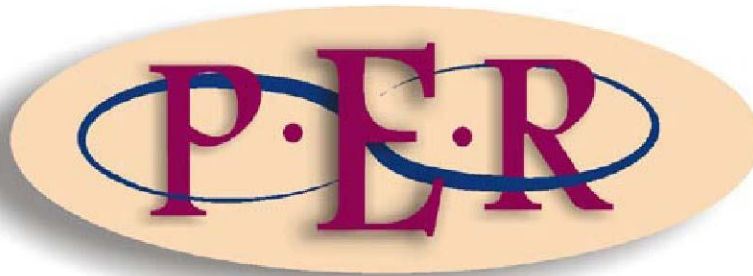


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IN SEARCH OF ALTERNATIVES OR ENHANCEMENTS TO COLLECTIVE BARGAINING IN SOUTH AFRICA: ARE WORKPLACE FORUMS A VIABLE OPTION?

MM Botha*

1 General

Workplace forums as they are currently envisaged in the LRA¹ are a dead duck. In the light of the decline in firm and plant-level bargaining a decision needs to be made about the appropriate vehicle through which engagement can take place at this level, particularly with a view to supplementing centralised bargaining. This endeavour will have to deal with the EEA² and SDA,³ because the effect of the employment equity and skills development committees set up in terms of these statutes has been to divorce grading and training issues from the bargaining agenda. These issues are however critical if one wants to link skills to rewards.⁴

From this quote and the discussion that follows it is evident that the provisions pertaining to workplace forums in their current format have proved to be unsuccessful.

The idea underlying the introduction of workplace forums, specifically, was to deal with productivity issues through consultation and joint decision-making, which issues did not fall within the scope of collective bargaining. Collective bargaining is primarily concerned with issues such as improvements to terms and conditions, higher wages and so forth. Collective bargaining and its associated freedoms and rights focus on the use of power, and are a counter to the managerial prerogative of the employer.⁵ Employees, as part of the collective process, can embark on strike action in order to force an employer to give in to their demands. Collective bargaining, by its nature, is adversarial. To counter this characteristic of collective bargaining the legislator introduced workplace forums as a complement to the collective bargaining system: it

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1 *Labour Relations Act* 66 of 1995.

2 *Employment Equity Act* 55 of 1998.

3 *Skills Development Act* 97 of 1998.

4 Godfrey, Theron and Visser *State of Collective Bargaining* 99.

5 See in this regard *BTR Dunlop Ltd v National Union of Metalworkers (2)* 1989 10 ILJ 701 (IC).

grants workers participatory decision-making power and a voice, and deals with production issues at a workplace level. The system of workplace forums⁶ draws upon the model of the German *works council system*, and was enacted to "introduce a form of participatory workplace governance" and to create a system of participatory decision-making in addition to, or alongside, (adversarial) collective bargaining.⁷

This article explores the position regarding workplace forums in South Africa and whether it is time to reconsider them (in some amended form) as a viable option for employee participation in decision-making.

2 Setting the scene: an overview regarding collective bargaining

Collective bargaining has a long history,⁸ as is evidenced by the developments in various countries. For workers collective bargaining is primarily a means of maintaining "certain standards of distribution of work, of rewards and of stability of employment", whereas employers view it as a means of maintaining "industrial peace".⁹ In general, the parties to collective bargaining engage in the process because employees are not happy with a decision of management: collective bargaining, thus, is more re-active than pro-active. Traditional collective bargaining¹⁰ is a mechanism to negotiate the terms and conditions of employment and is not a vehicle to facilitate joint decision-making.¹¹ Collective bargaining deals with a wide variety of disputes which fall within the ambit of "matters of mutual interest". These matters are not defined, and the term is broad enough to include disputes of interest or disputes of right *inter alia*, such matters include issues relating to the terms and conditions of employment, such as employee remuneration, service benefits and compensation. Disputes concerning mutual interests arise out of issues such as demands for higher wages, improved conditions of employment or a change to an existing collective agreement.¹²

