2 in order to initiate a critical analysis of the role of trade unions in the subject matter of this thesis. What follows is a discussion of how some principles of labour law may ensure that trade unions play an important role in employee participation in decision-making. The main function of a trade union is to regulate relations between employers and employees,<sup>343</sup> and as such the trade union is a major player in collective bargaining. Although the LRA has attempted to transfer production-related matters from union-management bargaining to workplace forums, the truth is that unions are still going to be major players in the workplace through shop stewards and participation in the workplace forums.<sup>344</sup>

It is a prerequisite that the union should be registered in order to enjoy the rights enshrined in the Act.<sup>345</sup> It is not enough to conclude that since the trade union represents employees, that the employees are participating in decision-making, because it could be the case that the union leadership deviates from membership aspirations. It is therefore important to understand how the members are able to influence the decision-making process within the union so as to ensure that trade union bargaining with the employer is indeed employee participation in decision-making.

##### 6.4.1 The Union and its Members' Mandate

The relevant questions to ask, is whether the trade union representatives can do as they please

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<sup>343</sup> Section 213 defines a trade union as follows: 'A trade union is an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organization.' In *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A), Centrilivres JA distinguished between three possible functions of a trade union: (1) that of spokesperson of its members(at 912); (2) to represent the interests of employees(at 913); and (3) to represent its own interest a person separate from its members(at 914-915).

<sup>344</sup> Section 80(2) states that 'Any representative trade union may apply to the commission in the prescribed form for the establishment of a workplace forum.' See further discussion below in Chapter 7.

<sup>345</sup> Section 96 provides for the registration of trade unions and there is no requirement of representativeness before registration.

in negotiations with management, and to what extent can members question agreements entered into by the leadership?<sup>346</sup> Every trade union should have a constitution which defines aims, objectives and rules and which outline what may be lawfully done on behalf of the trade union. Section 95(5)(j) provides that the constitution of a trade union should define the respective functions of each union representative. This section would hopefully provide for the authority which trade union representatives have when bargaining with the employer. Furthermore, section 95(5)(h) states that the constitution should provide for how decisions within the union are to be made. This ensures that union leaders do not negotiate beyond a resolution taken by the union membership. The question therefore is, what happens if the union representatives in the course of their negotiations deviate from their mandate?

Once a union is registered it becomes a body corporate with functions determined by its constitution, which means that if trade unions act beyond their mandate in the bargaining or consultation process their actions may be *ultra vires* and thus null and void.<sup>347</sup> To the extent that the Act provides that the constitution of the trade union must provide for functions of union representatives, they are expected to refrain from unauthorized actions.<sup>348</sup> The definition of a trade union in section 213 encompasses the fact that the basic function of a trade union is to represent its constituency. This implies a legal relationship which subjects the union to the control of the membership. To the extent that employees within a certain workplace can appoint a union as an agent for bargaining with the employer, they should be entitled to determine what the union may do on their behalf.

The doctrine of fair representation was developed by the US courts. In *Ford Motor Co. v*

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<sup>346</sup> In answering this question Du Toit D ‘Statutory Collective Bargaining: A duty of fair representation?’ (1993) 14 *ILJ* p 1167 writes: ‘ Trade unions are widely regarded as means whereby individually powerless employees can gain a degree of control over their working lives and moreover, in today’s political climate, over socio-economic policy and labour legislation. But such control can only be meaningful if the union itself is subject to democratic control by its members.’

<sup>347</sup> *Ibid* at 1168.

<sup>348</sup> Section 95(5)(j).

*Huffman*<sup>349</sup> where the court was concerned with a situation where the union entered into a collective agreement with the employer and still needed that agreement to be ratified by the membership. The following was stated:

‘Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. A bargaining representative under the National Labor Relations Act, as amended, often is a labor organisation but is not essential that it be such. The employees represented often are members of the labor organisation which represents them at the bargaining table, but it is not essential that they be such. The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to the interests of all whom it represents.’<sup>350</sup>

In explaining the duty of fair representation in our labour law, Du Toit<sup>351</sup> writes:

‘[E]ven if this does not arise from common-law agency, it does imply a legal relationship which remains to be clarified by the courts (or the legislature) but which will presumably be subject to some form of control by the employees whom the union is deemed to represent.’

In the LRA it is not clear whether employee members of a trade union which is a party to a collective agreement can contest the validity of such an agreement if it does not represent their interests. The LRA in section 24(1) provides for a procedure of resolving a dispute concerning the interpretation or application of a collective agreement. The section provides that this should be resolved through conciliation and if the dispute still remains unresolved, it should be taken to arbitration. The question is whether this section would also apply in circumstances where members of the trade union party to the collective agreement (to whom the agreement is binding as per section 23(1)(b) ), are questioning the application of the agreement for the reason that their representatives acted beyond their mandate. Du Toit<sup>352</sup> answers this by saying:

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<sup>349</sup> (345 US 330 at 338, 31 LRRM 2548 1953).

<sup>350</sup> In *Steele v Louisville and N.R. Co.* 323 U.S. 192 at 198-199 it was stated that the authority of bargaining representatives however is not absolute and their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interest of all members without hostility to any: see *Tunstall v Brotherhood of Locomotive Firemen* 323 U.S. 210 at 211 and *Brotherhood of Railroad Trainmen v Howard* 343 U.S. 768.

<sup>351</sup> Du Toit *op cit* note 346 p 1169.

<sup>352</sup> *Ibid* p 1172.

‘The ideal solution, from the trade union point of view, would be for the membership to resolve the problem by means of constitutional procedures. Legally this is enshrined in the principle, derived from the rule in *Foss v Harbottle*, that an ordinary member of an association may not bring an action against the association if the act complained of could be ratified by a simple majority vote.’

The implication of the above statement could be that before the members can even contemplate proceeding according to section 24(1), they would have to allow the internal democracy of the union prescribed by the constitution to apply. If the majority of the union members reject what the union leadership has agreed upon with management they must express such rejection as per the constitutionally prescribed procedure. The Industrial Court developed jurisprudence on limits to union authority.<sup>353</sup> Most significantly the Industrial Court had in several instances decided that it was not bound to enforce contractual provisions of which the enforcement would be an unfair labour practice against the employees.<sup>354</sup> The Industrial Court indicated that it would generally adopt a non-interventionist approach to challenges of collective agreements, because such agreements are the outcome of collective bargaining which was the prime method of resolving labour disputes under the LRA 28 of 1956.<sup>355</sup> However in one of the cases the Industrial Court indicated the point at which it could be prepared to intervene in a challenge to a collective agreement by union members. In *Collins v Volkskas Bank (Westonaria Branch) - A Division of ABSA Bank Ltd*<sup>356</sup> where the applicant employee had fallen pregnant and was legally obliged to take a minimum of three months maternity leave in terms of section 17 of the Basic Conditions of Employment Act 3 of 1983. However, in terms of a collective agreement entered into by the union of which applicant was a member, the applicant was prohibited from taking the leave

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<sup>353</sup> Du Toit, D ‘An All Contractual Wind Blowing Collective Good? Collective Representation in non-statutory bargaining and the limits of union authority’ (1994) 15 *ILJ* p 39. See also *Remolesane and Another v Andrew Mentis and Another* (1991) 12 *ILJ* 329(LAC) and *Don Products (Pty) Ltd v Monage and Others* (1992) 13 *ILJ* 900 (LAC).

<sup>354</sup> *Marievale Consolidated Mines Ltd v President of Industrial Court* (1986) *ILJ* 152 (T); *Mine Surface Officials Association of South Africa v President of the Industrial Court and Others* (1987) 8 *ILJ* 51 (T); *Natal Banking and Allied Workers Union v BB Cereals (Pty) Ltd and Another* (1989) 10 *ILJ* 870 (IC).

<sup>355</sup> *Tsebe and Others v Pelman Motor and Diesel Engineering SA (Pty) Ltd* (1992) 1 LCD 99 (IC); *FAWU and Others v Association of Bakeries* (1992) 1 LCD 36 (IC); *Ntsangani and Others v Golden Lay Farms Ltd* (1992) 13 *ILJ* 1199 (IC).

<sup>356</sup> (1994) 15 *ILJ* 1398 (IC).

within a period of two years after the termination of a prior period of maternity leave. Applicant's pregnancy fell within this condition and thus respondent forced applicant to tender her resignation in order to take the statutory maternity leave. In the application, the applicant claimed that the grounds upon which her maternity leave was turned down were unfounded and that the proviso in the collective agreement was *contra bonos mores* and infringed on her basic human rights and that her forced resignation constituted an unfair labour practice. Commenting on whether the court could intervene in a challenge to a collective agreement, Marcus AM stated that:

'In my view, only if such an agreement results in a manifestly gross unfair labour practice being perpetuated against an individual member or employee, would this court possibly be justified in intervening or striking down the provisions of a collective agreement. Even then it would be slow to do so, since this would amount to judicial intervention in the outcome of the collective bargaining process, an area which is generally regarded as falling outside this court's unfair labour practice jurisdiction.'<sup>357</sup>

Applying the aforementioned principle of intervention, the court did not consider the policy to be so manifestly unfair as to justify its intervention because there was a commercial rationale for placing a limitation on maternity leave. It is very doubtful that this decision would stand under the LRA 66 of 1995 because it is obvious discrimination and would be a residual unfair labour practice according to item 2(1)(a) of schedule 7. The most important indication from this case is that employees could contest the validity of collective agreements in case of an unfair labour practice in spite of the restrained approach of the IC in the past.

Perhaps a better indication of whether the Labour Court under the LRA 66 of 1995 would be prepared to intervene in a challenge to a collective agreement would be found in *SACCAWU v Garden Route Chalets (Pty) Ltd*<sup>358</sup> where members of applicant were challenging a collective agreement which excluded them from being provided with transport when other employees in the workplace were being provided with transport to work. The applicants contended that the fact that they were not being provided with transport was a discriminatory application of the

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<sup>357</sup> *Ibid* 1405 F-G.

<sup>358</sup> (1997) 3 BLLR 325 (CCMA).

collective agreement and thus an unfair labour practice.<sup>359</sup> One of the issues raised by the respondent was that applicants had waived their rights to invoke remedies in item 3 of Schedule 7 in the collective agreement, which provides grounds to challenge an unfair labour practice. In resolving this dispute the commissioner indicated that such statutory rights could not be excluded by the collective agreement, as it was not the intention of the LRA that such rights could be excluded.<sup>360</sup> In resolving the issue of whether the employer's conduct in not extending the transport benefit to the applicants was in breach of item 2(1)(b), the commissioner held that it was the task of the arbitrator to safeguard the constitutional and statutory rights to equality and fairness<sup>361</sup> and thereby decided that the reasonable solution to the matter was to extend equal benefits to the applicants just like other employees.<sup>362</sup>

Although the foregoing cases do not deal directly with the duty of fair representation, they highlight the fact that agreements entered into by union representatives with the employer could still be challenged if they resulted in an unfair labour practice. The fact that this challenge is possible according to the LRA will ensure that union representatives will represent the interests of their members in a way that will ensure that no unfairness results from their representations. These indirect measures of making union representatives accountable for their decisions with employers will be supportive of employee participation, as the interests of union members will inform the conclusion of collective agreements. Furthermore, union representatives will be forced to consult with their members from time to time and thereby involving greater numbers of employees in decision-making.

## 6.5 BARGAINING UNITS

The ability of a union to influence the decisions of an employer is partly dependent on

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<sup>359</sup> *Ibid* 329 B.

<sup>360</sup> *Ibid* 330 F-I.

<sup>361</sup> *Ibid* 334 B.

<sup>362</sup> *Ibid* 335 E. The commissioner also relied on decisions of the European Court of Justice where it held unlawful terms of collective agreements resulting in discrimination: *see Kowalska v Freie und Hansestadt Hamburg* [1992] IRLR 591(ECJ); *Endberg v Frenchay Health Authority* [1993] IRLR 591 (ECJ).

establishing a bargaining unit<sup>363</sup> which is evidence of representivity. The 1956 LRA did not provide for how bargaining units were to be determined<sup>364</sup> and as such the determination of bargaining units was left to the parties to negotiate in a collective agreement. This was very important for trade unions to do as was explained in *Banking, Insurance and Assurance Workers Union v Mutual and Federal Insurance Co Ltd*,<sup>365</sup> where Louw AM said:

‘The composition of a bargaining unit will not only determine on behalf of whom bargaining will take place, but will also determine which employees are to receive protection from an agreement that may emanate from negotiations between parties. The question of the appropriate bargaining unit underlies the union's demand to negotiate wages and conditions of employment and forms such an inextricable part thereof, that it would be nonsensical to grant an order to negotiate without first determining on whose behalf negotiations are to take place.’

It is in the designation of a bargaining unit that a trade union clearly defines to the employer the employees on behalf of whom it seeks to enter into negotiations. The influence of the trade union in a particular workplace is based on it being able to agree on a bargaining unit with the employer.<sup>366</sup> The question of bargaining units under the LRA 66 of 1995 no longer depends on a particular unit of the workplace but a trade union has to exhibit support in the entire workplace.<sup>367</sup> The LRA makes it clear that there are different thresholds of representativeness when it comes to the enjoyment of different rights. For instance, for the enjoyment of organisational rights from sections 12 to 16 the trade union has to be *sufficiently representative*

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<sup>363</sup> Grogan *op cit* note 314 p 209 ‘A bargaining unit is that part of a workforce or workplace in which a union claims recognition and in respect of which it negotiates.’

<sup>364</sup> Brassey M *et al The New Labour Law* (1990) p 154.

<sup>365</sup> (1993) 4 (9) SALLR 158 (IC) at p 165 (H-I).

<sup>366</sup> The IC at some point asked itself if it was entitled to decide on the question of appropriate bargaining units. In *Amalgamated Engineering Union of SA and Others v Mondi Paper Co. Ltd* (1989) 10 ILJ 521, the court decided that only the parties could agree to change the bargaining unit to suit the applicant. The court held that, to prescribe for the parties is something it could not do. However in subsequent decisions the IC affirmed the position that it cannot sit back and refuse to determine alleged unfair refusal to bargain until the employer agreed on the issue of bargaining units. If the court could sit back, an employer could simply propose a bargaining unit to which he knows the union is unlikely to agree to. See *Black Allied Workers Union (SA) v Pek Manufacturing Co (Pty) Ltd* (1990) 11 ILJ 1095.

<sup>367</sup> Workplace in Section 213 is defined as ‘the place or places where the employees of an employer work.’ See also further discussion on the meaning of workplace in Chapter 7 below.

of employees employed in a workplace.<sup>368</sup> The Act does not however define what sufficient representativeness means. In some cases sufficiently representative means a substantial enough number to warrant being dealt with.<sup>369</sup> In one of the decisions on the matter of what sufficiently representative means, the CCMA was able to provide direction. In *SA Clothing and Textile Workers Union v Sheraton Textiles (Pty) Ltd*<sup>370</sup> where the issue was whether the union should be granted the organisational rights of access and stop orders provided for in sections 12 and 13 of the LRA 66 of 1995. The applicant had 29.7% membership in the respondent's workplace. Deciding on the matter the commissioner stated the following:

'In terms of section 21(8)(b) an arbitrator, when deciding whether or not a union is sufficiently representative for the purposes of granting organizational rights, is obliged to have regard to the nature of the workplace, the nature of the rights sought, the nature of the sector and the organizational history of the workplace<sup>371</sup>....the expression "sufficiently representative" is not defined in the Act. Nor was it defined under the old law. In the past, courts have emphasized that sufficient representativeness ought not to be determined solely with reference to numbers.<sup>372</sup> Generally a union should be considered sufficiently representative if it can influence negotiations, the financial interests of those engaged in the industry or peace and stability within the industry or any section of the industry. The arbitrator is required to have regard to the interests represented by a union and not exclusively the numerical representativeness of employees. Some indications of the numerical threshold, in so far as it is relevant, is provided in section 39(1) of the Act where it sets a 30 % membership base as the figure required by unions wanting to establish statutory councils at sectoral level.... at the same time the arbitrator is obliged to minimize union proliferation and any financial or administrative burden on the employer.'<sup>373</sup>

The commissioner proceeded to decide that the union virtually had a 30% representativeness in the workplace and is a major player representing significant interests in the industry and on these

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<sup>368</sup> Section 11.

<sup>369</sup> The CCMA has also deemed trade unions that have less than the majority of members in a workplace as not being sufficiently representative: see *Chemical Workers Industrial Union v Millner's Dental Suppliers (Pty) Ltd* (1997) 18 ILJ (CCMA); *South African Commercial Catering and Allied Workers Union v Metlife (Pty) Ltd* (1997) 18 ILJ (CCMA) and *SACTWU v WM Eachus and Co.* Labour Law Library (CCMA WE152 1997).

<sup>370</sup> (1997) 18 ILJ 1412 (CCMA).

<sup>371</sup> *Ibid* at 1414 C.

<sup>372</sup> *ACTWUSA v National Industrial Council of the Leather Industry* (1989) 10 ILJ 894 A-F.

<sup>373</sup> *SA Clothing and Textile Workers Union v Sheraton Textiles (Pty) Ltd supra* at 1419 B-F.

bases, the union was sufficiently representative.<sup>374</sup>

What the foregoing case indicates is that, in the determination of what sufficiently representative means, a purposive approach will be adopted to ensure that the interests of workers are not disregarded particularly where there is no other trade union in the workplace. Union proliferation will be another consideration. This approach is very supportive of employee participation in decision-making as it ensures the influence of trade unions which are not a majority but have interests to protect. In fact the influence which the trade union has in that workplace is a factor to consider, particularly where there is no other active union. In some circumstances the Act requires majority representation, for instance, under section 14 for the enjoyment of rights under sections 16 to 20. In this instance minority unions can act together in order to achieve majority representation. This means that while a trade union may be recognised as a bargaining agent by law, it still has to go further to prove that it has a constituency large enough to entitle it to enjoy other rights in the Act. In some instances the Act defines a unit within the workplace and not in the whole workplace.<sup>375</sup>

Although the legislature has sought to simplify the determination of bargaining units, trade unions will still have to prove their representativeness in a workplace to enjoy certain rights. The Act however requires the parties to agree on their own, but if they fail they cannot automatically proceed to court for the resolution of their differences. Under section 21 the parties have to submit their dispute to the CCMA and in section 21(8) the commission is given guidelines in the determination of bargaining units. The commission must seek to minimise the proliferation of trade union representation in a single workplace. In section 21(8)(b) the Act has adopted the

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<sup>374</sup> Cheadle H *et al Current Labour Law* p 12 (1997) write that: ‘Warnings against union proliferation notwithstanding, it seems appropriate to set quite a low threshold for basic organization-resistant sectors. Perhaps a figure as modest as 20% might be needed to allow unions to gain a viable toehold. It might also be in order to introduce a dynamic element: if there is but a single battling union and no specter of union rivalry, the CCMA could adopt a relaxed view on thresholds. It should however advise that the criteria for representivity in a particular workplace may become more stringent over time, and if other unions join the fray, an employer could revert to the Commission under section 21(10) as circumstances changed and the representivity notion hardened.’

<sup>375</sup> According to section 78, in order to establish a workplace forum, a trade union has to prove that it is a majority union amongst non-senior managerial employees.

North American criterion of establishing the bargaining unit.<sup>376</sup> If the trade union is not satisfied with the advisory award, it may engage in industrial action according to section 64(2)(d)(i) as refusal to bargain also includes a dispute about appropriate bargaining units.<sup>377</sup>

According to the LRA 66 of 1995, the more representative the trade union is in a particular workplace the more rights it enjoys. Through this the union acquires a stronger position when it comes to bargaining with the employer. The ability of the union to show that it is representative within a particular workplace, makes the employer aware of the threat to production being disrupted in case of an industrial action. This makes the employees in that particular workplace quite influential. The problem with the LRA is that minority unions may find themselves in a disadvantageous position of not enjoying other rights.<sup>378</sup> This places the employee members of that union at a disadvantage because its status may affect the extent to which they will be able to participate in the decision-making process. However, the LRA tries to solve this problem by providing that minority trade unions can act jointly to achieve the required threshold of representivity and so enjoy more rights.<sup>379</sup> It may be that in order to avoid this problem of having to prove different thresholds of representativeness, the trade union may conclude a collective agreement wherein entitlement to certain rights will be included as per section 18. Alternatively trade union parties to a bargaining council will automatically enjoy some of the rights regardless of representativeness according to section 19.<sup>380</sup>

## 6.6 BARGAINING LEVELS

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<sup>376</sup> In North America the Labour Tribunals have outlined the following guidelines: whether the employees share a commonality of interests, the geographic proximity of the workplace, bargaining history of the parties, the extent of union organization, the employer's organizational structure, the interruption of the business process etc.

<sup>377</sup> It is interesting that the Act also maintains the position of the LRA 28 of 1956 on leaving the matter to the parties to try and resolve through industrial action.

<sup>378</sup> This is as a consequence of the choice for majoritarianism as explained above.

<sup>379</sup> See sections 11 and 14(1).

<sup>380</sup> *NUMSA v Feltex Foam* 1997(6) BLLR 798 (CCMA) at 805 I-J where it was stated that because the respondent was party to a bargaining council agreement, section 19 was applicable which meant that the union was automatically entitled to certain basic rights in terms of sections 12 and 13.

The LRA 66 of 1995 attempts to solve the problems of bargaining levels experienced under the previous Act<sup>381</sup> through indicating an explicit preference for centralised bargaining.<sup>382</sup> It is interesting to note that there is actually nothing to stop the employer and the trade union from bargaining at plant-level. It therefore remains to be seen whether collective bargaining has been absolutely removed from plant-level or not. It will also be interesting to see if this preference for sectoral bargaining will succeed. The need for it to succeed is very important seeing that there is no longer a legally enforceable duty to bargain and as such the voluntary embracing of this process by the parties concerned is essential. Failure to commit to the process voluntarily will invite the willing party to compel the unwilling party to commit to the process through power play.<sup>383</sup> Once the structure has been put in place it will also be important to ensure that parties are able to reach qualitative agreements.

Enforcement of and compliance with the agreements concluded also become important whether done through industrial muscle or judicial intervention. Finally, the success of this process will also depend on the scope of operation of centralised bargaining which is linked to the ability of the state to extend the agreements reached to non-parties. This would definitely benefit employees in the sense that those workers who may wish to abstain from being part of the system for various reasons may still benefit. It would also ensure that those who otherwise choose to opt out, feel the pinch of non-participation and are motivated to join. This is also linked to the willingness of the parties to the bargaining councils, to admit new parties who are interested in joining in. These are the factors against which the success of the system should be measured.

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<sup>381</sup> Under the LRA 28 of 1956 it was accepted that employers had a duty to bargain with employees. However, the level at which bargaining was to take place, became a problem which was complicated by the fact that it was accepted that collective bargaining should always assume a voluntary character in order to be effective. The courts were however occasionally called upon to adjudicate on disputes concerning bargaining levels: see *Metal and Allied Workers Union v Hart supra* note 317, *United African Motor and Allied Workers Union v S Thomson (Pty)Ltd* (1988) 9 ILJ 359, *SA Wood Workers Union v Rutherford Joinery (Pty) Ltd* (1990) 11 ILJ 659. The debate turned on whether the Industrial Court could compel parties to bargain at the plant-level or at sectoral level: see *SEAWU v BRC Weldmesh* (1991)2(8) SALLR 57 (IC).

<sup>382</sup> See discussion on centralised bargaining above.

<sup>383</sup> Section 64(2)(d)(ii).

### 6.6.1 Bargaining Councils

Bargaining councils are the primary institutions for collective bargaining.<sup>384</sup> Under section 28 of the LRA bargaining councils are given powers to cover a wide range of issues in collective agreements these may include wages, and terms and conditions of employment. The bargaining councils may also perform a dispute resolution function, develop policy, enforce collective agreements and confer on workplace forums additional matters for consultation.<sup>385</sup> They may also determine the issues which may not be the subject of a strike or a lockout at the workplace. Bargaining councils also have jurisdiction over issues which may entail even greater benefits for the employees. It is possible to argue that collective bargaining and participation of employees in distributive matters will stand or fall on the success of bargaining councils.

### 6.6.2 Collective Agreements

The binding nature of collective agreements reached in a bargaining council is very important as this is the determining factor of the extent to which employees will be able to bind the employers to agreements on which they (employees) have had a lot of influence. Section 31(a) of the LRA makes it clear that parties to the bargaining council who are also parties to the collective agreement are bound by the collective agreement. This section is open to two interpretations, the

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<sup>384</sup> Firstly, according to section 27 a trade union and an employers' organisation may agree on the formation of a bargaining council. It is to be noted that there is no duty on any party to constitute a bargaining council. It is not clear as to why the legislature chose not to make the formation of bargaining councils mandatory as they are the primary forums for collective bargaining. One answer to this position is that the system of collective bargaining is based on voluntarism. However if the Act attaches great importance to promoting collective bargaining at sectoral level, then it would have been appropriate to compel the formation of such councils. Secondly, bargaining councils may only be formed in a sector or area to be determined by NEDLAC or the minister (section 29(9)). Thirdly, according to section 29(11)(b)(iv) the parties to the bargaining council must be sufficiently representative of the sector and area determined by NEDLAC or the minister provided that there is no other council in existence within that particular sector as per section 29(11)(b)(v). The interpretation of what sufficiently representative means is left to be decided by the Registrar. A guideline may be obtained from the fact that for statutory councils to be formed parties need to show 30 % representation of their constituency in that sector. It will be important for the Registrar to consider the primary objects of the Act which include the promotion of collective bargaining at sectoral level. The Act gives the Registrar some guidance under section 49(1) where in determining representativeness, either the trade union or the employer party may be deemed to be sufficiently representative, even if such party does not have registered members in that particular area but the employer party has employees who would fall within the scope of concern of the trade union.

<sup>385</sup> Section 28. Perhaps the fact that the bargaining councils can increase the matters which fall within the jurisdiction of workplace forums, signifies the important role they have in the success of employee participation under the LRA.

first being that parties to the bargaining council will automatically be parties to the bargaining council agreement and the second being that only parties to the bargaining council who have agreed to be party to the agreement will be bound by such.<sup>386</sup> The latter interpretation would lead to an absurd position because it would mean that parties who fail to obtain what they want in the process could refuse to be bound by the collective agreement. Furthermore, it is doubtful whether such an interpretation would be sustainable in practice after all, the binding force of the agreement can be extended to non-parties through section 32. The former interpretation seems to be the correct one, because it accords with the purpose of the Act at section(1)(d)(i), which is to promote orderly collective bargaining and the latter would detract from the purposes of the Act.

The foregoing raises the question of how decisions in these councils are to be taken. According to Section 30(1)(e), the constitution of the bargaining council has to provide for the manner in which decisions may be taken. Under the LRA 28 of 1956 at section 27(7) a decision of the council could be taken by a two-thirds majority of those eligible to vote. This would mean that even those members of the industrial council who might have wanted to opt out of the agreement, would be bound by it because it was a decision of a council of which they are members. This could be an ideal interpretation of section 31(a) of the new LRA as it would avoid a situation whereby parties would refuse to abide by decisions of the council because they have not had their way in the bargaining process. After all, it is the duty of the bargaining council to enforce the collective agreement. If there is a dispute on the issue of the binding nature of the collective agreement, it can also be resolved through conciliation and if unresolved, through arbitration according to section 51.

Members of the trade unions and employers' organisations party to the collective agreement are also bound by the collective agreement to the extent that the provisions of the agreement apply

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<sup>386</sup> Du Toit *et al op cit* note 317 p 182 write that: ' the parties to the council who are not party to the agreement will not be bound to it, unless it is extended to them under section 32. This amounts to a significant change. Previously, in terms of section 27(7) read with section 48(1) of the LRA 28 of 1956 it was impossible , and often the case, for the agreement to be made binding on parties to the council who were not party to the agreement.'

to the relationship between such party and the members of such other party.<sup>387</sup> In the absence of the duty to bargain it is significant that the Act makes the bargaining council agreements applicable at all levels, further enhancing the influence employees will have in the bargaining process.

A bargaining council may also request the Minister to extend the application of a collective agreement to non-parties who fall within the scope of registration of that particular bargaining council.<sup>388</sup> The fact that these collective agreements can be extended to cover even employers who are not members of the council is an added advantage to employee participation in decision-making in that even reluctant employers will find themselves caught within the net of the decisions of bargaining councils.

Finally, outsiders may apply to the council for membership. This creates a door through which outsiders who realize that they are losing out by non-participation can become members.<sup>389</sup> If, however, the council refuses to admit such a party, the applicant can apply through the Labour Court, which is competent to admit such a party.<sup>390</sup>

### 6.6.3 Statutory Councils

In an attempt to calm the fears of big trade unions that bargaining councils on their own would not achieve centralised bargaining, the legislature provided for the creation of statutory

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<sup>387</sup> Section 31(b).

<sup>388</sup> Section 32(1). Such non-parties have to be identified in the request. It is also important that at the meeting of that particular bargaining council, a trade union which has a majority of members in the council, must vote in favour of the extension. This could be a problem in ensuring that all employees and employers conclude that agreement. However, the Act solves the problem by granting the Minister the power to extend a collective agreement in spite of the absence of the majority factor, so long as the parties are sufficiently representative and the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level (section 32(5)).

<sup>389</sup> Section 56.

<sup>390</sup> Section 56(6).

councils.<sup>391</sup> A statutory council can be created within a sector and an area.<sup>392</sup> The initiation of these councils is voluntary and can be formed by trade unions and employers' organisations which are representative, meaning representing about 30 percent of their constituency in a particular sector.<sup>393</sup>

The functions of statutory councils are but a shadow of those to be performed by bargaining councils and wage-related matters are not among them. Section 43 provides for the following functions: dispute resolution; promotion and establishment training and education schemes; the establishment and administration of social security schemes; and the conclusion of collective agreements on these issues. It is also possible for the statutory council to include increased functions in its constitution. This could include performing some of the functions to be performed by bargaining councils. Generally most of the comments made about bargaining councils apply equally to statutory councils and as such need not be repeated. It is clear that statutory councils are a stepping stone towards the formation of a bargaining council. According to section 48, statutory councils may register as bargaining councils.

According to section 1(d)(i), the Act definitely attempts to create orderly collective bargaining. This it does by demarcating different levels of bargaining. There is an attempt to clear the plant-level of any collective bargaining and to introduce cooperative governance through workplace forums. Bargaining councils and statutory councils provide an opportunity for employees to combine their strength as a collective in order to influence the decisions of the employers in a particular sector. The advantage of this is that employees are not competing with each other, as their primary objective is to achieve as many favourable benefits from their employment as possible. This common objective is a great unifying force which can survive many differences.

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<sup>391</sup> Du Toit *et al op cit* note 317 p 162 write that: 'In order to properly accommodate COSATU's demands for greater compulsion with regard to centralized bargaining, the Act makes provision for the establishment of statutory councils in sectors and areas where no bargaining councils exist.'

<sup>392</sup> Section 40.

<sup>393</sup> Section 39(1). The procedure for initiating them starts off as voluntary but if there is some reluctance, the statutory council may be formed by Ministerial compulsion. This is the difference between statutory and bargaining councils.

Meanwhile employers at central level are not exactly a united force as they are usually competing with each other. This is because they do not make the same profits and as such they cannot afford to give their employees the same benefits. Even though the bargaining councils may set minimum standards, some employers cannot afford those very minimum standards. Since profit is the fundamental reason for the formation of business enterprises, it would be very hard for employers to sacrifice their individual business realities. It therefore becomes clear that bargaining at sectoral level creates more chances for employees to participate in decision-making in a very significant and influential way.

### 6.7 VOLUNTARISM

Although the LRA creates the structures for collective bargaining, their successful operation is to a certain extent left to employers and employees to determine voluntarily. In labour law voluntarism refers to the voluntary self-regulation of the workplace by the independent social partners of management and labour, and shows the primacy of collective bargaining over legal enactment.<sup>394</sup> According to voluntarism, employers and employees realize that they are partners who cannot ignore each other when important decisions in the workplace are being made. The parties realize that although their relationship is based on power, a certain element of co-operative governance of the workplace is necessary without the intervention of the law or the courts.<sup>395</sup>

The LRA 66 of 1995 introduces a change in industrial relations from its predecessor<sup>396</sup> by

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<sup>394</sup> Wedderburn (Lord) *et al Labour Law and Industrial Relations: Building on Kahn-Freund* (1983) p 117 write that: ‘a voluntarist policy would allow the two sides [of industry] by agreement and practice to develop their own norms and their own sanctions, abstain from... compulsion in their collective relationship.’

<sup>395</sup> Reality is that the employer through the property rights has power which even employees as a collective can hardly match without the law guaranteeing certain rights. What the law does is provide for the rights of the employees and those of the employer which will result in the parties seeing each other as equals in the employment relationship. Therefore the law provides a framework within which the employers and employees can determine their relationship voluntarily with as minimal intervention as possible. It is in the belief that the differences that exist between the parties are not so fundamental as to be incapable of compromise that voluntarism is important in the understanding of collective bargaining.

<sup>396</sup> In support of voluntarism, the LRA 24 of 1956 provided for industrial councils and conciliation boards which were forums where issues of mutual interest between the employer and the employees were regulated. In order to ensure that voluntarism was protected, section 1 of this Act provided that amongst other things, any act

reorganising the collective bargaining process. Section 1(c) provides that the purpose of the Act is:

To provide a framework within which employees and their trade unions, employers and employers' organisations can:

- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
- (ii) formulate industrial policy

The Act does away with the unfair labour practice jurisdiction through which the courts could intervene in the bargaining relationship, and allows the parties to the employment relationship to determine matters of mutual interest on their own. Furthermore, the Act no longer provides for a duty to bargain. However, the Act bolsters collective bargaining by granting organisational rights in Chapter 3 to registered trade unions which are sufficiently representative.<sup>397</sup> The Act also recognises that industrial action is an integral part of collective bargaining, by providing for the right to strike in section 64.<sup>398</sup>

Collective agreements are also given prominence in section 23 as employers and employees can

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which affects employees unfairly or promotes labour unrest may be declared an unfair labour practice. Due to the fact that the unfair labour practice definition was broad the courts sought to avoid legal intervention in collective bargaining so as to promote voluntarism and at times the court ended up doing exactly that which it sought to avoid: see *BCAWU v Johnson Tiles (Pty) Ltd* (1985) 6 ILJ (IC) and *Ntuli and Others v Litemaster Ltd* (1985) 6 ILJ 508 (IC) and *MAWU and Others v Siemens Ltd* (1986) 7 ILJ 547 (IC). Employee participation was embodied within voluntarism as employees and employers were expected to negotiate matters of mutual concern. However the Industrial Court soon had to intervene in the collective bargaining relationship through the section 43 status quo remedy, which was available to maintain an existing or restore a pre-existing state of affairs. This relief was appropriate where a party offended against the collective bargaining process or threatened to defeat the ends of employment justice. Unilateral imposition of conditions could be challenged through the status quo remedy, thus giving a balance of power in employer-employee relations. Whenever the court granted the status quo remedy, it induced the parties to engage in serious negotiations in order to settle their differences: see *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court and Others* (1986) 7 ILJ 489 (A) at 494H and 495D and *Garment Workers Industrial Union and Another v Scotford Mills (Pty) Ltd* (1986) 7 ILJ 45 at 52 F. This evidently limited voluntarism but provided a background to the understanding of the relevance of voluntarism to employee participation in decision-making in the LRA 66 of 1995.

<sup>397</sup> Section 11.

<sup>398</sup> Unlike the freedom to strike, the right to strike means that an employer who unreasonably interferes with this right can be challenged in the Labour Court for such infringement. This will ensure that the power of employees to act as a collective in influencing the decisions of the employer is guaranteed. However the Act maintains a categorization of matters on which employees can strike and those they have to resolve through conciliation or arbitration. Protected strike action must be preceded by a conciliation process as per section 64(1).

enter into agreements on how they will regulate matters of mutual interest. As evidence of preference for voluntarism, the Act even provides for the possibility of trade unions and employees to enter into an agreement that excludes the right to strike in respect of particular issues.<sup>399</sup> The Act also provides for centralised bargaining which seems to be the favoured level of bargaining.<sup>400</sup> The advantage is that workplaces which belong to the same manufacturing sector, may set standards of workplace conditions at central level and thus minimise the disruption of production in the various workplaces. For employees this is advantageous as they can derive strength from working as a collective in that particular sector.

However, the Act also introduces an element of compulsion in certain circumstances. If an employer refuses to bargain with a trade union, such trade union can embark on strike action according to section 64(2).<sup>401</sup> If the employer makes unilateral changes in the workplace, employees through strike action may also force the employer to restore the status quo so that proper bargaining can take place.<sup>402</sup> Although the Act has not provided for the duty to bargain, employees through strike action can compel an employer to bargain with them without having recourse to the courts, which is in line with what happens in other jurisdictions.<sup>403</sup> The Act also provides for the residual unfair labour practice jurisdiction, through which the conduct of employers is guided. Failure to observe item 2(1) of Schedule 7 may result in an action in the

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<sup>399</sup> Section 65(1)(a).

<sup>400</sup> Section 27.

<sup>401</sup> This section defines what refusal to bargain may mean, for instance, refusal to recognize a trade union as a bargaining agent, a withdrawal of recognition of a collective bargaining agent etc.

<sup>402</sup> Section 64(4).

<sup>403</sup> Under the British Trade Union and Labour Relations Act 1992, section 179, there is no provision for the courts to intervene in collective bargaining. Trade unions have to bargain in order to improve all aspects of their members' interests. Even when they agree with the employer, such agreement is not legally enforceable. Where the parties do not agree, the necessary legal recourse does not exist under the statutory law or common law. In Australia all aspects of collective bargaining are subject to compulsory arbitration. If employers and employees are involved in any dispute, arbitration provides a binding resolution. Workers are denied the strike weapon. However, as a necessary by-product of the move towards decentralized bargaining, the Industrial Relations Reform Act 1993, has provided a right to strike under regulated circumstances.

Labour Court.<sup>404</sup>

Although voluntarism seems to be very evident in the Act, when one reads the powers that are granted to the Labour Court<sup>405</sup> intervention in the bargaining relationship is inevitable. For instance, the court may order the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act.<sup>406</sup>

The very nature of voluntarism supports the interaction between employers and employees in the collective bargaining process without compulsion. To the extent that the LRA provides for a framework within which the parties can solve matters of mutual interest, without fear of compulsion by the Labour Courts, they will be encouraged to recognise each other as partners. Furthermore, since the Act grants employees organisational rights and the right to strike, their power is bolstered and voluntarism encouraged. It is in this relationship of mutual recognition that employee participation in decision-making is supported and collective agreements are evidence of such.

## 6.8 THE DUTY TO BARGAIN

As shown in the discussion on voluntarism, the LRA makes no express provision for a duty to bargain. However, it is essential to consider the position of the LRA on the duty to bargain and its impact on employee participation. The duty to bargain<sup>407</sup> is at times known as the duty to

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<sup>404</sup> Item 3(4) of Schedule 7.

<sup>405</sup> Grogan *op cit* note 314 p 245 ‘Specifically reserved for the Labour Court are disputes concerning inter alia: the application and the exercise of association rights, the refusal to admit a party to a bargaining council, strikes, lockouts, breaches of picketing rules and protest action, strike dismissals, automatically unfair dismissals on the grounds of operational requirements; discrimination under the residual unfair labour practice definition.’

<sup>406</sup> Section 158(1)(a)(iii). This confirms that voluntarism cannot cover all the dynamics of collective bargaining hence the necessity for the Labour Courts to intervene in collective bargaining. A reasonable intervention coupled with voluntarism ensures that employee participation through collective bargaining is constantly evaluated. Any of the parties who seeks to be an obstruction in the process of bargaining should be dealt with and that is where the Labour Court is important.

<sup>407</sup> The relevance of the duty to bargain in employee participation in decision-making can never be over-emphasized. A background to the duty to bargain has already been discussed in chapter 3.

negotiate. Under the common law there is no duty to negotiate.<sup>408</sup> Although this was the position of the common law, the LRA of 1956 made collective bargaining the only way through which industrial unrest could be minimised. The duty to bargain was seen as part of the promotion of collective bargaining.<sup>409</sup> Through the duty to bargain, parameters were set within which collective bargaining was to be expected thereby extending the scope of influence which employees had on decisions in the workplace. The nature of this duty to bargain was defined in *Radio Television Electronic and Allied Workers Union v Tedex Manufacturing (Pty) Ltd and NUMSA*<sup>410</sup> where it was stated that the right to negotiate was a legal right which did not differ from any other legal right and as such was to be exercised in circumstances where it would be fair to do so. This meant that the duty to bargain was not absolute. What is significant is that it was accepted that there was a legally enforceable right to negotiate in appropriate circumstances.<sup>411</sup>

The LRA 66 of 1995 adopts a different position which was clearly articulated by the team that drafted the Labour Relations Bill, wherein it stated that ‘a notable feature of the draft Bill is the

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<sup>408</sup> *Scheepers v Vermeulen* 1948 (4) SA 884 (O) at 992 it was held that agreements to negotiate or to agree are unenforceable. Such an agreement is too vague to enforce as it depends on the absolute discretion of the parties. Nor does our law recognize an obligation to negotiate.

<sup>409</sup> In *FAWU v Spekenham Supreme* (1988) 9 ILJ 628 (IC) at 636-7 A-B Fabricius AM *et al* stated that: ‘[H]aving regard to the fact that fairness is now the overriding consideration in labour relations in South Africa, it is time for the court to find firmly and unequivocally that in general terms it is unfair for an employer not to negotiate bona fide with a representative trade union.’

<sup>410</sup> (1990) 1(10) SALLR 18 (IC).