6 See ss 78-94 of the LRA. Workplace forums are provided for in ch V of the LRA.

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

8 Du Toit 2007 *ILJ* 1405.

9 See Davies and Freedland *Kahn-Freund* 69; Godfrey *et al Collective Bargaining* 1; and Du Toit 2007 *ILJ* 1405.

10 Also see Van Jaarsveld 2009 *THRHR* 228-229 in this regard.

11 Esser 2007 *THRHR* 425.

12 Davis and Le Roux 2012 *Acta Juridica* 317.

The greatest net benefit from collective bargaining can be obtained when a system is in place that promotes good faith bargaining and the efficient enforcement of collective agreements.¹³ One of the purposes of the LRA is to promote collective bargaining¹⁴ and to provide a framework within which employers, employers' organisations, trade unions and employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest.¹⁵

The constitutional framework supports the provisions of the LRA. Section 23(5) of the *Constitution of the Republic of South Africa*, 1996 provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining. Central to the collective bargaining framework is the recognition of the right to strike, as well as the granting to representative trade unions of certain organisational rights. The process of collective bargaining and the provisions of a collective agreement remain subject to scrutiny. For example, if the provisions unfairly discriminate against a particular group will constitute an infringement of the constitutional right to equality.¹⁶ Commentators suggest that labour law in South Africa (and in Southern Africa) should take the region's particular socio-economic profile into account and develop an indigenous paradigm.¹⁷

South African labour legislation is superimposed on a rigid adversarial system based upon a liberal market system.¹⁸ Due to developments in South African corporate law and in the corporate landscape, as well as the importance attached to the promotion of participation in companies, the continuation of a rigid adversarial system "is incongruent with the direction"¹⁹ which many authors and commentators suggest the "new corporate project" could/should take.²⁰

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

14 Ch III of the LRA regulates collective bargaining in ss 11-63 of the Act.

15 Preamble and s 1 of the LRA.

16 See Slabbert *et al Managing Employment Relations* 5-69. See also *South Africa Airways (Pty) Ltd v V* 2014 35 ILJ 2774 (LAC).

18 See Davis and Le Roux 2012 *Acta Juridica* 316.

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

20 See also O'Regan 1990 *Acta Juridica* 119 and Du Toit 1993 *Stell LR* 332 in this regard.

The "liberal market system" can be contrasted with the "coordinated market system" found in certain European countries such as Germany,²¹ in which the relationship between the governance of a corporation and labour regulation differ. The relationship between labour law and corporate law is more harmonious in a coordinated market system because of the fact that the model seeks to institutionalise the views of employees within the company.²² In so doing employees are accepted as core stakeholders who contribute to the sustainability of the business and a sense of institutional responsibility is promoted.²³ In European countries such as Austria, Belgium, Germany and the Netherlands, employee participation mainly takes place in the form of works councils. The German model is regarded as the "first and most highly developed" model of worker participation.²⁴ A "dual channel" representation system exists: first, employees are active on supervisory boards and second, trade unions play an active role, in the context not only of works councils but also in collective bargaining. In Germany, for example, co-determination has made a significant impact upon the regulation of executive compensation packages: national legislation, which provides for corporate governance requires labour representation on the boards of directors.²⁵ The practice makes it possible to develop and to adhere to policies (in theory) that are likely to expand or at least to protect jobs, even if shareholder value may be compromised.

In contrast to this system, the predominant system of employee participation in South Africa is collective bargaining. Labour and capital are represented by trade unions and employers organisations, as is evident from section 23(5) of the *Constitution*, which recognises the right to engage in collective bargaining. Nevertheless,

[n]otwithstanding the right [to] bargain collectively, the law generally limits collective bargaining and its impact upon the so-called "core areas" of the managerial prerogative, ie determining the direction, plans and policies of the business.²⁶

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

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

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

24 Biasi 2014 *IJLLI* 461.

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

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

The managerial prerogative of the employer entitles it to make strategic and operational decisions. Collective bargaining does not empower trade unions and employees with greater power regarding decision-making with regard to the direction, plans and policies of the business. For this reason co-determination, or joint decision-making, over key decisions relating to the running of the business is not covered by collective bargaining.²⁷ The latter issues are left entirely to management²⁸ or to consultation/ joint decision-making.