<sup>411</sup> In *Mutual and Federal Insurance Co Ltd v BIF and A Workers Union* 1996 (3) SA 395 (AD) Vivier J made an analysis of where the right under the LRA of 1956 derived its life. He said that the notion of the employee’s individual right to negotiate derives its existence from paragraph (j) of the unfair labour practice definition in section 1 of the Act, which protected the right to associate. However, Cheadle H ‘One man one bargaining Unit’ (1990) 7 (2) EL p 37, departs from the notion that the right to bargain is attached to an employee as an individual. He writes that, inferring the right to bargain from the right to associate may find justification in the notion that collective bargaining is the central purpose of association in labour relations. Therefore the right to bargain is only available to employees when they associate, making it a collective right and not an individual right as the Industrial Court believed it to be. Although the reasoning by Cheadle makes sense, the Industrial Court chose to adopt a completely different approach, deciding that each employee has a fundamental individual right to bargain with his employer and that this forms the basis for the union’s right to bargain, however insignificant its representivity may be. The right to bargain was therefore not dependent on the collective of employees but was held to flow from the individual right of each employee, which could be delegated to the union; see *National Banking and Allied Workers Union v BB Cereals (Pty) Ltd and Another* (1989) 10 ILJ 870 (IC) and *Radio Television Electronic and Allied Workers Union v Tedex (Pty) Ltd and Another* (1990) 11 ILJ 1272 (IC).

absence of a statutory duty to bargain.<sup>412</sup> It would seem that the team had to choose between three notable models on this issue of the duty to bargain. The first model was a system of statutory compulsion to bargain. In this model the levels and topics of bargaining would be statutorily determined by statute. The second model would allow for limited intervention by the courts to determine the appropriate level of bargaining and bargaining topics. The third option would allow the parties to the bargaining process to determine their own bargaining arrangements. The drafters chose the third option as they felt that the other two models would introduce rigidity in the labour market, which needed to continuously respond to a changing economic environment. The question to be answered, is how far the Act compels bargaining in light of the voluntarism and the hands-off approach it has preferred.<sup>413</sup>

#### 6.8.1 Organisational Rights and Freedom of Association

Although the LRA does not expressly provide for a legally enforceable duty to bargain with a trade union, it grants extensive rights to trade unions which may be seen as effectively imposing a duty upon the employer to bargain. The rights are as follows: (i) freedom of association (section 4); (ii) trade union access to the workplace (section 12); (iii) deduction of trade union subscriptions or levies (section 13); and (iv) disclosure of information (section 16). The foregoing rights are supported by the right to strike in sections 64 and 65.

The significance of all these rights is that they bolster the strength of trade unions in collective bargaining, provided they are able to meet the required threshold for their enjoyment. Against such a strong position employers may not be able to wish away the necessary participation of trade unions in the decision-making process. This creates a measure of compulsion on employers to negotiate with the trade unions or risk disruption of production through industrial action.

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<sup>412</sup> Explanatory Memorandum *op cit* note 323 p 121.

<sup>413</sup> Jordaan B 'The Duty To Bargain Under the Draft LRA' (1995) 4 (8) *LLN* at 1 writes that: 'It will become apparent from this that the Bill does not adopt a complete "hands-off" approach to collective bargaining. While its philosophy is to reshape the underlying legal environment to increase the ability of workers themselves to influence its outcome, some of its provisions may have the effect of severely restricting the ability of the parties to determine the outcome of negotiations.'

Certainly in these circumstances there is a measure of a duty to bargain and the creation of fertile ground for the development of employee participation.

Limited judicial intervention and arbitral intervention to enforce the freedom of association and organizational rights are provided for in chapter 2 and 3 of the LRA. In so far as the organisational rights are concerned, instead of the trade union approaching the courts for the exercise of such rights, the union is required to notify the employer in writing that it seeks to exercise one or more of the rights conferred by the Act. The exercise of such rights may be subject to such conditions as may be imposed by the employer from time to time. According to section 22, if there is a dispute concerning a trade union seeking to exercise any of the rights, such dispute has to be referred to the CCMA, failing which it has to be resolved through arbitration. Industrial action and court intervention on the resolution of these issues are prohibited.

On the other hand, freedom of association disputes fall within the jurisdiction of a bargaining council if there is one, then the commission and then the Labour Court.<sup>414</sup> Jordaan<sup>415</sup> makes mention of the effect of the wide formulation of the freedom of association provision. According to him this could have far-reaching consequences for collective bargaining. He predicts that it would bolster the possibility of the existence of a duty to negotiate with employees and further protect employee participation in decision-making. This can be illustrated by reference to *CWIU v BP South Africa*<sup>416</sup> and *OK Bazaars v SACCAWU*.<sup>417</sup> In these cases the courts accepted the proposition that an employer may, subject to certain provisos, offer inducements to employees or threaten forfeiture of bonuses in order to avoid or halt a strike action. The LRA now provides in section 5(3) that:

‘No person may advantage, or promise to advantage, an employee .... in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.’

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<sup>414</sup> Section 9.

<sup>415</sup> Jordaan *op cit* note 413 p 3.

<sup>416</sup> (1991)12 *ILJ* 599 (IC).

<sup>417</sup> (1993) 14 *ILJ* 362 (LAC).

This section may have the effect of prohibiting an employer from using financial incentives to prevent or curtail strike action. This means that the employer will have to choose between facing a protected strike action on disputes of interest or to bargain with employees in order to reach an agreement and avoid the costly disruption of the production process. This will surely enhance the need for the employer to bargaining with the trade union.

### 6.8.2 Unilateral Change of Terms and Conditions of Employment

In the past an employer was permitted to introduce changes in terms and conditions of employment once negotiations had deadlocked.<sup>418</sup> Employees in these circumstances could not stop the employer from implementing its decision, after having participated in the decision-making process without winning concessions. This was based on the principle that employees do not have a right to maintain their working conditions unchanged.<sup>419</sup>

Under the LRA 66 of 1995 the position changes. According to section 64(4) an employee or a trade union can refer a dispute about a unilateral change to terms and conditions of employment to a council or commission for a period of 30 days. The employer is not permitted to implement the changes for the same period or can be compelled to restore the terms and conditions that existed previously, until such time that the dispute over the actual or intended changes have been channelled through the statutory or agreed dispute resolution mechanisms. This would mean that in the *Precision Tools* case,<sup>420</sup> the employer would have been temporarily stopped from implementing the changes until such time that the dispute over the actual or intended changes was resolved or pending strike action. Unilateral implementation of changes in terms and

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<sup>418</sup> In *NUM v ERGO* (1991) 12 ILJ 1221 (A) where Goldstone JA quoted the following statement of US law with approval: 'The law is clear that an employer may, after bargaining with the union to a deadlock or impasse on an issue, make unilateral changes that are reasonably comprehended within his pre-impasse proposal... another formulation is that after impasse is reached in good faith, the employer is free to institute by unilateral action changes which are in line with or which are no more favorable than those it offered or approved prior to impasse.'

<sup>419</sup> In *A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA* (1995) 4 LCD 226 (LAC) the court held that workers do not have a vested right to preserve their working conditions completely unchanged as from the moment when they first begin work, only if changes are so dramatic as to amount to a requirement that the employee undertake an entirely different job, may a worker refuse to do the job in the manner required.'

<sup>420</sup> *Ibid.*

conditions of employment would be challenged even after a deadlock had been reached. The intention of this status quo provision is to ensure that an employer does not implement changes without having made an effort to negotiate with the employees concerned. The impact of section 64(4) may be far-reaching should the expression “terms and conditions of employment” be interpreted so as to encompass not only agreed upon terms and conditions of employment but also employment practices generally. This section also adds weight to the duty to negotiate and ensures that employers do not get away with changes without the participation of employees in decision-making.

### 6.8.3 Refusal to Bargain

In order to further ensure that the employer negotiates with employees, section 64(2) provides for a protected strike action upon the refusal by an employer to bargain. The strike action is to be preceded by an advisory award, the purpose of which is to evaluate the justification for the refusal to bargain and make recommendations to the parties. A refusal to bargain includes: refusal to recognise a trade union as a collective bargaining agent; a refusal to agree to establish a bargaining council; a withdrawal of recognition of a collective bargaining agent; a resignation of a party from a bargaining council; and a dispute about: appropriate bargaining units, appropriate bargaining levels or bargaining subject. However, only the refusal to recognise a trade union as a bargaining agent is discussed here, because of its significance to employee participation. The other matters have been covered in the previous sections on bargaining units and bargaining councils, to the extent to which they are relevant.

The issue of recognition<sup>421</sup> of a trade union as a bargaining agent is very important to employee participation in decision-making. The importance arises from the fact that if an employer refuses to recognise a trade union, collective bargaining and consultation will not occur. Consequently employee participation through collective bargaining will be affected. Section 64(2)(a)(i) of the LRA classifies refusal to recognise a trade union as a collective bargaining agent, as a refusal to bargain. Although the Labour Court can no longer avail the union with a remedy in this regard,

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<sup>421</sup> Thompson, C *et al* note 315 p 122 state that recognition refers to the acceptance by the employer of a union as the representative of a defined group of employees for collective bargaining or other related purposes.

the union can engage in a protected strike in order to be recognised.<sup>422</sup> However, as already mentioned, the strike has to be preceded by an advisory award.<sup>423</sup> In making the determination, arbitrators should seek guidance from the Industrial Court decisions, where in the *Stocks and Stocks* case,<sup>424</sup> it was shown that recognition was central to the issue of bargaining. It is possible that the legislature realised this importance and made this one of the reasons upon which trade unions could engage in a protected strike. The strength of the trade union to engage in strike action will determine whether recognition will be forthcoming or not. Employers, on the other hand, may not want production to be disrupted due to an issue preliminary to collective bargaining and rather recognise the trade union as a bargaining agent. The fact that trade unions can strike in order to be recognised, introduces an element of compulsion on the employer to accept the role of the trade union in the decision-making process. Once the employer has recognised the trade union, the achievement of employee participation will be facilitated.

The foregoing discussion of the duty to bargain suggests that the legislature confined itself to a choice between a legally enforceable duty to bargain and none at all. Although the Act goes a long way towards protecting the rights of employees and trade unions to engage in collective bargaining, it falls short of protecting the process of bargaining itself. While there may be something to be said for the absence of a legally enforceable duty to bargain, the wisdom of entirely excluding the courts from the process must be questioned. It seems to be retrogressive for an Act which aims to promote, amongst other things, labour peace. Lacob<sup>425</sup> observed that

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<sup>422</sup> In *Stocks and Stocks (Natal) v BAWU* (1990) 11 ILJ 369 (IC), the employer sought an interdict against a strike on the grounds that it was unfair. The court discussed whether it was defensible for an employer to refuse to negotiate with a union which has not yet been recognized by it. De Kock SM held that the obligation to negotiate wages turned not on whether the employer had agreed to recognize the union, but on whether it ought to have recognized the union. The presiding officer went on to state that the registration precondition was improper and that a duty to bargain should not be dependent on a majority of employees, whether generally or in a particular category, involved in the dispute. However, the judgement was criticised on the basis that, if the representivity of a trade union was disregarded, this could result in the proliferation of trade unions who will seek to negotiate with the employer which might prove to be too expensive for the employer. Employers cannot, however, be allowed to avoid the bargaining process through the unreasonable refusal to recognize a union.

<sup>423</sup> Section 64(2).

<sup>424</sup> *Ibid.*

<sup>425</sup> Lacob Z 'Memorandum on the draft Labour Relations Bill' (1995) *De Rebus* p 368.

the task team that drafted the LRA argued that in a changing economic environment it is best to leave bargaining to the parties themselves to sort out without providing for a duty to bargain. Notwithstanding this, his view is that the intervention of courts tended to encourage bargaining between employers and employees. In fact, the intervention of the courts assisted the parties in reaching agreement and resolving disputes, thereby avoiding industrial conflict. He continues to write that:

‘The absence of a duty to bargain creates a vacuum, all of the mechanisms embodied in the LRA are of use if the parties agree to negotiate with each other. If they do not, industrial action of one sort or another will inevitably be the only recourse that any party will have to compel another to negotiate on any particular issue.’<sup>426</sup>

Furthermore, the absence of the duty to bargain makes a mockery of the rights of employees to bargain collectively as provided for in section 23(5) of the Constitution of the Republic of South Africa. Employees at the lowest level in the employment strata who desperately need to bargain in order to improve their conditions in particular will be on the receiving end. There is, however, a decision of the AD on the subject of the duty to bargain which may be of assistance in determining the extent to which employers may be expected to bargain with their employees.<sup>427</sup> In *South African Society of Bank Officials v Standard Bank of South Africa*<sup>428</sup> where the appellant sought an order declaring the respondent’s refusal to negotiate with the trade union in respect of all terms of employment of the bank’s “M” grade employees (who fall in the managerial category) to be an unfair labour practice. The issue before the court was whether the bank was obliged to engage in collective bargaining with the union regarding the terms and conditions of employment of all managers occupying “M” graded positions. Although the issue had arisen under the LRA 28 of 1956, the court surveyed foreign law on the duty to bargain and observed that our law did not provide for an express duty to bargain. The legislature under the LRA 28 of 1956 had left this to the Industrial Court to decide on under the unfair labour practice jurisdiction. Commenting on the LRA 66 of 1995, Scott JA observed that the Act did not

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<sup>426</sup> *Ibid* p 368. See also Benjamin P ‘Reforming Labour: Lessons from the USA’ (1995)19 (2) *SALB* p 50.

<sup>427</sup> In light of the exclusive jurisdiction of the Labour Court in section 157 on matters under the LRA, the decision of the AD may be persuasive and not binding on the LC.

<sup>428</sup> (1998)1 ALL SA 363 (A).

provide for a duty to bargain, but made an important statement in his *obiter dictum*, which may assist in determining the extent to which an employer is expected to bargain with employees.

Scott JA stated that:

‘In each case, therefore, whether there is a duty on the employer or not depends upon whether on a conspectus of all the circumstances,... the failure or refusal to engage in collective bargaining with the union representing a particular bargaining unit will amount to an unfair labour practice, where that bargaining unit comprises employees at the lower end of the organisation’s hierarchy, a refusal on the part of the employer would ordinarily constitute an unfair labour practice’.<sup>429</sup>

The foregoing judgment adopts a purposive interpretation of collective bargaining and this approach would be encouraged under the LRA as has already been done by the LAC.<sup>430</sup> A purposive interpretation would entail considering which of the purposes of the Act may be threatened by the employer’s refusal to negotiate with the trade union. Certain circumstances will have to be taken into account, particularly because the consequences of bargaining do not only concern trade union members but also non-union members and the need for efficient management.<sup>431</sup> Furthermore, the constitutionality of excluding the duty to bargain is questionable because section 23(5) of the Constitution of the Republic of South Africa provides for the right of every trade union and every employer and employer’s organisation to engage in collective bargaining. It may be that employees may have to approach the High Court to enforce their constitutional right.<sup>432</sup>

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<sup>429</sup> *Ibid* p 368.

<sup>430</sup> See *Business South Africa v COSATU and NEDLAC* (1995) 18 ILJ 474 (LAC) and *Ceramic Industries Ltd v NACBAWU and Others* (1997) ILJ 671 (LAC).

<sup>431</sup> *Mutual and Federal Insurance Co Ltd v Banking Insurance, Finance and Assurance Workers Union* 1996 (3) SA 395 (A) 404 C-E.

<sup>432</sup> Du Toit *et al op cit* note 317 p 137 make reference to Du Toit in ‘Labour and the Bill of Rights’ *The Bill of Rights Compendium*, Butterworths (1997) at 4B, where in commenting on the absence of a general duty to bargain they write: ‘The absence of a duty to bargain in the Act effectively means that parties have to resort to power play in order to enforce a right which is guaranteed in the constitution. Du Toit submits that the rights contained in section 25 of the constitution fall within the ambit of section 8(2) of the constitution, and therefore apply both vertically and horizontally. If so, section 23(5) may be read as introducing a duty on a contemplated bargaining partner to enter into good faith bargaining. He argues that, while it is not possible to compel collective bargaining over terms and conditions of employment in terms of the Act, it may be possible to seek a High Court order to enforce section 23(5) of the Bill of Rights.’

## 6.9 CONCLUSION

The above discussion on collective bargaining and its relevance to employee participation in decision-making, shows that the LRA has provided a very dynamic system which bolsters the strength of trade unions in the bargaining process. Although the Act is vulnerable to facilitating the growth of adversarialism, in many respects the LRA is also going to promote employee participation in decision-making. Firstly, the preference for centralised bargaining, although its success has still to be seen, is very significant as it will allow employees to combine their strength in order to be an influential force in negotiations thus encouraging employee participation. Secondly, majoritarianism is important because it will encourage employees to join trade unions and unions to act together in order to obtain more organisational rights and thus become influential. The greater the number of employees in trade unions the greater the increase of democratic participation in labour relations. Thirdly, trade unions are obviously important agents in collective bargaining, and although trade union representatives have discretion on how to meet their members' interests, if the duty of fair representation flourishes in the system, accountability will be enhanced. Furthermore, the fact that employees generally can challenge collective agreements that are unfair in nature will ensure that unions will strive to satisfy the interests of employees as they express them from time to time. Fourthly, since the collective bargaining machinery is based on voluntarism, interaction amongst employees and employers through negotiations, will be encouraged. It is important that this should be with as little compulsion as possible, providing ground for the growth of mutual trust as parties agree to decisions they have all contributed to. Although voluntarism may be the basis for the absence of the duty to bargain, there is no justification for the express exclusion of the duty to bargain. Voluntarism and the duty to bargaining could co-exists because an employer would not be expected to agree with the trade union. The limitation of court intervention has sufficed in the quest to facilitate voluntarism. Finally, although the Act wants to promote employee participation in decision-making or cooperative governance, the occurrence of industrial action on non-substantive issues may increase the conflictual culture which militates against the growth of employee participation. It therefore remains to be seen how the system achieves employee participation without being its own enemy.

## CHAPTER 7

### WORKPLACE FORUMS

#### 7.1 INTRODUCTION

Workplace forums are perhaps the most significant innovation the LRA has created and they are largely the reason why employee participation in decision-making is now an important aspect of the South African labour law discourse. In explaining the underlying motivation for the provision of workplace forums in the LRA Du Toit *et al*<sup>433</sup> write:

‘It represents a shift from the tradition of collective bargaining between employers and trade unions over all matters of mutual interest towards a division of labour between trade unions and workplace forums in representing employee interests. The underlying aim is to mitigate South Africa’s legacy of conflict-ridden industrial relations and promote economic growth by creating a second channel for more cooperative interaction between management and labour alongside the institutions of collective bargaining.’<sup>434</sup>

In reading the explanatory memorandum, there is clear evidence that the drafters of the LRA were highly influenced by similar structures in Europe. In the 1970s managements across Europe realized that if there was going to be a move from mass to flexible production, employees would have to be involved in decision-making.<sup>435</sup> This realization gave rise to a system of employee participation which has manifested itself in the form of works councils in countries like Germany and the Netherlands.<sup>436</sup> Works councils are the equivalent of workplace forums under the LRA

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<sup>433</sup> Du Toit D *et al* *The Labour Relations Act 1995* 2 ed (1998) p 251.

<sup>434</sup> The Explanatory Memorandum on the Draft Bill Government Gazette No. 16259 of 1995 p 136 states that, ‘In creating a structure for on-going 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 expand worker representation beyond the limits of collective bargaining by providing workers with an institutionalized voice in managerial decisions.’

<sup>435</sup> Du Toit *op cit* note 433 p 136.

<sup>436</sup> Balfour C *Participation in Industry* (1973) pp 185-193 and pp 197-202, in Germany the works councils have developed through many Acts over the years. Under the Works Constitution Act of 1952 members of the councils are to be elected by the employees in companies with certain designated numbers of employees. The works councils have clearly defined roles distinct from trade unions (sec.75). The employer is expected to consult with the works council on a variety of subjects before action is taken, coupled with this is the requirement that the employer has to disclose information to the works councils. The employer and the works councils have to refrain from activity within the establishment which may imperil industrial peace. The works councils are also provided with the rights of co-determination. In the Netherlands, works councils are regulated by the Works

which were introduced as a means not only to increase production but also by the need to democratise workplaces.<sup>437</sup> The creation of workplace forums emphasises the shared responsibility between government, employers and employees for effective industrial relations. While government has created a statutory framework for employee participation, it will be the responsibility of employers and employees to utilize the mechanisms for employee participation provided by the Act. Although industrial relations is inherently conflictual,<sup>438</sup> the creation of workplace forums indicates the possibility of cooperation between employers and employees.

It is therefore the aim to examine the way in which the LRA has provided for workplace forums by means of discussing the following matters: the perspectives of both employers and employees of workplace forums; the establishment of workplace forums; different models of workplace forums; mandatory consultation; joint decision-making; and the disclosure of information to workplace forums.

## 7.2 EMPLOYEES' AND EMPLOYERS' PERSPECTIVES

The views of both employees and employers towards workplace forums are essential if the structure of workplace forums in the LRA is to be understood. The structure of the forums is reflective of the compromises between the two groups during the drafting process.

### 7.2.1 Employees' Perspective

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Council Act of 1979. Workplaces employing 35 or more employees are expected to establish works councils. The works councils have to be consulted on a variety of matters and they also have rights of co-determination. Employers are also obliged to provide them with information. Undoubtedly, workplace forums were adapted from the structure of works councils in European countries like Germany and the Netherlands, with some variations.

<sup>437</sup> Section 1(d)(iii) states that the LRA seeks to advance economic development by fulfilling the primary objectives of the Act, one of which is to promote employee participation in decision-making through workplace forums. In Western Europe democratization of workplaces was also a motivation for the establishment of works councils: Bendix W 'Workplace Forums: Shadows of a shady past or beacons for reform' 1995 (15) *IRJSA* p108 writes: 'The core thought of the Western European philosophy of industrial democracy....is the democratization of work life by employee representation and employee participation in workplace control and the daily decision-making process in the enterprise which as it has been argued, convincingly affects their life as well as that of managers, owners, shareholders if not more so...'

<sup>438</sup> Kahn-Freund O *Labour and the Law* 2 ed (1977) pp 1-17.

Some employees saw workplace forums as posing a threat to the struggle towards achieving workers' control in the workplace.<sup>439</sup> In addition to this problem Von Holdt<sup>440</sup> writes that the main problems with the forums are that:

'They attempt to separate collective bargaining issues from production issues, they weaken rather than strengthen unions, they create two forums in the workplace, threaten to fundamentally undermine the tradition of worker representation through shopstewards that has been built over two decades of union struggle.'

In the above statement there is a sense that workplace forums are going to inhibit the further unionisation of the South African working class because, with forms of representation that are independent of unions, there will be no incentive for workers to join unions.<sup>441</sup>

Although employees view these forums critically, they are realistic in their appreciation of the advantages that such forums are likely to bring. According to a broad-based research report, labour sees the purpose of workplace forums as the broadening and institutionalisation of employees' rights in order to achieve workplace democracy.<sup>442</sup> Lehulere<sup>443</sup> writes that workplace forums will act as an incentive for unions to devise strategies to organise white collar workers, in the sense that unions can nominate some members of this strata of workers to the forum as part of winning them over. Furthermore, there is a perception that workplace forums will introduce some vibrancy and a democratic culture within the working class in the shopfloor. There is also an expectation that the levels of debate may be raised within the working class since the different unions will be forced to develop positions on key questions facing employees.

The views of employees show that they realize both advantages and disadvantages in the

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<sup>439</sup> Lehulere O 'Workplace Forums: Co-determination and workers' struggles' (1995) 19 (2) *SALB* p 42 writes: 'at an ideological level there is an objection to workplace forums, co-determination undermines the struggle for socialism, because, instead of preparing workers for the struggle against capitalism, it promotes the idea that the capitalists and workers have common interests. It therefore leads to the co-option of the working class. The alternative to co-determination is workers' control. Unlike co-determination, workers do not attempt to jointly manage the problems of capitalism. In this way, workers' control forms part of the struggle for socialism.'

<sup>440</sup> Von Holdt K 'Workplace forums: undermining unions' (1995) 19(6) *SALB* p 60.

<sup>441</sup> Du Toit *et al op cit* note 433 p 42.

<sup>442</sup> *The Star* Wednesday 11 the May 1996 p 2.

<sup>443</sup> Lehulere *op cit* note 439 p 43.

workplace forums, which may be evidence of the critical approach with which they will approach workplace forums.

### 7.2.2 The Employers' Perspective

There are two main dominating view points on workplace forums amongst employers. The more common view is that these forums are yet another nail in the coffin of the management prerogative.<sup>444</sup> This makes sense since the more rights employees have to participate in decision-making, the greater the possibility that the decision-making process will take longer. The second view acknowledges the decision-making rights of employees, and does not see workplace forums as a threat to their management rights.<sup>445</sup> Instead they see these forums ideally as structures where responsibility can be shared.

A summary of the perspectives of employees and employers to workplace forums indicates that it will be important for the parties to adopt a very constructive approach to the forums. If the more radical positions are adopted, the intentions of the legislature will not see the light of day.

## 7.3 THE FUNCTIONS OF WORKPLACE FORUMS

The functions of a workplace forum are provided for in section 79 of the LRA which states that:

A workplace forum established in terms of this Chapter -

- (a) must seek to promote the interests of all employees in the workplace, whether or not they are trade union members;
- (b) must seek to enhance efficiency in the workplace;
- (c) is entitled to be consulted by the employer, with a view to reaching consensus, about the matters referred to in section 84; and
- (d) is entitled to participate in joint decision-making about the matters referred to in section 86.

Section 79 sets out four functions for workplace forums, two of which are general obligations owed by the workplace forum to employees and the employer and the other two are rights which

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<sup>444</sup> Du Toit *et al op cit* note 433 p 253 express this point when writing that the employers' view is that workplace forums may restrict the employers' prerogative to manage and also introduce some inflexibility in the decision-making process.

<sup>445</sup> *Ibid* p 2.

the forums can claim from the employer.<sup>446</sup> This section may seem clear, but workplace forums not constituted in terms of this chapter may not be bound to perform all the functions provided for. For instance, if a workplace forum is formed on the basis of a collective agreement, section 80(8) provides that the provisions of this chapter do not apply, which may mean that the workplace forum will not promote the interests of all the employees in that workplace. This may result in only members of the parties to the collective agreement benefiting. However, if section 80(8) is read together with section 23(1)(d) it will be clear that even though a workplace forum has been formed on the basis of a collective agreement, it could still promote the interests of all employees in the workplace. Furthermore, there is nothing to prevent the parties from including any of the provisions of section 79 in their collective agreements.

In the first place a workplace forum must seek to promote the interests of all employees in the workplace whether or not they are members of the trade union.<sup>447</sup> The composition of the workplace forum is very important in this regard, since this will possibly determine the ability of the forum to advance the interests of all employees in the workplace. Since workplace forums can only be initiated by trade unions, there is always a threat to the ability of the forum to address the interests of all employees in the workplace versus the interests of the union's members. This is why it is important that the trade union concerned must be a majority union<sup>448</sup> so as to ensure that the union will have the ability to represent the democratic views in that particular workplace. In order to ensure that the workplace forum is kept accountable for the agreements it reaches with the employer, an employee who feels aggrieved by an agreement may challenge its validity in terms of section 94.

One may ask why, if workplace forums are required to represent the interests of all employees,

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<sup>446</sup> *Ibid* p 255.

<sup>447</sup> Cheadle H *et al Current Labour Law* (1995) p 75 write that: 'it is for the above reason that the composition of the workplace forum must be by way of a direct election of members by the employees in the workplace (section 82(1)(c)). However if a representative trade union is recognised by the employer for the purposes of collective bargaining in respect of all employees in the workplace, then the trade union may choose the members of the workplace forum from among its elected representatives in that workplace.'

<sup>448</sup> Section 78(b).

senior managerial employees are excluded from their scope.<sup>449</sup> This may look like a contradiction in the purpose of the LRA to promote employee participation in decision-making and democratising the workplace. However, in this regard the LRA follows on jurisprudence developed in countries like Germany and Spain. In Germany the exclusion of senior managerial employees was seen as reasonable because their inclusion would deprive the works councils of their effectiveness in the protection of junior employees' interests.<sup>450</sup> Although the exclusion of managerial employees avoids unnecessary contradictions in the workplace forums, it is hoped that such managerial employees will be able to negotiate with the employer in order to establish participatory structures beyond the LRA. This is necessitated by the fact that they may experience as many problems as the other employees, which can be solved cooperatively and they also need to be involved in the democratisation of the workplaces.

Secondly, the workplace forum must seek to enhance efficiency in the workplace. Efficiency in the workplace has not been defined and it still has to be seen how it is going to be defined.<sup>451</sup> Whereas workplace forums are intended to facilitate co-operative governance of the workplace, the possible introduction of adversarialism on the matters falling within the jurisdiction of

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<sup>449</sup> Section 78(a).

<sup>450</sup> In a German case, *Federal Labour Court*, 1 ABR 94/7, *International Labour Law Report* (30 th September-1 st October 1975) p 331, it was stated that: 'Executive staff, because of their close relationship with the employer, have been deliberately excluded from the operation of the Works Constitution Act. They are entitled to set up a spokesman's committee to represent them and enter into agreement with the employer.' See also the Spanish case *In re Confederation of Managerial Staff*, *International Labour Law Reports* ( 30 the September- 1st October 1988) p 449 where it was held that: ' the exclusion of senior managerial staff from participation, as selector or candidate, in the election of workers' representative organ in the undertaking as provided for in Art 16 of Royal Decree 1382/1985 was reasonable, given that the particular nature of the employment relationship of such staff deprives it of the independence necessary for the effective defense of trade union aims. Accordingly there was no infringement of freedom of association, and, as a consequence, no violation of the principle of hierarchy norms.'

<sup>451</sup> In the *Collins Dictionary of the English Language* 2ed (1986) efficiency is defined as: 'the quality or state of being efficient [functioning or producing with the least waste of effort].' In an attempt to indicate what efficiency may entail, Du Toit D 'Corporatism and Collective Bargaining in a Democratic South Africa' (1995)16 *ILJ* p 792 writes that: 'The only imperative identified with the functions of workplace forums is that of seeking to enhance efficiency in the workplace. Such an explicit directive will be binding on a court in a way that a general statement of intent by the Minister is not. The implication is that economic efficiency must take precedence over the requirements of democracy and that, if "efficiency" as understood by the courts demands it, workers' rights to be involved in decision-making must be curtailed.'

workplace forums may in fact impede efficiency in the running of the workplace. The greatest threat to this objective is the fact that employees are not prohibited from engaging in industrial action on issues of consultation.<sup>452</sup> It is very difficult to see how workplace forums will avoid such problems when the employee members of the forum decide to engage in industrial action as employees and not as members of the workplace forum. However, on issues of joint decision-making, the workplace forum and employees may not engage in industrial action. Clearly though, where a workplace forum exercises its rights in a way that affects efficiency negatively, the employer should be able to bring an action in terms of section 94(1)(d), before the CCMA. The employer would have to request the CCMA to decide whether the forum is acting in compliance with its function of enhancing efficiency in terms of section 79(b).

The overall significance of section 79(a) and (b) is that the workplace forums are to serve the interests of employees as a whole in a particular workplace. This means that if the workplace forum deviates from this objective then it is no longer performing its functions. Furthermore, the possibility of challenging the decisions of the workplace forum through section 94, also strengthens the control that even non-union employees of the workplace have over the forum. This other function (that of enhancing efficiency) indicates that the relationship between the workplace forums and the employer is based on the parties sharing the right to decide on production matters which are at the centre of efficient running of the workplace. This fortifies the importance of cooperation in the functioning of workplace forums.

The foregoing position in the LRA compares with the Dutch model under the Works Councils Act of 1979 which provides that the purpose of the works councils is to promote consultation with and representation of persons employed in the enterprise and in the interest of a proper function of the enterprise in all its objects.<sup>453</sup> The German model offers an example of a

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<sup>452</sup> Olivier M 'Workplace Forums: Critical questions from a Labour Law Perspective' (1996) 17 *ILJ* 803 p 813 where it is written that: 'it is very significant that the new Labour Relations Act does not exclude the possibility that employees may embark on strike action if agreement on a matter meant for consultation cannot be reached.'

<sup>453</sup> Works Council Act of 1979, Chapter 2, Article 2 section 1. It may be that efficiency in section 79(b) of the LRA will mean proper functioning of the workplace in all its objectives as in the Dutch model or it may reflect that workplace forums may not engage in activities that will imperil peace in the workplace as in the case

cooperative relationship between employers and works councils. Section 74 of the Works Constitution Act gives more precise instruction on how the parties in an establishment are to practice the fundamental order to cooperate.<sup>454</sup> The employer and the works council must refrain from activities that interfere with operations or imperil the peace in the establishment. Industrial action between the employer and the works council is unlawful; the employer may not lock out the works council, nor may the works council call a strike in the establishment. Internal disputes must be dealt with through the intervention of the conciliation committee or the competent labour court.<sup>455</sup> The German model offers guidance in dealing with the more subtle actions which may be subversive to the functions of workplace forums under the LRA, particularly those which are not expressly prohibited by the Act.

#### 7.4 INITIATING WORKPLACE FORUMS

According to section 80(2) read together with section 80(1), any representative union may apply for the establishment of a workplace forum in a workplace that employs more than 100 employees. The Act requires that the application be made to the CCMA and a copy be sent to the employer.<sup>456</sup> It is also very important that there should be no functioning workplace forum in that particular workplace.<sup>457</sup> The Act once more shows preference for majority unions in the initiation of workplace forums.<sup>458</sup> Du Toit *et al*<sup>459</sup> point out that minority unions have three possible options: firstly, they may have to increase their membership in order to meet the

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of German works councils: section 74 of the German Works Constitution Act 15 of 1952.

<sup>454</sup> Knudsen H *Employee Participation in Europe* (1995) p 38.

<sup>455</sup> Halbach G *et al Labour Law in Germany: an overview* (1994) paragraph 136. The duty to maintain industrial peace does not apply to industrial action between members of a trade union and an employer. The works council must not call for participation or non-participation in a trade union strike. The individual works council members who belong to a trade union may participate in union strikes: participation in a strike is unlawful in so far as advantage is taken of the position of a works council member, for example, if financial or material resources destined for works council activities are used for the purpose of industrial action.

<sup>456</sup> Grogan J *Workplace Law* 3 ed (1998) p 212.

<sup>457</sup> Section 80(5)(b)(iii).

<sup>458</sup> Section 78(b).

<sup>459</sup> Du Toit *et al op cit* note 433 p 259.

threshold; secondly, minority unions may act together in order to establish the necessary majority and thirdly, it could seek to establish a non-statutory structure for the purposes of consultation and joint decision-making. It is important to understand the role of the CCMA at this stage. If the trade union and the employer can reach agreement, the CCMA will withdraw and the parties will regulate the workplace forum according to their agreement. But if there is no agreement the CCMA can establish the forum against the will of the employer.<sup>460</sup>

Since workplace forums were not conceived as an alternative to trade unionism, it makes sense that workplace forums be triggered by trade unions. International experience has shown that works councils cannot exist apart from trade unions.<sup>461</sup> In Germany the Works Constitution Act provides that the works councils can be initiated by either workers or a trade union. The German position therefore is distinguishable from the South African position as it allows non-union employees to initiate works councils just like trade unions. This position is advantageous as it makes the works councils a real employee institution instead of the domain of trade unions. Although evidence shows that in practice works councils are dominated by trade unions, it is significant that independent employees can compete with trade unions and counter the possibility of the works councils addressing only trade union concerns.

South Africa can follow the German position in future once trade unions have recognised that workplace forums will not threaten their existence. Allowing non-unionised employees to initiate the establishment of workplace forums would facilitate the growth of employee participation without making it the exclusive preserve of trade unions.

The requirement that only workplaces with more than 100 employees can establish a workplace forum presents a problem because workplaces with less than 100 employees will not be in a

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<sup>460</sup> Section 80(6).

<sup>461</sup> 'In the Netherlands, some two thirds of works council members in the larger enterprises are trade unionist. The trend is even more marked in Germany, where some 86% of works council members are trade unionist and some 75 % are members of unions affiliated to the social-democratic union federation, the DGB. Union representation on works councils is more than twice their representation in the workforce as a whole. In countries with higher union density such as Belgium, on the other hand, unions are said to have colonized the works council': Du Toit *op cit* note 452 p 799.

position to establish workplace forums. There is absolutely no reason why a lower threshold was not preferred. For instance in the Netherlands, enterprises with 35 or more employees who work at least one-third of the normal week must establish a works council.<sup>462</sup> In Australia the threshold is even lower where the law requires that a works council may be formed on staff initiative if the enterprise has at least five employees aged over 18.<sup>463</sup> The South African position is very disadvantageous to small enterprises which seem to be fast growing in South Africa and are providing employment to a majority of people.<sup>464</sup> On the other hand, there is nothing stopping employees within such small establishments from negotiating with their employers to establish participatory structures. There should be a consideration of reducing the threshold in order for the LRA to be in line with international trends.

A problem linked to the preceding one is the way in which the Act defines a workplace. Section 213 states that:

In this Act, unless the context otherwise indicates, workplace: (c) in all other instances means the place 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 the employees work in connection with each independent operation, constitutes the workplace for that operation.

This definition would support the establishment of a workplace forum in any place or places where more than 100 employees of an employer work.<sup>465</sup> The problem is what happens if an

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<sup>462</sup> Coopers and Lybrand *Employment Law In Europe: A country by country guide for employers* (1992) p 176.

<sup>463</sup> *Ibid* p 25.

<sup>464</sup> Olivier *op cit* note 452 p 808 writes: 'Why the legislature opted for such a high threshold is unclear and unjustified, especially in view of the way in which business organize themselves in the South African context.... it is estimated that this could exclude up to 74% of the workers in the formal sector. Small and medium-sized undertakings are effectively exempted from the introduction of the statutory variant of the system. The apparent irony is that workplace forums as envisaged by the Act cannot be introduced there where they are perhaps most needed.' Also see: Du Toit D *op cit* note 451 p 803: 'Why does the draft bill set its face against the establishment of works councils in smaller enterprises? If cost is the issue, it could be a simple matter to stipulate the kinds of costs for which employers will be liable and the circumstances under which they would be liable for what. Alternatively (or additionally) provision could be made for forms of representation specially adapted to the situation of the smaller enterprise. In many small workplaces it is arguable that no special structures of employee participation are needed since the parties are in one-to-one contact. Even here, however, the objects of worker participation are no less valid than in larger workplaces and even if no special structures are created, the appropriate rights of consultation and joint decision-making should be vested in the workforce as a whole.'

<sup>465</sup> Rudd C *et al Guide To The LRA 1995 Part 1* (1996) p 462.

employer establishes several workplaces producing different components of a single product, three blocks from each other employing less than 100 employees each?

According to Grogan<sup>466</sup> each of the foregoing examples would be a workplace because they are operations conducted by an employer which by reason of size, function and organisation can be regarded as independent. Employers who are reluctant to interact with workplace forums may organise their workplaces in such a way that they make sure that they do not employ more than 100 employees in any single operation. It is very unfortunate that the Act does not provide a definition for 'operation', neither determines which size is required nor which criteria should be taken into account in determining 'independent'. The Industrial Court under the LRA 28 of 1956 was prepared to declare artificially dividing of an enterprise for purposes of frustrating the intentions of the Act, as improper conduct.<sup>467</sup> The interpretation of workplace under the LRA does not provide a clear guideline of what happens in such cases. The LC has only stated that the definition of the workplace in section 213 of the LRA was intended to apply whenever it appeared in the Act and bears the same meaning throughout the various sections of the Act.<sup>468</sup> However, the LAC was to make a different determination from that of the LC by stating that workplace may have different meanings in different circumstances under the Act.<sup>469</sup> The LAC

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<sup>466</sup> Grogan *op cit* note 456 p 212.

<sup>467</sup> In *Paper Printing Wood and Allied Workers Union v Lane NO* (1993) 14 ILJ 1366 (IC), where the first respondent carried on business as a close corporation and as a result of various transactions, including the purchase of defective machinery, the first respondent was discovered to be insolvent. The first respondent decided to institute liquidation proceedings and at the same time form a new close corporation, the second respondent. Employees of the first respondent were dismissed and the second respondent selected some of them for employment. Applicant alleged that the demise of the first respondent by means of liquidation and the simultaneous creation of the second respondent was a device used to among other things, to get rid of part of the workforce without having to enter into a retrenchment exercise. The court held that this constituted unfair labour practice (1369 J).

<sup>468</sup> *Speciality Stores v Commercial Catering and Allied Workers Union and Another* (1997) 18 ILJ 992 (LC) at 1003(F-G). In *NUMSA and Feltex Foam* ( Law Library CCMA KN1441), there was emphasis on the element of being 'physically distinct' thus constituting a separate entity: see also Cheadle H *Current Labour Law* (1997) p 6.

<sup>469</sup> *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC) at 565 (C-E), where Froneman DJP stated that: 'It must also be kept in mind that the definition of a workplace in section 213 of the Act is preceded by the qualification that it bears that meaning unless the context (of the Act) otherwise indicates.' As pointed out by Cheadle *et al ibid* p 4 the context of determining a proper workplace in

position may provide a guideline to commissioners or arbitrators in dealing with employers who strategically organise their operations in order to avoid the establishment of workplace forums by their employees. Otherwise the LRA should have included an anti-avoidance clause so as to make sure that employers do not deny employees the establishment of workplace forums by creating a multiplicity of workplaces with less than 100 employees.<sup>470</sup>

It is widely held that the Act gives rise to four models of workplace forums:<sup>471</sup> bargained forums; forums with a bargained constitution; forums constituted by the commissioner and trade union-based workplace forums.