3 Workplace Forums

3.1 Purpose and rationale for workplace forums

Section 1(d)(iii) of the LRA sets the promotion of employee participation in workplace decision-making as a primary object. The LRA introduced workplace forums as a means of employee participation,²⁹ and is part of a series of progressive labour law reforms, of which the LRA forms a part.³⁰

Workplace forums are intended to create a "second channel" of industrial relations³¹ or representation;³² to act, not as an alternative to collective bargaining, but rather as a supplement to it. The introduction of workplace forums by the LRA was regarded as "the most important innovation"³³ in the Act. One of the aims of the provision of workplace forums was to grant employees a voice in the workplace with regard to "production issues".³⁴ The need for proper consultation and joint decision making on "non-distributive issues" (the so-called production issues) affecting the functioning of the enterprise between employers and employees in-house has long been recognised by both employers and workers.³⁵ The voice provided to employees by the LRA relates to decisions that "affect them in their daily work activities", and provides an alternative

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

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

29 See Van der Walt 2008 *SA J Bus Man* 45-51 in this regard.

30 Slabbert *et al Managing Employment Relations* 5-253.

31 Van Niekerk 1995 *CLL* 32.

32 Mtayi 1997 *JBL* 98.

33 Olivier 1996 *ILJ* 803.

34 Slabbert *et al Managing Employment Relations* 5-25 as well as Steadman 2004 *ILJ* 1171.

35 Slabbert *et al Managing Employment Relations* 5-253.

alongside the existing "conflict-ridden" labour relations model in South Africa.³⁶

As wage matters, which typically deal with terms and conditions of employment, "were seen as the essential subject matter of collective bargaining between employers and trade unions, preferably at sectoral level",³⁷ workplace forums are designed to deal largely with "non-wage" issues such as changes in the organisation of work, restructuring, the introduction of new technologies and work methods, health and safety at work. If viewed holistically within the national context, including the LRA, "the workplace forum promoted the narrowest form of dialogue between labour and capital, firstly, at the level of the workplace".³⁸ In turn, "this underpinned collective bargaining at the sectoral level and social dialogue at national or regional level, conducted primarily through the establishment of the National Economic Development and Labour Council (NEDLAC)".³⁹

Even before the enactment of the LRA there was strong support for the basic premise of the workplace forum proposal. Summers, for example, articulated that he did not believe that "a society can be democratic, an economy can prosper and workers improve their life if management and employees see each other as adversaries".⁴⁰ Inevitably they compete for the returns from the enterprise, but they have "a common interest in increasing those returns".⁴¹ Cooperation in the workplace is essential because it not only makes work safer and more satisfying, but also makes it more productive. Summers therefore submits that a collective bargaining system "must be construed to encourage that cooperation".⁴²

The Explanatory Memorandum to the Labour Relations Bill, 1995⁴³ motivated the creation of workplace forums as designed to facilitate the shift from adversarial collective bargaining on all matters to joint problem-solving and participation relating to certain aspects in the workplace. *The Exploratory Memorandum* further states:

36 Slabbert *et al* *Managing Employment Relations* 5-253.

37 Du Toit *et al* *Labour Relations Law* (2006) 343; Du Toit *et al* *Labour Relations Law* (2015) 389.

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

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

40 Summers 1995 *ILJ* 809.

41 Summers 1995 *ILJ* 809.

42 Summers 1995 *ILJ* 809.

43 Ministerial Task Team 1995 *ILJ* 310.

In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realisation that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards. Workplace forums are designed to perform functions that collective bargaining cannot easily achieve: the joint solution of problems and the resolution of conflicts over production.⁴⁴

Thus, two assumptions underlie the LRA's provisions on workplace forums: in order for South Africa to respond to the challenges brought about by globalisation, productivity levels should be improved, which can be achieved only if a more cooperative relationship exists between labour and management.⁴⁵ The issues (indicated above) that will contribute to "increased productivity" are unsuited to collective bargaining.⁴⁶ This does not mean that conflict between management and workers will be eliminated completely but it ensures that conflictual relations will be removed from the organisation of production.⁴⁷ *The Exploratory Memorandum* claims that the purpose of workplace forums is "not to undermine collective bargaining but to supplement it", which will be achieved by "relieving collective bargaining of functions to which it is not well suited".⁴⁸ Therefore the LRA envisages a "clear and strict institutional separation" between workplace forums and collective bargaining in order "to keep distributive bargaining and cooperative relations apart, so as to allow the latter an opportunity to develop".⁴⁹