#### 7.4.1 Bargained Forums

Section 80(2) provides that a representative trade union may apply to the CCMA for the establishment of a workplace forum. This presupposes that the employer and the trade union must seek to agree on the establishment of a workplace forum with the assistance of the CCMA. After having been satisfied of the requirements as per section 80(5), the commissioner must assist the parties or trade union and the employer to reach a collective agreement<sup>472</sup> on the establishment of a workplace forum. If the employer and the relevant trade union are able to reach an agreement over the establishment, powers and constitution of the forum during negotiations, the provisions of chapter 5 of the LRA do not apply<sup>473</sup> as the forum is then governed solely by the collective agreement. The parties are then free to add to or limit its

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terms of the Act in a lock-out dispute may well be different from the context for determining a workplace in a organizational rights dispute. The possibility of different determinations of a workplace, in different contexts, is contemplated and accepted in terms of the Act itself.

<sup>470</sup> Some may argue that in practice this would prove costly for an employer, however it is possible for employers today to set up small enterprises which are specialized in their production. This has many advantages, the main one being that smaller enterprises seem to have a few obligations under labour law compared to bigger enterprises e.g if they employ less than 100 employees they are not obliged to establish workplace forums, even the Employment Equity Act 55 of 1998 does not entail greater obligations for businesses that employ less than 50 employees and has a turnover less than that stated in schedule 4 of the Act (see section 1 on the definition of a designated employer).

<sup>471</sup> Jordaan B 'Workplace Forums: Their structure and function' (1997) 6 *LLN* p 2.

<sup>472</sup> Section 80(6).

<sup>473</sup> Section 80(8).

functions. This opens the forums to the sole domination of unions, who can in turn use them to achieve union aspirations to the detriment of non-union members, since the general functions of these forums as per section 79 could be excluded.<sup>474</sup>

A contrary interpretation is that the collective agreement derives its life from section 80(7) and as such should be reflective of the contents of Chapter 5. This would mean that if the collective agreement deviates from the provisions of the chapter, such deviation should not amount to a fundamental departure from what the Act requires. Whatever the contents of the collective agreement, section 79 of the Act must be included in the collective agreement .

#### 7.4.2 Forums with a Bargained Constitution

Section 80(9) provides that should the parties be unable to conclude an agreement over the rights, powers and duties of the workplace forum, they may nevertheless with the aid of the commissioner be able to reach agreement on its constitution. This would mean that the forum would retain the functions in section 79 which include the organisational rights in sections 85 and 86. Schedule 2 will serve as a guideline to the contents of the constitution. The guidelines in Schedule 2 item 4(2) provide for the eligibility of non-unionised members to stand for election to the forum. Section 82 will still be relevant since it contains provisions which must be included in the constitution of the forum.

#### 7.4.3 Forums Constituted by the Commissioner

Section 80(10) provides that:

If no agreement is reached on any of the provisions of a constitution, the commissioner must establish a workplace forum and determine the provisions of the constitution in accordance with this chapter, taking into account the guidelines in Schedule 2.

This section once again provides employees with another avenue to ensure the establishment of a workplace forum if the employer is reluctant to establish one. It is not clear whether the commissioner is to intervene when parties disagree on the entire or part of the constitution, because there is no provision that the parties must declare a point of disagreement. It seems

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<sup>474</sup> See discussion on the role of trade unions in employee participation in Chapter 2.

therefore that it will be the responsibility of the commissioner to decide when to intervene.<sup>475</sup> It is also expected that the employer and trade union will have a right to be heard in the process, if the forum to be established is to be legitimate in the eyes of the parties. If any of the parties is not satisfied with the way the commissioner has carried out his duties, Du Toit *et al* write that such dispute may be referred to the Labour Court in terms of section 158(1)(b) or section 158(1)(a), depending on the circumstances.<sup>476</sup>

#### 7.4.4 Trade Union-Based Workplace Forum

Section 81 (1) provides for the establishment of workplace forums by a trade union recognised by the employer in terms of a collective agreement. This must be a majority union entitled to bargain on behalf of all the employees in the workplace. The trade union can constitute the workplace forum exclusively of its own members in that particular workplace who will most probably be members of the shop stewards' committee. If the workplace forum is established in terms of section 81(1), the provisions of section 80 and section 82 will apply with the exception of those sections dealing with the election of a workplace forum.<sup>477</sup> The union's constitution will be applicable in the nomination and election of members of workplace forums. Although the Act wants to promote employee participation through workplace forums, the legislature provides a threat to this very goal through the heavy involvement of trade unions.<sup>478</sup> The fact that a collective agreement is to be concluded for the establishment of a workplace forum, immediately introduces the concept of collective bargaining and adversarialism. This may also undermine the cooperative relations that are supposed to prevail in these forums. The Act further provides for the election to the workplace forum of trade union representatives in the workplace (shopstewards) who may come with a mind-set of adversarial bargaining which may militate

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<sup>475</sup> Du Toit *et al op cit* note 433 p 269.

<sup>476</sup> *Ibid.*

<sup>477</sup> Section 81(3).

<sup>478</sup> Olivier *op cit* note 452 p 809 states that: 'This provision potentially undermines the notion that representatives at this level should be democratically elected, and that the workforce should be directly involved. Otherwise the forum could be seen as just another union tool and employees could be discouraged from participating meaningfully in a body which is supposed to be independent and separate from unions, both institutionally and structurally.'

against the cooperative approach which is necessary for employee participation. The intention of ensuring that workplace forums serve the needs of all employees in the workplace is also threatened, since most members of the workplace forum will be from a trade union and only a minority may come from non-unionised members whose interests may tend to be disregarded in favour of trade union aspirations. Section 79 may be the answer to the threat posed by union-dominated forums.<sup>479</sup> Although the Act creates forums separate from the collective bargaining structures, the Act does not succeed in this institutional separation,<sup>480</sup> at best the forums will be supplementary structures for collective bargaining dominated by trade unions.

In Germany works councils exist independently of the trade union network as a matter of law. As in the South African situation, although trade unions and works councils are institutions which are completely independent of each other there are, however, some personnel and functional links between them. Moreover, on the basis of the right of association protected by the Basic Law, the trade unions are entitled to represent their members' interests in the establishment. The Works Constitution Act dissolves the strict separation of functions on the one hand and the personnel and functional links between trade unions and works councils on the other hand.<sup>481</sup> The German position makes the case even stronger for allowing non-unionised employees to initiate workplace forums so that they will only have functional and personnel links with the trade unions. The power that trade unions presently enjoy over workplace forums, creates doubt in the independence which is necessary for them to promote employee participation for the benefit of all employees in a particular workplace.

Finally, the plural ways of establishing workplace forums have ensured that employees will not be stopped by employers when they want to establish a workplace forum, provided they (the employees) meet the requirements of establishing such a workplace forum. It is significant that primarily the LRA allows the parties to establish workplace forums through negotiation based

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<sup>479</sup> See discussion on functions of a workplace forum above.

<sup>480</sup> See discussion on institutional separation in the conclusion to this chapter below.

<sup>481</sup> Halbach *op cit* note 455 paragraph 134.

on a collective agreement. A consensual establishment of a workplace forum sets a precedent in the parties' relationship of cooperation and will ensure that all parties respect the credibility of the forums. However, compulsion is important in case some employers are resistant to the idea of a workplace forum, hence the forums which can be established with the assistance of the CCMA. The different approaches to the establishment of a workplace forum will ensure that employee participation is not strangled at inception. Perhaps the concern about the significant role of trade unions in the operations of workplace forums needs to be monitored to ensure that it does not militate against the achievement of employee participation in decision-making.

### 7.5 MEETINGS OF THE WORKPLACE FORUM

Meetings are important in understanding the role of workplace forums. It is only within the context of a meeting situation that the workplace forum and the employer can engage in the other two main functions of the forums namely: consultation and joint decision-making. It is also important to understand how the workplace forums derive their mandate and account for their actions in the course of enhancing employee participation in decision-making. In section 83, the Act envisages three types of meetings namely: meetings of the workplace forum, meetings between the workplace forum and the employer; and meetings between the workplace forum and the employees employed in the workplace.

Firstly, section 83(1) provides that there must be regular meetings of the workplace forum. This section does not proceed to say exactly how regularly the meetings must be held. Guidance can be sought from schedule 2 item 6(c), according to which the workplace forums must meet whenever necessary, but at least once a month. It would therefore seem that necessity will be the guiding factor on how frequently the forum must meet. Another important factor is that members of the workplace forum must be given time off to perform their functions and duties as members according to item 7(a)(i) of schedule 2.

Secondly, section 83(2) provides that the workplace forum and the employer must have regular meetings. At those meetings the employer must present a report on its financial and employment situation, its performance since the previous report, and its anticipated performance in the short

term and in the long term.<sup>482</sup> The employer may further consult the workplace forum on any matter arising from the report that may affect employees in the workplace. Section 83(2) also leaves it to the employer and the trade union party constituting the workplace forum to agree on how often they will meet. It is also very important to point out that this meeting is given significance, because it is at this meeting where the employer must present a report of his financial and employment situation. These are matters which were traditionally reserved for management only to deliberate on. Furthermore, the employer is expected to reveal its anticipated plans for the future. This gives this meeting an important status in the decision-making process outside the matters reserved for consultation and joint decision-making. However, section 83(2) raises serious questions: for instance, are there any limitations to the disclosure of the financial situation of the employer; is it assumed that the limitations to disclosure in section 16(5) are applicable here? It remains for the commission to define the extent of disclosure in this section. Another issue is that consultation in this section is confined to matters emanating from the employer's reports and the section does not stipulate the aim of consultation in this section. It may be the case that the legislature wanted to give consultation here its ordinary meaning without any requirement for the parties to agree on anything, however, nothing prevents the parties from reaching agreement on the issues being discussed. It would also seem possible that the employer may consult on the matters referred to in section 84 in one of the regular meetings or call for a specific meeting for consultation.<sup>483</sup>

In the third place section 83(3) provides that there must be a meeting between members of the workplace forum and the employees employed in the workplace at regular and appropriate intervals. In this meeting the workplace forum must report on its activities generally, on matters in respect of which it has been consulted by the employer and matters in respect of which it has participated in joint decision-making. This is a report-back mechanism to ensure that the workplace forum is accountable to the employees for its activities. Item 6(f) of schedule 2 suggests that such meetings could be held at least four times a year. In a single workplace the meeting with employees should be with all members of the workplace forum. However, in a

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<sup>482</sup> Section 83(2)(a).

<sup>483</sup> Cheadle *et al op cit* note 447 p 71.

workplace with geographically dispersed locations the meetings with employees should be with one or more members of the workplace forum. In one of the meetings with the employees, the employer must present an annual report of its financial and employment situation, its performance generally and its future prospects and plans.<sup>484</sup> This section provides a unique situation whereby the employees, and not only their representatives get together with the employers to discuss the state of the workplace. The Act does not define the status of the meeting whether it is a consultative one or not. Furthermore the extent of disclosure is not defined. If there are restrictions to disclosure to a few people such as members of a workplace forum, it can be expected that it will be more so in a meeting with all employees.

It is not clear whether in cases where employees do not agree with the decisions taken by the workplace forum and the employer, they can alter such decision in the meeting with both the workplace forum members and the employer. This raises the question of what exactly the relationship is between decisions of the workplace forum and this meeting of employees and the employer. If this meeting is just for the employer and the workplace forum to report and no decisions are to be taken, effective employee participation would be foiled, whereas it would be strengthened by accountability and the possibility of altering unsatisfactory decisions.

Under the German Works Constitution Act<sup>485</sup> provision is made for the consultative meetings with the employer at least once a month and under the Dutch model such consultative meetings are to be held with the employer at least six times per year.<sup>486</sup> These meetings could be equated to the consultative meetings envisaged under section 84 of the LRA. It would seem that in other jurisdictions there is a separation of the processes between consultative meetings and meetings held for the purpose of accounting to constituencies, and the employer does not duplicate the consultative process with the works council and the employees in the workplace. It remains to be seen how the processes will develop in South Africa. However, a separation of meetings for

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<sup>484</sup> Section 83(3)(b).

<sup>485</sup> Section 74.

<sup>486</sup> Ottervanger T R *et al* 'Employee participation in corporate decision-making: the Dutch Model' (1996) *International Lawyer* p 400.

consultation purposes and for accounting should be clearly defined, in order to avoid any duplication of processes.

## 7.6 MANDATORY CONSULTATION

Workplace forums are granted rights which are aimed at bolstering their influence in the decision-making process in the workplace. One such right is the right to be consulted over certain matters. Section 84 provides that a workplace forum has to be consulted on the matters stated in the section, unless there is a collective agreement regulating such matters. It is possible that through a collective agreement, matters for consultation may be reduced which would obviously militate against the scope of influence that employees have gained. Sometimes a reduction on the matters for consultation can occur as a result of making concessions which will extend gains on other matters for the employees. However, section 84(2) gives the impression that what is envisaged is an increase of the matters for consultation. This would in fact accord with the objective of enhancing employee participation in decision-making. The implication here is that collective agreements will not have a negative effect in so far as the scope for consultation is concerned but they will also help widen the scope for consultation.<sup>487</sup>

Section 84(1) outlines the matters on which the workplace forums are to be consulted and this shows the extent to which the legislature was prepared to reduce the scope of management prerogative in decision-making. Deal<sup>488</sup> categorises these matters as follows :

- (i) Business decisions: investment decisions; corporate structures; strategic business plans; mergers; transfers; partial or total plant closures.
- (ii) Production decisions: productivity; quality; production planning system; production development plans; introduction of new technologies; and new work methods.
- (iii) Organisational decisions: changes in the organisation of work; working time patterns; and restructuring the workplace.

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<sup>487</sup> In Germany it is also possible to increase consultation rights of works councils through collective agreements in *Federal Labour Court (First Senate) 1 ARB 70/86 International Labour Law Report* (30th September- 1st October 1988) at 466 it was held that the rights of participation of a works council under the Works Constitution Act can be extended and strengthened by collective agreement.

<sup>488</sup> Deal P 'Meeting Eye to Eye: the working of workplace forums' (1995) 13 (9) *People Dynamics* p 22.

(iv) Personnel decisions: dismissal based on operational requirements; education and training; job grading.

Additional matters for consultation may be agreed upon by a bargaining council according to section 28(j).<sup>489</sup> It is also possible for the parties to define the matters for consultation in the constitution of a workplace forum, whether by adding to or subtracting from the list contained in section 84(1).<sup>490</sup> Furthermore, workplace forums may acquire the rights to be consulted on any other matters provided for by any other law according to section 84(5).<sup>491</sup> Finally, a representative trade union may agree with the employer that the workplace forum may be consulted on health and safety matters according to any applicable health and safety legislation.<sup>492</sup>

The foregoing is an indication of how extensive the matters are upon which workplace forums have to be consulted. Although the LRA provides for a limited list of issues, this list can be expanded as parties realize the importance of the forums.

#### 7.6.1 Content of the duty to consult

Section 85(1) provides that:

Before an employer may implement a proposal in relation to any matter referred to in section 84(1), the employer must consult the workplace forum and attempt to reach consensus with it.

The employer has to initiate the consultation process. This is a problematic arrangement as it may weaken the effectiveness of the consultation process in the sense that the employer is given the

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<sup>489</sup> It is very significant that it is at central level where additional consultation matters can be decided upon. However, it is still an open question whether the trade unions can easily get along with increased powers for workplace forums or whether workplace forums will thereby become competitors of the unions. In the latter case the structural impact on the labour movement and on the system of industrial relations as a whole cannot be ignored.

<sup>490</sup> Section 82(2)(c).

<sup>491</sup> In this regard one may think of the Employment Equity Act 55 of 1998 which at section 16 (3) provides that: This section does not affect the obligation of any designated employer in terms of section 86 of the Labour Relations Act to consult and reach consensus with a workplace forum on any matter referred to in section 17 of this Act.'

<sup>492</sup> Section 84(5).

right to subjectively decide whether to initiate consultation or not.<sup>493</sup> This may allow employers to initiate consultation when they think they are in a stronger position and the workplace forum in a weak position to offer very strong resistance. One thing that is clear though, is that workplace forums will not be consulted on trivial matters which are linked to the issues for consultation. The issue must be important for consultation to begin. Du Toit *et al*<sup>494</sup> say, the Dutch system can be instructive in this regard. If consultation was meant to enable employees and employers to continuously communicate on matters, the legislature should have given the workplace forums the right to initiate the consultation process.

The commencement of the consultation process is also very important in determining the effectiveness of the decision-making process. Under the retrenchment procedure which is one of the issues for consultation, consultation has to commence as soon as the employer contemplates the possibility of retrenchment.<sup>495</sup> In the AD decision of the *Atlantis Diesel Engines* case<sup>496</sup> it is stated that consultation should begin once an employer recognises that the business is failing, considers a need to remedy the situation and identifies retrenchment as the possibility. Section 85(1) does not specify exactly when consultation should begin, apart from the fact that this has to be before implementation of the proposal. This opens a possibility for employers to decide on the matter and just pretend to be consulting openly with the workplace forum. In the Netherlands, consultation must commence in a 'timely fashion' to permit both careful consideration of issues presented and also to permit the advice of the works council to affect the

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<sup>493</sup> Du Toit *et al op cit* note 433 p 276 write that: 'While the legislature may have intended to appease employers' concerns for the preservation of managerial prerogative, the restriction placed on the ability of workplace forums to take the initiative at the same time limits the scope for consultation and joint decision-making. The right of workplace forums to raise counter-proposals does not redress the balance fully in that it can only be exercised once the employer has made a proposal that is subject to consultation. To this extent the aim of the Act to provide a structure of on-going dialogue between management and workers, has only partially been realized.'

<sup>494</sup> *Ibid* p 279 where it is stated that the inquiry is shifted to the meaning of 'important'. Dutch case law has established the following guidelines: the issue must relate to a matter that is out of the ordinary, it must be significant in relation to the scope of operation of the enterprise or of a frequency with which such decisions are taken' and the length of time for which a decision will apply.

<sup>495</sup> Section 189(1).

<sup>496</sup> (1995) 1 BLLR 1 (AD) at 5 F-I.

ultimate decision-making process.<sup>497</sup> This position is similar to that in Germany whereby consultation with the works council has to commence ‘in good time’.<sup>498</sup> Although the German and the Dutch positions seek to clarify when consultation must commence, they do not offer any clarification because ‘good time’ and ‘timely fashion’ are very broad terms which could be open to manipulation by the employer. Therefore, it would be correct to adopt the approach under dismissal for operational requirements, where consultation must commence as soon as the employer contemplates a proposal.<sup>499</sup> The legislature would not have intended a different point of consultation for the workplace forum on retrenchment matters as provided for in section 84(1)(e) from that which is set out in section 189(1).

The consultation process is strengthened by the fact that the employer must allow the workplace forum an opportunity during the consultation process to make representations and advance alternatives.<sup>500</sup> Furthermore, the employer must consider and respond to the proposals made by the workplace forum, and if the employer does not agree with the proposals, reasons for disagreeing must be stated.<sup>501</sup> This is a codification of the principles of consultation established under the retrenchment jurisprudence.<sup>502</sup> The workplace forum is given the opportunity to make meaningful and effective proposals which may ultimately influence the decision of the employer. Under the Dutch system, in addition to discussion and consultation, the statute provides that before a company's management board may render a decision on certain specified subjects, it must seek the advice of the works council. Furthermore, the works council must be advised in

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<sup>497</sup> Works Council Act of 1979, Section 25(2).

<sup>498</sup> Works Constitution Act of 1952, Section 90.

<sup>499</sup> In Denmark where they have corporate committees (the equivalent of a workplace forum) established according to the Corporation agreement of 1947, article 3 provides that management must involve the corporation committee at an early stage in the decision-making process, so that the viewpoints of employees can be taken into account: see Knudsen *op cit* note 454 p 86.

<sup>500</sup> Section 85(2).

<sup>501</sup> Section 85(3).

<sup>502</sup> *Atlantis Diesel Engines (Pty) Ltd v NUMSA supra* note 496 at 5H where it is stated that: ‘consultation provides an opportunity, *inter alia* to explain the reasons for the proposed retrenchment, to hear representations on possible ways and means of avoiding retrenchment and to discuss and consider alternative measures.’

advance of the reasons for the decision being contemplated, the consequences it will have for their employees and the measures management intends to take in light of those consequences.<sup>503</sup> This goes further than the LRA in the sense that the Dutch Act prescribes what the employer has to make available to the works council. In fact it goes beyond just consulting on the proposal but also on the consequences it will have and what the employer plans to do having regard to those consequences. The Dutch position may be a consideration for making consultation in workplace forums even more effective.