In South Africa, historically, trade unions have been hostile to forms of workplace consultation because they believe it may result in "co-option by management and the blunting of class struggle".⁵⁰ On the other hand, the LRA seeks to encourage "non-adversarial consultation" on issues such as productivity and workplace grievances by establishing workplace forums.⁵¹ This objective is evident in that it promotes joint problem solving by introducing a statutory forum for both consultation and joint decision-making to "augment" collective bargaining at workplace level.⁵²

44 Ministerial Task Team 1995 *ILJ* 310. See also Godfrey, Hirschsohn and Maree 1998 *LDD* 86.

45 Klerck 1999 *Transformation* 14.

46 Klerck 1999 *Transformation* 14.

47 Klerck 1999 *Transformation* 14.

48 Ministerial Task Team 1995 *ILJ* 315. Also see Klerck 1999 *Transformation* 14.

49 Ministerial Task Team 1995 *ILJ* 316. Also see Klerck 1999 *Transformation* 14.

50 Hepple 2012 *SALJ* 265.

51 Hepple 2012 *SALJ* 265.

52 Also see Du Toit *et al Labour Relations Law* (2006) 31 in this regard.

It can be argued that a having a voice in decision making provides workers with a more active role and a greater input than otherwise. Employees can provide more information on a production issue if the employer consults with them and improvement in the information flow takes place. Workplace forums facilitate this information flow, because they ensure that employees are more committed to participation. Emphasis is on the role of employee cooperation and harmonious labour relations, which, ultimately, will improve quality and efficiency in the organisation.

Olivier states that the idea of corporatism in the notion of employee participation seeks to provide an alternative or a supplement to the "conflict relationship which has become so much part and parcel" of South African employment relations.⁵³ Corporatism works, in principle, on a presupposition which is sometimes vehemently contested, namely that a clear distinction should be drawn between collective bargaining and workplace forum activity.⁵⁴ Two consequences flow from this presupposition: (i) production issues for which participatory structures are ideally suited should be institutionally separated from distributive issues meant for collective bargaining;⁵⁵ and (ii) the institutional separation implies structural separation, which means that "the adversarial and co-operative structures should ideally operate at different levels, in order to avoid unnecessary conflict and competition from arising".⁵⁶ In order for the system to work, collective bargaining must be restricted to central level structures, whereas participation at plant level deals with day-to-day workplace issues and is not subjected to "the antagonisms generated by bargaining".⁵⁷

3.2 Establishment of workplace forums

Workplace forums grant significant new rights to employees and also to trade unions. The LRA provides statutory protection to the participation of employees in workplace forums. Sections 79 and 82 of the LRA provide that all employees in the workplace, and not just union members, elect workplace forums and the workplace forum is

53 Slabbert *et al Managing Employment Relations* 5-147.

54 Slabbert *et al Managing Employment Relations* 5-147.

55 Also see Smith 2000 *Ga J Int'l & Comp L* 615.

56 Slabbert *et al Managing Employment Relations* 5-147.

57 Summers 1995 *ILJ* 807; Slabbert *et al Managing Employment Relations* 5-147.

charged with representing the entire workforce.⁵⁸ Workplace forums can be established in any workplace where the employer employs 100 or more employees, and a trade union on its own if it is a majority representative union(s) or two or more registered trade unions acting together represent the majority of employees employed by the employer at the workplace.⁵⁹ The application for the establishment of a workplace forum can be made to the Commission for Conciliation, Mediation and Arbitration (CCMA).⁶⁰ A representative trade union that is recognised in terms of a collective agreement by an employer for the purposes of collective bargaining in respect of all employees in a workplace may also apply to the CCMA for the establishment of a workplace forum.⁶¹