The consultation process must be coupled with an attempt to reach consensus. As has already been discussed in dismissal for operational requirements,<sup>504</sup> this consultation does not make agreement mandatory. This process is obviously distinguishable from joint decision-making and negotiation under collective bargaining.<sup>505</sup> If the workplace forum and the employer cannot reach any agreement, the employer is entitled to implement its proposal, after invoking any agreed upon dispute resolution mechanism.<sup>506</sup> This indicates the extent to which the management prerogative to decide on the matters for consultation has been maintained. Although the workplace forum can make representations on alternative proposals this means very little if the employer ultimately implements its proposal. The fact that the employer can still implement its proposal may seem to threaten effective consultation. However, it is significant that the consultation process, if done with an open mind, will ensure that the ultimate decision to be implemented by the employer has been influenced by the employees through the process of consultation.

It is also significant that the Act provides an opportunity for a third party to assist the workplace forum and the employer to be reconciled if they do not agree. This will be done through any agreed procedure between the parties which may be included in the constitution of the workplace

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<sup>503</sup> Works Constitution Act of 1952, Section 25(3).

<sup>504</sup> See Chapter 5 above.

<sup>505</sup> *Metal and Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC) at 493 (H), *Atlantis Diesel Engines (Pty) Ltd v NUMSA* *supra* note 496.

<sup>506</sup> Section 85(4).

forum in terms of section 82 and possibly in a collective agreement where applicable. If, however, one of the parties to the consultation process feels that there was non-compliance with the procedure for consultation, such a dispute may be resolved through section 94 on arbitration, which is a further limitation of the management prerogative.

The Dutch position is clearer and more detailed and supports the participatory aim of works councils. According to section 26 of the Works Council Act of 1979, if having obtained the advice of the works council, the company's management makes a decision contrary to that advice, it shall promptly advise the council of its decision and explain why it has not followed the council's advice.<sup>507</sup> Where the company's management has made a decision that is contrary to the advice given, it may not implement such a decision for thirty days, during which time the works council may appeal the decision to the Enterprise Chamber of the Amsterdam Court of Appeal.<sup>508</sup> The sole basis for an appeal to the Enterprise Chamber is that the management board could not have reasonably reached a decision had it weighed all the interests involved. This is a very strong mechanism of maintaining checks and balances on the process of consultation compared to the weaker system under the LRA. In fact after reviewing the decision, the Enterprise Chamber may issue an order requiring the enterprise to withdraw the decision as a whole or in part and to reverse specified consequences of that decision or enjoining the company from taking any acts implementing its decision. Decisions of the Enterprise Chamber may be appealed to the Supreme Court of the Netherlands. It is important that the concept of corporate decision-making be limited in favour of ensuring that employees are given significant influence in the decision-making process. To ensure that parties are focussed and that employees are given an effective opportunity to influence the decision-making process, strong mechanisms to evaluate the substantive and procedural correctness of the decisions should be put in place in the LRA similar to the Dutch position.

## 7.7 JOINT DECISION-MAKING

Trade unionist have viewed joint decision-making as a victory and a furtherance of the

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<sup>507</sup> Ottervanger *et al op cit* note 486 p 401.

<sup>508</sup> *Ibid.*

democratisation process in the workplace.<sup>509</sup> Due to the fact that joint decision-making is a new concept in our law, there are no precedents on the subject. However, we can trace the origins of this concept from Germany where it is called co-determination.<sup>510</sup> This is the process whereby the workplace forum can participate in the decision-making process on an equal footing with the employer. According to section 86(1) of the LRA the employer must consult and reach consensus with the workplace forum before implementing proposals on the issues under the provision. The provision makes joint decision-making peremptory on the issues outlined. However, the provision is applicable only if the issues for joint decision-making are not regulated by a collective agreement. Like the right to consultation, only the employer can initiate joint decision-making. This differs from the German position where the works council has an equal right of initiating co-determination. The German legislature found this to be necessary because otherwise the employer could prevent the works council from exercising its right of co-determination through omitting to take a decision.<sup>511</sup> In fact, under section 87 of the Works Constitution Act of 1952, works councils have an enforceable right of initiative mainly in social matters. Since our legislature had already decided that it shall grant workplace forums and employers equality in making decisions on matters under section 86(1) of the LRA, equal rights of initiative could not have limited management's prerogative, to any greater degree than already has been done by the very fact of joint decision-making.

#### 7.7.1 Matters for Joint Decision-Making

As already mentioned in Germany the matters for co-determination are mainly social issues. It would seem therefore, that it is an international trend to confine issues for joint decision-making to social matters. Section 86(1) requires the employer to engage in joint decision-making on the following matters: disciplinary codes and procedures; rules relating to proper regulation of the workplace in so far as they are related to the work performance of employees; affirmative action

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<sup>509</sup> Von Holdt *op cit* note 440 p 33 writes that: 'co-determination (whether in the form of workplace forums or some other form) could confer important powers on unions to participate and shape decision-making in the workplace... co-determination provides unions with the power and means to democratize the workplace and improve the quality of working life... In a real way it allows unions to tame and civilize the employers.'

<sup>510</sup> Knudsen *op cit* note 454 pp 31-49, Halbach *et al op cit* note 455 paragraph 150-152.

<sup>511</sup> Halbach *et al ibid* .

issues; and changes of rules regulating social benefit schemes. Decisions on these types of issues will have a direct effect on the lives of the employees. The range of matters is very conspicuous in its limitations. This may be an indication of a compromise by the legislature to the already shrinking managerial prerogative. However, it is interesting to note that matters can be added through a collective agreement between a representative trade union and an employer according to section 86(2)<sup>512</sup> and any other law can increase the matters for joint decision-making as per section 86(3).<sup>513</sup>

In both Germany and the Netherlands,<sup>514</sup> works councils have to engage in co-determination with employers on about 12 matters. Although section 86 of the LRA is limited in scope, it is very significant for employee participation in decision-making to the extent that it brings an end to unilateralism in respect of certain issues. However, by facilitating joint decision-making on social matters, the achievement of employee participation would be strengthened

#### 7.7.2 An employer must reach consensus with a workplace forum

Under section 85(1) workplace forums are only required to attempt to reach consensus with the employer on the issues for consultation. However, for the purposes of joint decision-making, the employer must not only attempt, but must reach consensus with the workplace forum. Mandatory agreement required by this section indicates a stronger sense of purpose in the quest to enhance employee participation in decision-making. This goes beyond collective bargaining which entails negotiations with a view to compromise coupled with the threat of industrial action. In spite of compromise, in joint decision-making the employer and the workplace forums enjoy equal status in decision-making .

However, once the decision has been taken by both the employer and the workplace forum it

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<sup>512</sup> Halbach *et al ibid* paragraph 153 write that in Germany: ‘Pursuant to a decision of the Federal Labour Court, the works council may have its participation rights relating to social and staff matters under this Act (Works Constitution Act 15 of 1952) extended or increased by collective agreement’.

<sup>513</sup> See the Employment Equity Act 55 of 1998 section 16(3).

<sup>514</sup> Works Council Act of 1979, section 27

does not appear that such a decision can be reviewed. Only newly established workplace forums (according to section 87) can request a review of the criteria for merit increases or payment of discretionary bonuses, disciplinary codes, and procedures and rules regarding the regulation of work performance. Under the Dutch system where co-determination is concerned, a continuing dialogue is contemplated. It would make sense for the LRA to ensure that workplace forums and employers do not only engage in joint decision-making when the employer has a proposal but there should be a continuous process.

According to section 86(4), if the employer and the workplace forum cannot reach consensus, the employer may refer the dispute to arbitration in terms of any agreed upon procedure, and if there is none, refer the dispute to the CCMA in terms of section 94. The commission has to try to resolve the dispute through conciliation and if it still remains unresolved, then it should be resolved through arbitration. There seems to be a diversity of ways in which non-agreement in co-determination matters can be resolved in different jurisdictions. Under the Dutch model, if the works council does not consent to the decision proposed by the management board, the board may request the Industrial Committee to approve the decision.<sup>515</sup> Such approval shall take the place of the consent of the works council. What this implies is that the decision-making is removed from the employer and the works council and then made by the Industrial Committee. It is possible that both the works council and the employer make representations, after which a decision is made, which is more akin to arbitration. A decision made without consent of either the works council or the Industrial Committee is null and void.

In Germany under section 76<sup>516</sup> if the works council and the employer do not reach agreement a ruling shall be given by the conciliation committee. That decision shall supersede an agreement between the employer and the works council.<sup>517</sup> It is interesting to note that in both Germany and the Netherlands conciliation is not a prerequisite prior to a decision being made by the

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<sup>515</sup> Ottervanger *op cit* note 486 p 403.

<sup>516</sup> Works Constitution Act 15 of 1952.

<sup>517</sup> *Ibid* section 76(6).

independent forums. This clearly makes the LRA more friendly to employees' interests because conciliation gives the employees a chance to get a decision which they have clearly contributed to although it may not be absolutely favourable. The problem of arbitration is that it allows the independent body to make the decision based on what it deems to be appropriate and the parties are bound by the arbitration decision. This may immediately be seen as a decision which is being imposed on the forum and not one which employees participated in and the implementation of such a decision is prone to be frustrated. Although the workplace forum may not be happy with the arbitration award, the Labour Court has no jurisdiction to hear the matter and the workplace forum cannot engage in industrial action.

#### 7.8 DISCLOSURE OF INFORMATION

The success of the consultation and joint decision-making processes rests on the knowledge the parties to the process have about the proposals being made. Thus, the legislature has granted workplace forums the right to information in section 89.<sup>518</sup> The employer must disclose to the workplace forum all relevant information that will allow the workplace forum to engage effectively in consultation and joint decision-making. The wording of this provision is similar to that of section 16.

The disclosure of the information by the employer is mandatory and to that extent the workplace forum need not request such disclosure. The stage at which such disclosure is made is also very important. According to section 89(1) the disclosure is intended to allow the workplace forum to engage effectively in consultation and joint decision-making. This implies that disclosure should occur prior to the commencement of the processes which will allow the parties to prepare for either consultation or joint decision-making.<sup>519</sup>

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<sup>518</sup> See further discussion of the rationale of disclosure in Chapter 3 above.

<sup>519</sup> Knudsen *op cit* note 454 writes that under article 2 of the Denmark Corporation Agreement, the employers of all enterprises are obliged to inform their employees at an early time so that viewpoints, ideas and proposals from employees can be part of the basis of the decisions. In Germany article 80 of the Works Constitution Act states that as a general duty the employer has to supply comprehensive information to the works council in 'good time' and to grant access at any time to any documentation it may require for the discharge of its rights. Although both positions use broad terms to define the point at which an employer is expected to disclose information to the employees, it is clear that such disclosure should be done in time to allow the employee representatives to benefit from such disclosure in the consultation process.

The employer has to disclose all relevant information. Relevance in these circumstances is not as problematic as in the retrenchment and collective bargaining context, because relevant information here will refer to information on the issues that are subject to consultation<sup>520</sup> and joint decision-making.<sup>521</sup> What is important is that the information disclosed must enable the parties to engage effectively in consultation and joint decision-making. Full disclosure is necessary for effective participation of the workplace forum. The workplace forum may request further disclosure subject to the limitations that the following information may not be disclosed: legally privileged information; information that cannot be disclosed because such disclosure will contravene an order imposed by law or order of court; disclosure may cause substantial harm to an employee or the employer; and private and personal information.<sup>522</sup>

Although the limitations to disclosure are similar to those under section 16, it would seem that workplace forums are entitled to more generous disclosure than a representative union. Firstly, employers are not just required to disclose information that will allow the workplace forum to engage in consultation and joint decision-making only, but the information to be disclosed is outlined under the issues for consultation and joint decision-making. Therefore, the subjective evaluation of relevant information by the employer is limited. Secondly, the employer at section 90 is supposed to allow the forum to inspect any documents containing information to be disclosed in terms of section 89 or at the request of the workplace forum. Furthermore, the employer should provide copies of the information to the members of the forum. However, confidentiality of the information disclosed should be respected by the workplace forum members, as breach thereof can result in the withdrawal of the right to disclosure from a workplace forum by the commissioner.<sup>523</sup> Thirdly, beyond the consultation and joint decision-making matters, section 83(2) prescribes that the employer must have regular meetings with the workplace forum, at which the employer must present a report on its financial and employment

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<sup>520</sup> Section 84.

<sup>521</sup> Section 86.

<sup>522</sup> See further discussion on limitations to disclosure in Chapter 3.

<sup>523</sup> Section 91.

situation, its performance since the previous report and its anticipated performance in the short term and in the long term, and consult the workplace forum on any matter arising from the report which may affect the employees in the workplace. Furthermore, section 83(3)(b) provides that at least once a year the employer must meet with the employees in the workplace covered by the workplace forum, at which meeting the employer must present an annual financial report and a report on the employment situation, its performance generally and its future prospects and plans. The interesting point is that there seems to be no limitation to the disclosure at this point. It may be reasonably assumed that the principles of good faith bargaining may serve as a guide in regulating the handling of information disclosed in the process. However, the significant point here is that these meetings provide the workplace forums and employees in the workplace with a further opportunity for disclosure. It remains to be seen whether the limitation in section 89 (2) will apply to section 83.

All the foregoing is evidence of the extent to which the legislature has sought to enhance the effective participation of employees in decision-making through workplace forums. It is clear that it is not only through section 89 that workplace forums are to obtain information, but also through section 83 in compliance with which as already mentioned, specific information should be disclosed. An analysis of the information to be disclosed gives the impression that the workplace forum, together with the employees in the workplace, will be given an opportunity to understand the general status of the company. If workplace forums are to be informed of the financial status, employment situation and future plans of the company, they are brought into the terrain that used to be reserved for shareholders of a company. Although disclosure in the case of workplace forums has been widened, it is important that the information should be provided within its full context. This means that the employer must not present only the information that will support its intentions. The information must also be provided in a clear and unambiguous way. It is possible that employers may present information that requires skill to analyse and understand, which may not be easy for the employees in the workplace forum to grasp. Hence the reason why it becomes important that the employees be empowered in order to understand the processes in the workplace forum. Where the employees feel that the information is too intricate for their understanding, it will be important for them to obtain the assistance of an

expert in analysing the information at issue.<sup>524</sup>

In case of a dispute about the disclosure of information, the issue must be resolved by the CCMA.<sup>525</sup> The CCMA must first attempt to resolve the issue through conciliation and if the issue remains unresolved it should be determined through arbitration. As provided in section 16 the commission must first determine whether the information sought is relevant and also determine whether disclosure will cause the employer any harm. The commissioner can either order the employer to disclose all the information sought by the workplace forum or order disclosure that will limit the harm which may ensue as a result of the disclosure.

A comparative analysis with other jurisdictions reveals a slight variation in the disclosure provisions. The Dutch model under the Works Council Act of 1979, provides that the management board should provide information at the request of the works council.<sup>526</sup> This is different from the LRA where the employer is supposed to disclose information without a request from the workplace forum. In the Netherlands information to be disclosed must pertain to the legal and factual organization of the company and the names and addresses of its executives (at the beginning of each term of office), the financial statements, budgets, the expectations which the management board has for the future, investment plans, long term plans (twice per year), the employment situation and social policy (once per year).<sup>527</sup> This position is nearly identical to the position in the LRA save for the fact that it goes further to stipulate how often the information is to be disclosed to the works council. Members of the works council are however obliged to observe secrecy regarding matters of which they learn in their capacity as council members.<sup>528</sup> This is a very restrictive position compared to the LRA where, confidentiality is to be observed only on matters labelled as confidential. However, the Dutch position seems to apply in all

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<sup>524</sup> Marais P 'Workplace Forums and Information Disclosure' *The Star* 13 March 1996 p 2.

<sup>525</sup> Section 89(3).

<sup>526</sup> Works Council Act of 1979 Chapter 4 section 31(2).

<sup>527</sup> Ottervanger *op cit* note 486 p 399.

<sup>528</sup> Works Council Act of 1979 Chapter 2 section 20(1).

situations where the members of a works council have come to obtain information in their capacity as members. In both the Dutch and South African consultation by the works councils and workplace forums respectively with employees is limited by a confidentiality provision. It is to be questioned whether this does not militate against the effective accountability of either workplace forums or works councils to their constituencies.

The German position is very similar with the LRA position. According to section 80(2)<sup>529</sup> the employer must supply comprehensive information to the works council in good time to enable it to discharge its duties under the Act. The section proceeds to provide that the works council should be granted access to any documentation it may require for the discharge of its duties. This provision is also supported by other specific rights to information which are not directly linked to other participation rights.<sup>530</sup> These rights, however, can be considered as preliminary stages of or prerequisites for other participation rights for instance to give advice and make recommendations. For instance at section 90, the employer has to inform the works council in good time of any plans in respect of the construction, alteration or extension of production, technical equipment, work procedures and routines or jobs. Although the employer is obliged to inform the works council, this does not at the same time oblige him to consult the works council. The observance of secrecy under the German statute is even wider and more restrictive than that of the LRA. Section 79(1) provides that members and substitute members of works councils shall not divulge or exploit trade or business secrets which have come to their knowledge through their membership of works councils and which the employer has explicitly described as confidential. There is some commonality with the LRA in the sense that a member of the works council only breaches confidentiality if the information is labelled as confidential whereas this is not the case in the Netherlands. The section goes further to apply to former members and substitute members of works councils. However, it does not apply between members of a works council.

In comparison the LRA is more liberal in disclosure of information to workplace forums as it

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<sup>529</sup> Works Constitution Act 15 of 1952.

<sup>530</sup> Halabach *et al op cit* note 455 paragraph 148.

does not impose extensive secrecy provisions which may tend to restrict effective participation.<sup>531</sup> This may occur in the sense that the members of the forum may be restricted from discussing pertinent issues with the employees in the workplace because information would be regarded as confidential. The CCMA should interpret this section in favour of disclosure even if it means restrictive disclosure.

### 7.9 CONCLUSION

The success of workplace forums will surely depend, in addition to what the Act provides, on the attitude that employees and employers adopt towards them. If the workers see the forums as a step towards achieving worker control<sup>532</sup> which is informed by a socialist ideology, and the employers as a threat to their management prerogative which is informed by a capitalist ideology, then the necessary cooperation will not be achieved. However, it is hoped that the functions of the forums stated in section 79 will serve as a guide to the approach that the parties should adopt.

The basis which the LRA provides for the workplace forums to enhance employee participation in decision-making for instance through the rights of consultation and joint decision-making, will definitely contribute to the transformation of labour relations in South Africa.<sup>533</sup> Through the provision of organisational rights to support the functioning of the workplace forums, the LRA has ensured that employees will not be handicapped by the lack of time and expertise to perform their work effectively.<sup>534</sup> The functioning of the workplace forums will also be enhanced by

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<sup>531</sup> However a confidentiality clause can be included in the constitution of the workplace forum during negotiations between the employer and the trade union. An example of such a clause in a workplace forum constitution is provided in Cheadle H *et al Current Labour Law* (1997) p 174.

<sup>532</sup> Van Holdt *op cit* note 439 p 34.

<sup>533</sup> *Ibid.*

<sup>534</sup> For instance, the constitution of every workplace forum which is subject to section 82, must require the employer to allow members reasonable time off with pay to perform their functions and receive training (sec.82(1)(p)), require the employer to provide facilities for the workplace forum to perform its functions (sec. 82(1)(r)), provide for the designation of full-time members of the workplace forums if there are more than 1000 employees in the workplace ( sec.82(1)(s)), provide that the workplace forum may invite any expert to attend meetings, including meetings with the employer, and will be entitled to any information that the workplace forum is entitled to (82(1)(t)); and provide that office-bearers or officials of the representative trade union will likewise

information disclosure<sup>535</sup> under section 89 and the information that will be disclosed during the meetings required by section 83.

However, one of the factors of concern which will be crucial to the success of the workplace forums is their relationship with trade unions. The relationship between workplace forums and collective bargaining, is firmly established through the necessary link between trade unions and the forums. This primary link is the fact that workplace forums can only be established at the instance of trade unions. Since trade unions are strongly involved in collective bargaining, they are obviously going to link the functions of workplace forums with their bargaining agenda. The following points will show the extent of this link. Firstly, matters for consultation and joint decision-making can only be handled by the workplace forum if there is no collective agreement regulating those issues. Collective agreements are concluded in the process of collective bargaining and as such the functioning of workplace forums will be dependent on the extent to which the trade unions will want to operate the two processes. Secondly, through collective bargaining in the bargaining council, matters for consultation and joint decision-making can be increased. This means that the extent of employee participation which will be enjoyed by workplace forums will be dependent on the success of centralised bargaining.<sup>536</sup> There will be a need for the employees and employers to guard against creating an identity crisis for the forums, through making sure that they do not confuse the forums with collective bargaining.<sup>537</sup>

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be entitled to attend such meetings(sec. 82(1)(u)). See also Du Toit *et al op cit* note 433 p 284.

<sup>535</sup> Benjamin P 'Reforming Labour: lessons from the USA' (1995) 19 (2) *SALB* p 52 on the role of information disclosure in consultation.

<sup>536</sup> Summers C 'Workplace Forums from a Comparative Perspective' (1995) 16 *ILJ* p 809 writes that: 'you have a very difficult and unique problem in constructing such a system, primarily because you presently lack centralization of collective bargaining which leads easily to a separation of functions. In so far as you have bargaining councils or develop them, the goal is within reach. The bargaining councils can limit themselves to the distributive or economic terms and can, by their agreements expand the subjects of consultation beyond those prescribed by the statute.'

<sup>537</sup> Some have suggested that there be clear cut boundaries for each representative structure at plant-level and that elected union representatives be not considered for election to the workplace forum. The success of these two suggestions is very doubtful because throughout the drafting of the LRA the unions wanted to make sure that they have great influence in these forums. It may be that the parties will realize the importance of not utilizing the forums for purposes which they were not set for. After all evidence shows that works councils in Germany and the Netherlands are stronger where strong union structures exist: see Du Toit *op cit* note 451 p 800.

Another problem which still needs to be resolved is the status of the agreements between the employer and workplace forums. These agreements are not collective agreements as defined in section 213 and they do not seem to be covered by section 23. This problem is also linked to the question of whether the workplace forums have a legal status to enter into legally binding agreements. Du Toit *et al*<sup>538</sup> express the view that the Act does not treat workplace forums as legal persons capable of concluding contracts, suing or being sued. However, they do state that such legal status may be conferred through a clause in a constitution of a workplace forum established through a collective agreement. The legal status of the workplace forum agreements is very important if the forums are to become powerful institutions. Otherwise parties may be tempted not to honour such agreements. It is hoped that employees and employers will honour their agreements in order to nurture the strength of workplace forums. The situation in Germany is very clear, section 77 of the Works Constitution Act makes agreements between the works council and the employer binding on the parties and their application may only be waived on the authorisation of the works council. Trade unions therefore may not overturn the agreements entered into by the works council and the employer. The position in Netherlands is as problematic as the position under the LRA.<sup>539</sup> In interpreting the binding effect of the agreements of the workplace forum and the employer under the LRA, the German position seems to be more sensible.

Another threat to the success of workplace forums is the possibility of industrial action once the workplace forum and the employer have consulted and ended in deadlock. If employees utilize their right to industrial action, the adversarialism which the forums are set to reduce will in fact be increased. It is necessary to consider inserting a binding peace obligation between employers and workplace forums, which will prevent industrial action on matters for consultation. The German position would be very instructive in this regard, where works councils are prohibited

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<sup>538</sup> Du Toit *et al op cit* note 433 p 271.

<sup>539</sup> In Denmark, both employers and the corporate committee are obliged to aim at reaching agreement on the issues discussed and to carry out in practice what has been agreed. Each of the parties can, with two month's notice, terminate an agreement, and demand negotiations on new principles: see Knudsen *op cit* note 454 p 86.

from engaging in industrial action on consultation matters.

Although the LRA provides the workplace forum with the right to disclosure of information, the Act limits the disclosure to the constituency which is represented by the workplace forum. This will limit the accountability that workplace forums need to be subjected to if real participation is to be achieved. In fact, employees may tend to view the workplace forums as having secret meetings with the employer and thus create mistrust.<sup>540</sup> There is a need to consider creating a mechanism that will allow the employees represented by the workplace forum to have access to the information. This will enhance the level of participation amongst the employees and ultimately result in the effective participation of workplace forums in decision-making.

Finally, workplace forums should not be seen as emasculating the effectiveness of trade unions. Trade union representatives should realise that for workplace forums to be effective, trade unions need to support them. The two are not mutually exclusive and workplace forums have more facilities in the workplace, which they could put to effective use for the benefit of the trade unions. The trade union, on the other hand, can supplement the weakness of the workplace forum's strength without dominating it. This supportive relationship between trade unions and workplace forums will ensure that employee participation in decision-making is a shared responsibility amongst all workers .

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<sup>540</sup> Lehlere *op cit* note 439 p 46 writes that: ' the important issue raised by the provision on the right to information is that: workers in the forums cannot share the information with their unions; unions should also have access to this information. There is no clear provision that workers have the right to information on holding companies. Capitalists use a lot of tricks to shift profits among their different holding companies. In order to counter possible misrepresentation, workers must have the right to information on holding companies. The forum must be able to report its findings from the company books to the workers in the enterprise. Failure to do this will mean that forums are in secret meetings with management, and this will compromise their independence and accountability to the workers.'

## **CHAPTER 8**

### **CONCLUSION**

#### **8.1 INTRODUCTION**

Although only two years have passed since the promulgation of the LRA 66 of 1995, it can be fairly concluded that the LRA sets up a framework for employee participation in decision-making. This framework is strongly dependent on the new democratic values of the South African state founded on the values in the Constitution of the Republic of South Africa Act 108 of 1996. The supremacy of the Constitution and the democratic values that it embodies have permeated labour law, as evidenced by the inclusion of labour relations rights in section 23 of the chapter on fundamental rights in the constitution.

The entrenchment of industrial democracy and hence employee participation in decision-making in the LRA, is embodied in the intention of the legislature to create a break from the past by establishing a more democratic order in the workplace. It is an objective of the Act that employee participation is to be promoted through the establishment of workplace forums. Although workplace forums are the primary means of achieving employee participation, they are certainly not the only means for so doing. There is also evidence of employee participation structures which were established before the promulgation of the LRA and which may continue to exist thus contributing to the development of employee participation in decision-making in general.

#### **8.2 JURISPRUDENTIAL BACKGROUND**

An evaluation of the previous regime of labour law statutes provides evidence that employee participation in decision-making is not an entirely new concept in our labour law. The LRA 28 of 1956 although not having placed the achievement of employee participation amongst its purposes, indirectly gave birth to some of the principles of employee participation in decision-making. The very fact that collective bargaining was the means through which the LRA 28 of 1956 sought to quell industrial unrest, is proof of the nurturing of certain principles of employee

participation in decision-making. In the process of bargaining, employees through their trade unions were involved in the decision-making process. Perhaps one of the most significant contributions to the participation jurisprudence was the enactment of the unfair labour practice jurisdiction which was interpreted by the Industrial Courts as entailing a duty for employers to bargain with their employees. Once employees and employers were expected to bargain in order to arrive at mutually acceptable decisions, the stage was set for employees to participate in the decision-making process. Although good faith bargaining is an American concept, it was enforced in our labour law, as a consequence of which the Industrial Court developed principles which discouraged sham bargaining and encouraged openness in the bargaining process through disclosure of information. These principles have provided a jurisprudential background for the development of employee participation in decision-making.

Certainly the foregoing were not the only means through which employee participation in decision-making was nurtured. The LRA 28 of 1956 also provided for the establishment of industrial councils where employees in an industrial sector could collectively influence the decisions of employers in that sector. Furthermore, the Act provided for the establishment of works councils which were aimed at being forums where employers and employees could jointly make decisions about the workplace. However, these forums were unable to effectively promote the participation agenda.

Perhaps the most significant foundation to participatory forums were the works committees and non-statutory forums which were established by employees and employers who saw the need for cooperation in the workplace. There is documented evidence of the existence of such structures in companies like VW SA and Toyota.<sup>541</sup> A fair conclusion is that the LRA 28 of 1956 provided a circumscribed opportunity for the development of employee participation. The limited provision for employee participation can be attributed to the highly adversarial relations between employers and employees at the time. Industrial action was frequently utilized to press home employee demands. Albeit previous legislation provided a shaky foundation for employee participation, there is a case for expecting employee participation to be firmly established under

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<sup>541</sup> Anstey M *Worker Participation* (1990) pp 213-225.

LRA 66 of 1995.

### 8.3 INTERPRETATION

If employee participation in decision-making is to assume a subject of significance in South African labour law jurisprudence, the interpretation of the LRA by the Labour Courts, and by the CCMA will be very important. Section 3 provides that:

Any person applying the Act must interpret its provisions:

(a) to give effect to its primary objects; (b) in compliance with the constitution; (c) in compliance with the international law obligations of the Republic.

Although the jurisprudence on the interpretation of the Act is just emerging, Grogan<sup>542</sup> writes that:

‘[I]n cases of uncertainty or ambiguity a court must interpret the Act in order to protect individual labour rights rather than restrict them.’

In the above statement it is not clear whether Grogan is suggesting a purposive and generous approach to interpreting the provisions of the LRA. However the LAC has provided an indication of the appropriate approach to interpreting the provisions of the LRA in *Business South Africa v COSATU and NEDLAC*<sup>543</sup> and *Ceramic Industries Ltd v NACBAWU and Others*.<sup>544</sup> In the *Business South Africa* case the respondents had argued that the Court should interpret the Act in a purposive manner in order to give effect to section 1 of the LRA. In its majority judgment, the court expressed the view that a purposive interpretation of the Act was appropriate.<sup>545</sup> In fact, according to Jammy<sup>546</sup> section 1 of the Act contains its own directive in favour of purposive interpretation. The foregoing statements indicate that the purposive

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<sup>542</sup> Grogan J *Workplace Law* 3 ed (1998) p 195.

<sup>543</sup> (1997) 18 *ILJ* 474 (LAC) where the applicants sought an interdict against COSATU’s general strike for reasons of failure to comply with three aspects of section 77. Generally the dispute concerned the exercise by COSATU of its right to engage in protest action.

<sup>544</sup> (1997) 18 *ILJ* 671 (LAC) where the applicant sought to interdict a strike, *inter alia* on the grounds that the notice given by the respondents under the Act had been invalid. Section 64(1) of the Act requires 48 hours written notice to be given of the commencement of the strike action. The notice given by the respondent had stated that the strike would start at any time after 48 hours from the date of this notice.

<sup>545</sup> *Op cit* note 543 p 479B.

<sup>546</sup> Jammy P ‘Interpreting the New Act: getting down to business with the Labour Appeal Court’ (1997) 18 *ILJ* at 910.

interpretation is on ascendancy in labour law.<sup>547</sup> Perhaps another motivation for adopting the purposive interpretation is that the LRA must be interpreted in compliance with the constitution. Section 39(1) of the Constitution of the Republic of South Africa Act 108 of 1996 provides that: When interpreting any legislation..... every court, tribunal or forum must promote the spirit, the purpose and objects of the Bill of Rights.

The jurisprudence on the interpretation of the constitution indicates the adoption of a purposive approach to interpretation.<sup>548</sup> The question arises whether the LRA should also be interpreted purposively. Devenish answers this question when referring to section 39(1) of the constitution by writing that:

‘This provision is not merely “an exhortation to the courts to seek and discover the values underlying the Bill of Rights” rather it is a prescription to apply the values encompassed in the Bill of rights in the process of interpretation.’<sup>549</sup>

One of the values of the constitution is to create a fair and democratic environment in South Africa, and it is within this objective that employee participation should be included. The contention is valid that employee participation in decision-making is an aspect of democratising South Africa, if the role of employees is not limited just to struggling for job security and better wages but is viewed in the wider context of instilling democratic values in all facets of life.

Another important matter is whether the purposive interpretation is to be coupled with a generous or liberal interpretation of the LRA provisions? In the *Business South Africa* case the court (majority judgment) remarked that:

‘[D]epending on the proper purpose of the Act, a particular section may have to be interpreted restrictively rather than extensively.’<sup>550</sup>

According to the foregoing view, the adoption of a purposive approach does not automatically

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<sup>547</sup> *Ibid* p 911.

<sup>548</sup> For instance in *S v Zuma and Others* 1995 (2) SA 642 (CC), Kentridge AJ adopted the view that the meaning of a guaranteed right or freedom contained in a constitution was to be ascertained with reference to the purpose of such guarantee (651E-G).

<sup>549</sup> Devenish G E A *Commentary on the South African Constitution* (1998) p 103.

<sup>550</sup> *Op cit* note 543 p 499 B-C.

entail that a generous approach should be adopted in interpreting the LRA. The approach will be determined by a consideration of each and every section.<sup>551</sup> The problem with a restrictive application of the objects of the Act, is that employees' rights might be limited, whereas there is a need to generate jurisprudence which will define the limits of the rights of employees to participate in decision-making. The minority judgment of Nicholson JA<sup>552</sup> in the same case provides a further direction on how the purposive approach should be supported. Nicholson sought to emphasize the different purposes of the Act, including advancement of economic development, social justice, labour peace and the democratisation of the workplace. Based on the consideration of the foregoing matters, Nicholson's judgment indicates that the values and the experiences in South African labour relations will be taken into account. Since employees in the past were disenfranchised and the workplace was not underlined by democratic values, employee participation should be viewed as one of the elements which the LRA seeks to instill in labour relations. In rejecting the narrow interpretation adopted by the majority in the decision, Nicholson pointed out that:

'A narrow interpretation stultifies this and flies in the face of the double admonition in the Constitution and the Act to have regard to the rights of persons, more especially those enshrined in the Bill of rights in the Constitution.'<sup>553</sup>

The distinguishing factor between the majority judgment and the minority judgment by Nicholson, is that he places an emphasis on the objects of the Act which should permeate the application of each and every provision of the Act. Employee participation is one of them.

In the *Ceramic Industries Ltd v NACBAWU* case<sup>554</sup> the LAC took this approach to interpretation

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<sup>551</sup> Chaskalson M *et al Constitutional Law of South Africa* (1996) paragraph 11.8 wrote that a purposive interpretation will not always coincide with a liberal and generous interpretation....In many other instances a purposive approach will result in generous interpretation, but this would be the consequence of ascertaining the purpose of the right in question, and would not be a premise of interpretation: see *De Klerk and Another v Du Plessis and Others* 1995 (2) SA 40 (T) at 45J-46D. The particular context in which a right is claimed may be very important in deciding whether it should be construed broadly or with greater specificity: see *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC).

<sup>552</sup> *Op cit* note 543 at 493 A-B.

<sup>553</sup> *Ibid* at 499D-F.

<sup>554</sup> *Op cit* note 544.

even further when it recognized the need for a two stage inquiry, firstly into the purposes of the Act and secondly into the purposes of the particular section.<sup>555</sup> This approach would place every section within its appropriate context and ensure that a section is interpreted to achieve one or more of the purposes of the Act. This would mean that for instance section 189 (1) which places a duty upon an employer to consult with employees, will not only be interpreted to ensure procedural and substantive fairness, but also to ensure that employee participation in decision-making is achieved through proper consultation.<sup>556</sup> Therefore the challenge is to ensure that in interpreting the Act the purpose of enhancing employee participation in decision-making should be applied in all appropriate provisions of the Act.

#### 8.4 COMPANY LAW

Although the thesis concentrates on the LRA, it is important to highlight one of the factors beyond the LRA which will also determine the achievement of employee participation in decision-making. This discussion is focussed on public companies because they are most likely to employ more than 100 employees, and thereby obliged to establish a workplace forum.<sup>557</sup> Furthermore, the other reason is that their structural organisation may present some problems to employee participation compared to other forms of companies. The suggestions for company law reforms are not exhaustive except to point out some of the areas that need attention. The question to be answered here is whether there is any motivation in the interests and structures of public companies to readily embrace employee participation in decision-making. As in many western countries, South African company law entrenches the powers of shareholders and directors to make decisions for the company.<sup>558</sup> Furthermore, in carrying out their duties

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<sup>555</sup> *Ibid* p 675 G-H.

<sup>556</sup> Jammy *op cit* note 546 p 917 where he observes that: '[T]he Labour Appeal Court expressly considered whether the purposes of the sections with which they were concerned had been achieved. To the degree that this indicates the approach to be adopted in future by the court, then that approach is to be welcomed.'

<sup>557</sup> The Department of Trade and Industry in its document entitled 'Financial Access for SMMEs: Towards a comprehensive strategy' April 1998 (<http://www.dti.pwv.gov.za/dtiwww/fnwp101/htm>) indicates that companies that employ more than 100 employees only account for approximately 40% of all employment in the economy.

<sup>558</sup> O' Regan C 'Possibilities for worker participation in corporate decision-making' (1990) *Acta Juridica* p113.

directors are expected to act in the best interests of the company, which are underlined by the conventional goal of business to realise a profit.<sup>559</sup> Although the LRA now provides for employee participation in decision-making, a pertinent issue is to what extent are the interests of employees considered as an interest of a company and whether company structures will facilitate employee participation in decision-making. Beuthin<sup>560</sup> writing twenty years ago also raised this question when he asked whether after a company has paid its employees their remuneration, it can wash its hands of any other needs of the employee. In his analysis, Beuthin mentioned that directors may only have regard to the interests of employees to the extent that they will affect the interests of the company.<sup>561</sup> That directors can only consider the interests of employees to the extent that they may affect the interests of the company, does not seem to recognize the growing role of employees in the administration of the company and there is a clear need for reform of the interests of a company.

#### 8.4.1 Re-defining a Company's Interests

The position that the interests of employees are not necessarily the interests of the company, is based on the old classical approach to management, which does not view the relationship between the shareholders and employees as a joint venture.<sup>562</sup> However, company law has to recognise the enhanced status of employees in the workplace which requires that their interests be seen as those of the company. The reasons for re-defining the interests of a company were well expressed by Esen *et al*<sup>563</sup> when they wrote that:

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<sup>559</sup> Pickering MA 'Shareholders' Voting Rights' (1965) 81 *LQR* 254. Vagts D 'Reforming the "modern" corporation: perspectives from the German' (1966) *Harvard Law Review* p 36 wrote that 'the conventional goal of business corporations is thought to be making profit for its shareholders. This traditional rule was most explicitly stated by the Victorian courts of Great Britain, notably Lord Justice Bowen in *Hutton v West Cork Ry* 23 Ch. D.654, 673 (1883), "The law does not say there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."

<sup>560</sup> Beuthin R C 'The Range of a Company's Interests' (1969) 86 *SALJ* p 155.

<sup>561</sup> *Ibid* p 161, Beuthin also refers to English law where this principle has been long established: *Park v Daily News Ltd* (1962) 1 Ch 927, *Hampson v Price's Patent Candle Company* (1876) 45 L.J. Ch. 437.

<sup>562</sup> *Ibid* p 164.

<sup>563</sup> Esen R *et al* 'Board Structures and the protection of employees' interests: the English and the Dutch position' (1996) 17 (8) *The Company Lawyer* p 255.

'The need to give due consideration to the interests of employees in a company is an important one. The main and obvious reason for this is that employees should be given the right to take part in the decisions of the company that they work in and on which their livelihood depends. Such participation at management level will not only encourage them to feel needed but will give them a certain amount of job satisfaction.'<sup>564</sup>

The foregoing statement strengthens Beuthin's views that modern managerial techniques require directors to satisfy the interests not only of shareholders but also the interests of employees.<sup>565</sup>

South Africa is behind in reform and this might militate against employee participation provided for by the LRA. British company law had to face this challenge, as a consequence of which the British Government set up the Bullock Commission to look into the matter.<sup>566</sup> Consequently the British Companies Act of 1985 was amended with the insertion of section 309 which provides that:

'[T]he matters to which the directors of a company are to have regard to in the performance of their functions include the interests of the company's employees in general as well as the interests of its members.'

Furthermore, section 390(2) of the British Companies Act provides that the duty imposed by section 309 is owed by the directors to the company. South Africa would do better by following the British company law reform so that directors will be statutorily bound to consider employees' interests as an interest of the company. However, the problem with this route is that if the directors do not perform this duty, employees will be in no position to compel them to consider their interests. This is as a consequence of the application of the rule in *Foss v Harbottle*<sup>567</sup> which entails that this duty may only be enforced by the company.<sup>568</sup> Since employees are not members of the company they would have no *locus standi* to enforce this duty. In order to enforce the duty, the employees would have to become shareholders of the company and take a derivative action in that capacity. Alternatively our company law could require directors to reflect in their

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<sup>564</sup> *Ibid* .

<sup>565</sup> Beuthin *op cit* note 560 p 164.

<sup>566</sup> Prentice D 'Employee Participation In Corporate Government-a critique of the Bullock Report' (1978) 56 *The Canadian Bar Review* pp 295-296 where the commission recommended that directors in carrying out their duties should take into account the interests of the company's employees as well as its shareholders... this obligation should be made mandatory.

<sup>567</sup> (1843) 2 Hare 461.

<sup>568</sup> Esen *et al op cit* note 563 p 225.

annual report how far they have gone in addressing employees' interests. Gower<sup>569</sup> views such legislative reform as a strait-jacket and prefers that the present definition of a company's interests be left in place as it allows directors to take into account employees' interests within the present restricted parameters for the ultimate benefit of the company.<sup>570</sup> However, in the South African context the restrictive approach can no longer be sustainable because the LRA bolsters the need for companies to involve employees in the decision-making process. It would therefore make sense for company law to be reformed in order to finally consider the interests of employees as interests of the company.

#### 8.4.2 Structural Re-organisation of Companies

In order to further complement employee participation in the LRA, structural reform of the public company is necessary. In South Africa at present, the management of a company is divided between directors and shareholders who have the ultimate control of the affairs of the company through the general meeting.<sup>571</sup> Furthermore in terms of South African company law employees have no formal say in the management organs of the company and do not play a role in the appointment of directors.<sup>572</sup> The need to re-organise the South African company's structure was also recognised by O' Regan who wrote that:

'In South Africa, adopting a restructured board of directors will require changes to company law, not only in respect of the appointment of such directors, but also in respect of the exercise of their power.'<sup>573</sup>

In other jurisdictions like Germany and the Netherlands, company law has been reformed to complement employee participation. In the Dutch model of a public company, the management is divided into two. The overall management of the company is carried out by the management board, the functions of which are similar to those of the South African board of directors.<sup>574</sup> In

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<sup>569</sup> Beuthin *op cit* note 560 p 172.