Workplace forums⁶² can take four forms:⁶³

- (i) a bargained workplace forum based on a collective agreement which was entered into between the representative trade union and the employer;⁶⁴
- (ii) a workplace forum with a bargained constitution;⁶⁵
- (iii) a workplace forum constitution by a commissioner of the CCMA;⁶⁶ and
- (iv) a trade union-based workplace forum.⁶⁷

3.3 Workplace forums' functions and powers

Section 79 in Chapter V of the LRA sets out the general functions of workplace forums as follows:

58 See ss 79 and 82 of the LRA as well as Du Toit *et al Labour Relations Law* (2006) 31 in this regard. Also see Delpont 1995 *De Jure* 416.

59 Section 80(1) of the LRA.

60 Section 80(2) of the LRA.

61 Section 81(1) of the LRA.

62 The employer is not a part of such a workplace forum in South Africa: "[u]nlike some of its counterparts the statutory system does not provide for the employer to be part of or represented on the forum: the forum is rather seen as a body representing employee interests with which the employer has to engage before certain measures can be implemented" (Slabbert *et al Managing Employment Relations* 5-145).

63 Steadman 2004 *ILJ* 1172.

64 Section 80(7) of the LRA.

65 Section 80(9) of the LRA.

66 Section 80(9) of the LRA.

67 Section 80(10) of the LRA.

- i) to seek to promote the interests of all employees in the workplace (whether or not they are union members);
- ii) to enhance efficiency in the workplace;
- iii) to be consulted by the employer with a view to reaching consensus on the matters listed in section 84; and
- iv) to participate in joint decision making about the matters referred to in section 86.

The LRA has foreseen three forms of participation rights by workplace forums which are exercisable against the employer, namely consultation, joint decision-making and information-sharing.⁶⁸

3.3.1 Consultation

Currently, consultation is required on the matters listed in section 84, whereas joint decision-making is required for matters listed in section 86. Consultation requires the employer "to do more than notify the forum of any proposal and in good faith to consider any suggestions it may make".⁶⁹ Du Toit points out that consultation and joint decision-making are not the same as collective bargaining, but there are distinct points of connection between them: both processes involve discussion between employers and employees "on a collective basis over employment related issues" and for the employer "accustomed to dealing with employees in an autocratic or paternalistic way, as well as for workers, crossing one threshold may assist in crossing the other".⁷⁰

Section 85(1) requires, before an employer implements a proposal on any of the topics in section 84(1), that the employer "must consult the workplace forum and attempt to reach consensus with it". Extensive inroads into management's prerogative are made because the employer must obtain more than the opinion of the employee representatives on the issues.⁷¹ It seems that "consultation" means "negotiation",

68 Olivier "Inchoate Regulation" 453; Slabbert *et al Managing Employment Relations* 5-148 - 5-149.

69 Grogan *Workplace Law* 332.

70 Du Toit 1995 *ILJ* 803.

71 Slabbert *et al Managing Employment Relations* 5-259.

because there must be an attempt by the employer to reach consensus.⁷² The employer must allow the workplace forum to make representations and advance alternative proposals and if the employer disagrees, it must state reasons for its disagreement.⁷³

The definition of consultation in section 85(1) of the LRA is a departure from international practice, where the employer, generally, after hearing the workplace forum's views will decide; rather, it is "akin to good faith bargaining".⁷⁴ This could have the effect of prolonging the consultation process and force the employer into various procedures before acting.⁷⁵ Section 85(4) of the LRA provides that if the employer and the workplace forum cannot reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the proposal. The implication of this "agreed deadlock-breaking mechanism", in principle, is that it remains possible to embark upon industrial action, unless the agreed procedure provides otherwise.⁷⁶

This position appears not only to be an unusual feature of consultation provided by the LRA,⁷⁷ but is also regarded as unfortunate,⁷⁸ based on the fact that it is the "very essence of cooperative systems that parties should not be allowed to use their economic weapons when agreement cannot be reached, but rather to make use of appropriate alternative dispute resolution mechanisms".⁷⁹ Immense strain is put on the cooperative relationship, which could ruin the cooperative endeavour from the outset, since adversarial elements are brought into the relationship if the use of economic power is allowed.⁸⁰