<sup>570</sup> *Ibid* p 173.

<sup>571</sup> Cilliers H S *et al Corporate Law* 2 ed (1992) paragraph 103.

<sup>572</sup> *Ibid* paragraph 10.05.

<sup>573</sup> O' Regan *op cit* note 558 p 128.

<sup>574</sup> Esen *op cit* note 563 p 256.

addition, there is a second independent board known as the supervisory board which acts as a watchdog to the former. Amongst the duties of the supervisory board is ensuring that employees' interest are taken into account by management. In fact there is a close relationship between the supervisory board and works councils because members of the former are appointed in consultation with the works councils.<sup>575</sup> The German system is similar to the Dutch system, in fact it is said that the dual board system was born in Germany.<sup>576</sup> The German company has a two-tier system of management: (i) the day-to-day conduct of business of the German public company is entrusted to the management board; and (ii) the second is the supervisory board, which is composed of representatives of both shareholders and employees, and appoints and dismisses members of the management board, supervises and checks their activities, and reports back to shareholders. The managing board manages the company and the supervisory board does not concern itself with the day-to-day running of the company. This approach has been incorporated into the European Company Regulations<sup>577</sup> where it is provided that member states shall take the necessary steps to enable employees of the European Company to participate in the supervision of the strategic development of the enterprise.

Perhaps one of the criticisms of this elaborate structure is that it will add to the running costs of companies. However, the possible benefits of this may be that as employees get an understanding of the state of affairs of the company at the highest level, constructive and productive decision-making will be achieved. It is interesting that in one of the studies carried out by the King Committee<sup>578</sup> on corporate governance, the committee recommended that the unitary structure is appropriate for South Africa compared to the two-tier system in other countries.<sup>579</sup> It may be the case that this committee made its recommendations based on the fact that employee

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<sup>575</sup> *Ibid.*

<sup>576</sup> Conlon T 'Industrial Democracy and EEC company law: a review of the draft directive' (1975) 24 *International and Comparative Law Quarterly* p 358.

<sup>577</sup> Dine J 'Why not Employee Participation in the European Community context?' (1995) 16 (2) *The Company Lawyer* p 44.

<sup>578</sup> Coopers and Lybrand 'Corporate Governance: the King Report' (1995) 1 (Commissioned by the South African Institute of Directors).

<sup>579</sup> *Ibid* p 8.

participation in decision-making had not been legislated at the time. Perhaps now there is a case for the reform of the public company structure. The King report was only prepared to go as far as saying:

‘Corporations should develop systems, through involving workers’ participation on works committees, executive committees, boards or otherwise, that will assist in developing the following: effective sharing of information; effective consultation; and speedy identification and resolution of conflict.’<sup>580</sup>

To the extent that the foregoing statement supports employee participation in decision-making it is significant, but it may be necessary to go even further by legislating the involvement of employees in the company management structure. Already South African employees have started indicating their intention to be involved in the boards of directors of companies based on their realisation that there important decisions are made.<sup>581</sup> It is hoped that employers and employees will realise the importance of company law reform if employee participation in decision-making provided for in the LRA is to be firmly grounded in South African labour law.

## 8.5 DISCLOSURE OF INFORMATION

One of the fundamentals that will ultimately determine the success of employee participation in decision-making is going to be information disclosure. In this thesis it has been shown that information disclosure is an aspect of constitutional democracy which encourages accountability and better administrative justice. This concept has also been imported into the LRA to strengthen industrial democracy. International experience has shown that the success of employee participation is also determined by the disclosure of information on which employers base their decisions. In countries like Germany and the Netherlands employee participation in decision-making is supported by the right to information. International Labour Conventions have also

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<sup>580</sup> *Ibid* p 11.

<sup>581</sup> Ka Nkosi S ‘Unions want say in boardroom’ *Electronic Mail and Guardian* 15th August 1997 (<http://www.mg.za>) writes that: ‘COSATU says directors tend to make broad policy decisions, but become very remote in their implementation. For unions to have access to information and influence at the highest level, there is a need for a structure where senior shop stewards can meet and engage with executives.’ Recently the president of the National Union of Mineworkers, James Motlatsi was appointed to the board of directors of AngloGold as an independent director. Commenting on the appointment Bobby Godsell, the chief executive officer of AngloGold said, ‘Motlatsi’s appointment did not suggest that any lines of contest between ourselves and the union movement have been blurred. (Rather it) indicates a growing realisation that both we and the union, however different our world views, are entirely dependent for our future survival on the weal or wore of our industry’: see Spicer A *et al* ‘Blacks join board of AngloGold’ *The Star Business Report* (<http://www2.inc.co.za>).

supported the right to disclosure of information for the achievement of employee participation in decision-making.<sup>582</sup>

The jurisprudential background to information disclosure under the LRA has been established in different fields of the South African legal system: the constitution; the doctrine of discovery and the unfair labour practice jurisdiction under the LRA 28 of 1956. The foregoing background will ensure that information disclosure provided by the LRA 66 of 1995 is interpreted to improve the participation of employees in the decision-making process.

The significance of disclosure requirements in the LRA is that the culture of openness in the relations between employers and employees is being encouraged and employees will participate in decision-making armed with information which enables them to make decisions that are based on facts. Although section 16(2) and 16(3) define the information that employees are entitled to, it is significant that the jurisprudence of disclosure shows that an employer is expected to be upfront in disclosing information. Therefore employers would not only be expected to disclose the information specified, but to include all information that will be of assistance in the decision-making process. A factor linked to the latter is that although the LRA does not provide a test for relevance, a purposive interpretation will ensure that commissioners will interpret relevance in such a way as to achieve the purposes of the Act, one of which is employee participation in decision-making.

Although there are limitations to disclosure of information, these limitations are such as to strike a balance between the interests of employers and employees. However, in applying the limitations, the CCMA must ensure that the application of these limitations are in favour of disclosure which ultimately will support employee participation in decision-making.

The contribution of information disclosure to employee participation in decision-making will only be realized if employees utilize the information they have obtained constructively to facilitate proper collective bargaining and consultation, and not to destroy the employer. Furthermore, in

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<sup>582</sup> Collective Bargaining Recommendation 163 of 1981 Article 7(2)(a).

order to avoid misconstruing information disclosed by employers, it will be important for trade unions in particular to enhance their training programmes so that their members can understand the information disclosed. There will also be a need for the employees to utilize experts in analysing the information disclosed so that the right to disclosure contributes to the growth of cooperative relationships.

There is some evidence of reluctance on the part of employers to disclose financial information, which is usually at the hub of all decision-making. This reluctance is due to the fear that employees will manipulate the information, resulting in the employer having to make unfavourable concessions. In order to overcome this fear employers will have to utilize the limitations to disclosure in order to secure their interests. It is also hoped that the suspicious perception of employees will be solved as the culture of disclosure takes root in our labour relations. The most significant contribution of information disclosure to employee participation is that no longer will employees participate in collective bargaining and consultation from an ill-informed position.

#### 8.6 CONSULTATION PRIOR TO DISMISSAL FOR OPERATIONAL REQUIREMENTS

Although consultation prior to dismissal for operational requirements is just an aspect of the entire process, there is clear evidence of principles supportive of employee participation in decision-making embodied in the procedure. In fact, it was partly under the retrenchment jurisprudence that consultation and disclosure of information developed.

One of the most significant elements of section 189 is that it gives employees the right to be consulted and employers the duty to consult employees. From the outset a partnership in decision-making is established and both parties are expected to seriously engage each other for the process to be exhaustive.

The stage in time at which employees are involved in the decision-making is very important, because the sooner they are involved the more effective the participation might be. Section 189 (1) requires that the employer must consult the affected employees as soon as he contemplates

retrenchment as a solution. Accordingly employees will contribute to the decision-making process before retrenchment becomes a reality. Although early consultation is welcomed, the Act needs to go further and prescribe a period for the consultation process. This will ensure that employees are consulted timeously and employers will know how much time they have to devote to the consultation process. Furthermore sufficient consultation may also be determined by the amount of time spent in the consultation process and there could be a reduction of costs resulting from protracted consultation. The UK position could be instructive in this regard. Deakin *et al*<sup>583</sup> state that according to the TULRCA 1992 section 188(2) an employer who is considering dismissing an employee for operational reasons must commence consultation at the earliest opportunity, at least 90 days before the first dismissal takes place where the employer plans to retrench 100 or more employees at one establishment within a 90-day period, or not less than 30 days earlier where it plans to dismiss 10 or more employees within a 30 day-period. In respect of less than ten, there is no time stipulation, however 28 days would seem to be appropriate.

Underlying the consultation process is that it is a two-way process, which requires that both employers and employees participate in the consultation process constructively knowing that they are responsible for the outcome of the process. The fact that parties also have to attempt to reach consensus, further fortifies the reciprocity required in the process. Employees and employers will have to consider each other's positions and make an attempt to reach an agreement where possible. Although employees have now been placed in a stronger position they are expected to approach the process of consultation in a very constructive way. If they fail to participate in the two-way process, they will only have themselves to blame. Understanding this partnership in decision-making is essential for the success of employee participation.

Section 189(2) also gives content to the consultation process by outlining the matters upon which employers and employees have to consult. It is interesting to note that the first matter for consultation is means to avoid the dismissal, which is indicative of the fact that even the validity of the reasons to retrench have to be evaluated by the employees. Surely this puts employees in a very influential position in the decision-making process. Furthermore, for sufficiency of

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<sup>583</sup> Deakin S *et al Labour Law* (1995) p 685.

consultation, the employer should have consulted the employees on all the matters stipulated above. The above statutory provisions are significant limitations of the management prerogative and further fertile ground for the growth of employee participation. It is also essential to point out that for the substantive fairness of the decision to retrench, consultation with employees is necessary, which again points in the direction of the involvement of employees in decision-making.

To further increase employee participation in decision-making in retrenchment proceedings, according to section 189(3) the employer is expected to disclose information to the employees. The information should not be confined to that which supports the position of the employer but all information that may be relevant to the making of a decision concerning the direction to be adopted by the company. The section does not stop at just requiring disclosure, it goes further to stipulate the type of information to be disclosed, which should be given in writing.

In spite of all the foregoing, the employer is still left with a residue of power to make the final decision after the consultation process. After all the employer is only required to attempt to reach consensus with the employees. What may militate against effective employee participation in decision-making, is the extent to which this power will be utilised by employers in the decision-making process. Clearly there are severe limitations to the management prerogative to make the decision to retrench, and it is highly improbable that the employer after the consultation process will implement his original decision. The decision after the consultation process will probably reflect the influence of employees, whether agreement is reached or not. Influence is the essence of employee participation in decision-making. Alternatively, the residual power should motivate employees to influence the employer as much as possible before he exercises the power to finally decide.

### 8.7 COLLECTIVE BARGAINING

The contribution of collective bargaining to employee participation must be approached critically because of its adversarial nature, which creates doubt as to whether collective bargaining can contribute to the strengthening of employee participation or not. However, as has been shown

in the thesis, the definition of participation is wide enough to include collective bargaining. Some elements of collective bargaining will undoubtedly facilitate employee participation in decision-making.

The basic premise of collective bargaining is the acceptance of the fact that employers have the right to manage the workplace. But the limitation to this right is that, where the interests of employees are at stake, there needs to be negotiations until a mutually agreeable solution is found. It is in the give and take process of bargaining that employees through their trade unions are able to participate in the decision-making process although in a limited way.

The LRA shows a preference for centralised bargaining which will have a profound effect on the success of employee participation in decision-making. Employers argue that centralised bargaining will encourage strikes which may engulf an entire industrial sector. However, its importance in employee participation is that it will provide employees with an opportunity to collectively influence the decisions of employers at central level. It is also significant that agreements reached at central level will bind all employers falling within a particular industrial sector. The criticism of the choice for centralised bargaining is that, as strikes are declared at central level, the adversarialism that ensues will trickle down to the plant-level militating against the achievement of employee participation. This raises the question of the ability of the industrial partners to separate issues which need a large measure of adversarialism and those that require a great deal of cooperation.

The LRA also provides for bargaining councils which through their agreements, will determine the broadening of matters that can be handled by workplace forums. Consequently bargaining councils will contribute to the broadening of the scope for employee participation in decision-making.

The choice for majoritarianism may be criticised for favouring majority unions in decision-making to the detriment of minority unions. This is because more rights are conferred on majority unions which places them in a better position to participate in decision-making. However, the

significance of majoritarianism is that it will encourage trade unions to recruit more members in order to increase their influence. Minority unions are encouraged to act together in order to attain majority status. That the LRA favours majoritarianism is also important in the sense that decisions made with the participation of a majority union will be carried through, because democratically that union represents the significant views of employees in a workplace. Another reason for the choice for majoritarianism is to discourage union proliferation, which is to be welcomed because the proliferation of small unions might result in unions which will be unable to carry through the decisions reached with the employer. Most importantly, majoritarianism may encourage unions to be vigilant in expressing the aspirations of employees in order to maintain their majority status.

Trade unions will undoubtedly play a pivotal role in collective bargaining and will also make major contributions to the growth of employee participation in decision-making. However, for trade unions to be able to contribute constructively, they will have to be accountable to their members for their joint decisions with the employer. Although the duty of fair representation is an American concept, its introduction to our labour law will be a means by which employees will be able to ensure that the union is championing their cause through representative participation in decision-making. Furthermore, to ensure that unions represent the interests of employees when concluding collective agreements with the employer, employees may challenge agreements which are contrary to the mandate given to the union. This extensive accountability will ensure that union members participate in decision-making through their trade union representatives.

The greatest threat that the LRA poses to employee participation in decision-making is the absence of an express statutory duty to bargain. The absence of a duty to bargain may give rise to strikes by employees in order to compel the employer to accede to their demands. Consequently the collective bargaining process may be a breeding ground for adversarialism, which in turn could erode the cooperation required in employee participation in decision-making. However, in practice both employers and employees may be prepared to negotiate in order to avoid strike action, as strikes do not only affect the profits of employers but also the income of the employees.

Although the adversarial nature of collective bargaining is a limiting factor, employee participation in decision-making on distributive matters, requires this element of robust exercise of power. Therefore, it is appropriate to conclude that although collective bargaining may be seen as conflictual, some of its elements will be supportive of employee participation in decision-making.

### 8.8 WORKPLACE FORUMS

Workplace forums are the most significant innovation in our labour law and they are perhaps the central pillar for the success of employee participation in decision-making. The centrality of workplace forums in employee participation is borne out by the functions of the workplace forums which according to section 79 are to promote the interests of all employees; enhance efficiency and are entitled to be consulted with a view to reaching consensus and to participate in joint decision-making with the employer.

Although workplace forums are intended to promote the interests of all employees including non-union members, their ability to do so still has to be proved because of the heavy involvement of trade unions in the initiation of the forums. It will be important that in the election of employee representatives, non-unionised employees be given significant representation on the forums. Furthermore, the meaning of efficiency still has to be defined in order to further explain the objectives of the workplace forums in their interaction with the employer.

Another important point to raise is that, if workplace forums are to promote the interests of all employees why are only trade unions permitted to initiate them. The heavy involvement of unions may be indicative of the suspicion that trade unions have of the forums.<sup>584</sup> It may be that in order to control development of workplace forums, trade unions wanted to have control on the very

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<sup>584</sup> Perhaps an indication of the extent to which trade unions support the formation of workplace forums would be the number of workplace forums formed to date. In a statement by Membathisi Mdladlana, Minister of Labour on the occasion of the second anniversary of the Labour Relations Act (11 November 1998) stated that: ‘The LRA enables the establishment of workplace forums to promote more democratic workplace decision-making. A total of 57 applications for workplace forums have been received by the CCMA. Of these, 28 have been rejected and 16 forums have been set up.’ Although the statistics do not cover the number of participatory forums which have been formed outside the scope of the LRA, the low number of workplace forums formed after two years, may be indicative of the suspicion with which trade unions are approaching workplace forums.

existence of the forums. However, international experience shows that such participatory structures are usually initiated by both unions and employees.<sup>585</sup> For instance in Germany, where works councils generally can be initiated by unions or employees. There is no reason why this should not be the position in South Africa because unions can always use their strength to influence the operations of the forums

Another aspect of the workplace forums is that they can only be established in workplaces employing 100 or more employees. This is a very high threshold because there is evidence that this will exclude a large number of workplaces in South Africa.<sup>586</sup> A lower threshold should be considered for which guidance may be sought from the German and Dutch systems.

It is also very significant that the LRA has provided for mandatory consultation of workplace forums. Mandatory consultation creates an expectation that the employer will have to involve the workplace forum in decision-making. This consultation is given content because the Act specifies the topics for such consultation, thereby defining the scope of influence of the workplace forums. Furthermore, the Act encourages both the workplace forum and the employer to attempt to reach consensus, which gives focus to the decision-making process. Another strength of the mandatory consultation process is that workplace forums are allowed to make representations to the employer and advance alternatives on the matters raised for consultation. The employer is expected to respond to these representations. If the alternatives are rejected, the employer has to supply reasons for doing so. Such accountability will ensure that consultation is not just a sham but an exhaustive process. However, one of the limitations to consultation is the fact that ultimately the employer can make the final decision. This should encourage the workplace forums to ensure that the employer is influenced as much as possible in order to avoid the employer deciding to the detriment of the employees. A further limitation is that only the employer who can initiate the consultation process. It is not clear why the workplace forum

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<sup>585</sup> Refer to chapter 7, under the discussion on initiating workplace forums (paragraph 7.4)

<sup>586</sup> The Department of Trade and Industry has indicated that small businesses which include survivalist enterprises (with no paid employees and minimal assets) to medium enterprises (which have up to 100 employees), account for approximately 60 % of all employment in the economy: see 'Financial Access for SMMEs: Towards a Comprehensive Strategy' *op cit* note 557.

cannot initiate the process, after all commencing consultation does not mean an obligation to agree. Therefore, the legislature should consider granting workplace forums the right of initiative. Guidance on this matter can be obtained from the functioning of works councils under the German system.<sup>587</sup>

The success of employee participation could be impeded as a result of the possibility of employees engaging in strike action if consensus is not reached during consultation. This will introduce unnecessary adversarialism into the functioning of workplace forums. Engaging in strike action on the matters for consultation could subvert the cooperation that should underlie the functioning of workplace forums. In Germany<sup>588</sup> a peace obligation was introduced as regards matters to be dealt with in the context of cooperative structures. The legislature should consider inserting a section in the LRA that prohibits industrial action on matters falling within the jurisdiction of workplace forums.

Joint decision-making is the real strength of workplace forums because the employer is expected to reach consensus with them. It is also important that the LRA clearly provides that the employer and the workplace forum may broaden the matters for joint decision-making, thus extending the scope for employee participation. Again the only problem here is that only the employer can initiate the joint decision-making process. There is no reason why the workplace forum should not initiate the process since the parties are already expected to reach agreement on certain matters. Granting the forums a right of initiative will strengthen employee participation in decision-making.

The influence of workplace forums in decision-making is further strengthened by the right to disclosure of information, ensuring their effectiveness in decision-making. The relevant information to be disclosed to workplace forums is determined by the matters for consultation and joint decision-making.

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<sup>587</sup> Refer to Chapter 7 at paragraph 7.4.

<sup>588</sup> Works Constitution Act 15 of 1952, section 74.

The Act does not seem to deal sufficiently with the problem of overlapping institutions at plant-level. It is evident that the LRA allows the existence of both workplace forums at plant-level and shopstewards for plant-level bargaining. It is hoped that any conflict that may arise in the functions of these bodies will not militate against employee participation in decision-making. After all, in Germany and Sweden there is evidence that works councils are particularly strong where they are supported by collective bargaining.

The status of workplace forum agreements still needs to be clarified if workplace forums are to be respected by employers. Clearly section 23 of the LRA excludes workplace forums from the parties that can conclude collective agreements binding both the employer and employee parties to the agreement. If the strength of the agreements between the employer and workplace forums is going to depend on the good faith of the parties, then the LRA 66 of 1995 has placed the success of the forums at risk because enforceable agreements are the ultimate objective of employee participation in decision-making.

## 8.9 SUMMARY

The examination in this thesis was undertaken with the objective of establishing the extent to which the LRA provides for employee participation. Several of the sections and principles discussed indicate that employee participation has been formally born through the LRA, and this is very significant in South African labour law. However, the relationship between employers and employees cannot be regulated and enforced by statutes alone. Hence the LRA will succeed in enhancing employee participation only if employers and employees are able to make the necessary mental shifts and learn to trust and be trusted, the one by the other. Increased productivity and hence the economic prosperity of South Africa, depend among other things on the success of employee participation in decision-making as envisaged by the LRA 66 of 1995.