An employer must consult on the following matters:⁸¹

72 Steadman 2004 *ILJ* 1174.

73 Sections 85(2) and (3) of the LRA.

74 Steadman 2004 *ILJ* 1173.

75 Steadman 2004 *ILJ* 1173.

76 Slabbert *et al Managing Employment Relations* 5-259.

77 Steadman 2004 *ILJ* 1173.

78 Olivier 1996 *ILJ* 813.

79 Olivier 1996 *ILJ* 813.

80 Olivier 1996 *ILJ* 813.

81 Section 84(1) of the LRA.

- (i) restructuring of the workplace (including the introduction of new technology and work methods);
- (ii) changes in the organisation of work;
- (iii) export promotion;
- (iv) job grading;
- (v) education and training;
- (vi) product development plans;
- (vii) partial or total plant closures;
- (viii) mergers and transfers of ownership in so far as they have an impact on the employees;
- (ix) the dismissal of employees for reasons based on operational requirements;
- (x) exemptions from any collective agreement or any law; and
- (xi) criteria for merit increases or the payment of discretionary bonuses.

The above list can be extended. A bargaining council may confer on a workplace forum the right to be consulted about additional matters that fall within the registered scope of the bargaining council.⁸² A representative trade union and an employer may also conclude a collective agreement conferring on a workplace forum the right to be consulted about any additional matters⁸³ and any law may confer on a workplace forum the right to be consulted about additional matters.⁸⁴ An agreement can be reached that the workplace forum can also exercise health and safety functions.⁸⁵ The issues for consultation, therefore, may be said to broadly cover many matters of mutual interest.

It has been said that "consultation", in effect, "represents an extension of collective bargaining to the level of the workplace".⁸⁶ Grogan points out that the LRA prescribes that an employer shall consult a forum "with a view to reaching consensus", which "seems to come very close to what is normally understood to be collective

82 Section 84(2) of the LRA.

83 Section 84(3) of the LRA.

84 Section 84(4) of the LRA.

85 Section 84(5) of the LRA.

86 *Anstey Employee Participation* 164.

bargaining".⁸⁷ He adds that "[a]ny premature implementation of a proposal under consultation may be reversed by the appointed arbitrator of the CCMA".⁸⁸ As indicated above, this ruling holds certain risks for a successful cooperative model.

3.3.2 *Joint decision-making*

The employer must enter into joint decision-making once the workplace forum is established.⁸⁹ Joint decision-making places serious limitations on the managerial prerogative of the employer: the employer is compelled to obtain concurrence with the workplace forum on certain matters that are subject to joint decision-making.⁹⁰ Joint decision-making requires the employer to consult with the workplace forum *and* reach consensus.⁹¹ Joint decision-making fundamentally breaks with "unilateralism and hierarchical decision-making" in the workplace, because workers can prevent management from deciding on a particular issue unless the consent of the workplace forum has been obtained.⁹² In these instances, a proposal may not be implemented without the forum's consent.⁹³

The following matters require joint decision-making:

- (i) disciplinary codes and procedures,
- (ii) measures designed to protect and advance persons disadvantaged by unfair discrimination,
- (iii) rules for the proper regulation of the workplace other than work-related conduct and
- (iv) changes to the rules of employer-controlled social benefit schemes by the employer or employer-representatives on the trusts or boards governing such schemes.⁹⁴

87 Grogan *Workplace Law* 333.

88 Grogan *Workplace Law* 333.

89 Section 86(1) of the LRA.

90 Slabbert *et al Managing Employment Relations* 5-149. Also see Satgar 1997 *LDD* 45.

91 Section 86(1) of the LRA.

92 Slabbert *et al Managing Employment Relations* 5-149. Also see Satgar 1997 *LDD* 45.

93 Section 86(1) of the LRA.

94 Section 86(1) of the LRA.

A collective agreement can be concluded between a representative trade union and an employer conferring on the workplace forum the right to joint decision-making on additional matters or removing any matter in section 86(1) from the list of matters requiring joint decision-making.⁹⁵ Any other law may also confer the right to participate in joint decision-making matters on the workplace forum.⁹⁶

If the employer and the workplace forum cannot reach consensus, the employer must refer the dispute to arbitration in accordance with an agreed procedure or, if there is no agreed procedure, refer the dispute to the CCMA.⁹⁷ The employer must satisfy the CCMA that a copy of the referral has been served on the chairperson of the workplace forum. The CCMA must attempt to resolve the dispute through conciliation and, if it remains unresolved, the employer may request that the dispute be resolved through arbitration.⁹⁸

In the case of section 86-matters the employer may not unilaterally implement a proposal. The right to strike over such issues does not exist⁹⁹ and the parties are subject to alternative dispute resolution processes to settle a dispute concerning matters regarding joint decision making.¹⁰⁰ However, the LRA does not exclude the possibility that employees may embark on strike action if no agreement can be reached on a matter that is the subject of consultation.

3.3.3 Information-sharing

Coupled with the rights to consultation and joint decision making is the right to the disclosure of information.¹⁰¹ The information must be relevant, that is, information which allows the workplace forum to engage in consultation and/or joint decision making. No reciprocal obligation exists to disclose information: only employers are obliged to disclose information, and no obligation rests upon the workplace forum.¹⁰²

95 Section 86(2) of the LRA.

96 Section 86(3) of the LRA. In this regard see the discussion on the EEA below.

97 Section 86(4) of the LRA.

98 Sections 86(5)-(8) of the LRA.

99 Steadman 2004 *ILJ* 1174.

100 Slabbert *et al Managing Employment Relations* 5-266.

101 Section 89(1) of the LRA.

102 Steadman 2004 *ILJ* 1173.

If information is confidential, the employer must notify the workplace forum in writing that the information disclosed is confidential.¹⁰³ A dispute must be referred to the CCMA for conciliation if a dispute exists with regard to the disclosure of information, and should the dispute be unresolved any party may request for it to be referred to arbitration.¹⁰⁴

The commissioner has the power to decide if the information is relevant. If the commissioner so decides and if it is information regarding an employee's private personal information or the employer's confidential information, then the commissioner must "balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of the workplace forum to engage effectively in consultation and joint decision-making".¹⁰⁵ If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of information on terms designed to limit the harm likely to be caused to the employee or the employer.¹⁰⁶

When the commissioner makes an order in terms of section 89(9) of the LRA, the commissioner must take into account any breach of confidentiality in respect of the information being disclosed and the commissioner has the power to refuse to order the disclosure of requested information and any other confidential information that might otherwise be disclosed for a period specified in the arbitration award.¹⁰⁷ Section 91 of the LRA further provides that if the commissioner finds in a dispute (about an allegation of the breach of confidentiality) that such a breach has occurred, the commissioner may order the withdrawal of the right to the disclosure of information in that workplace for a period specified in the arbitration award. The regulation therefore penalises the misuse of confidential information *ex post facto*.

103 Section 89(2A) of the LRA.

104 Sections 89(3)-(6) of the LRA.

105 Sections 89(7)-(8) of the LRA.

106 Section 89(9) of the LRA.

107 Section 89(10) of the LRA.

3.4 Problems and concerns regarding workplace forums

3.4.1 General

Workplace forums as a model for employee participation remain unpopular¹⁰⁸ and largely unsuccessful. Olivier, for example, notes that unlike the position in some European countries such as the Netherlands and Germany, the LRA "lacks a provision to the effect that workplace forums may initiate consultation or joint decision making in respect of a particular matter".¹⁰⁹ In South Africa the employer remains the initiator, depriving the workplace forum of the ability to be proactive.

Collective bargaining is the primary means of negotiating with employers, in that it still is largely concerned with settling the terms and conditions of employment and the resolution of disputes between employers and employees. The idea of the drafters of the 1995-LRA (novel as it seems to be) was to depart from the tradition of collective bargaining between trade unions and employers and, instead, to provide for "more co-operative interaction between management and labour alongside collective bargaining" in order to allow non-wage issues "that previously fell within the scope of managerial prerogative" to be dealt with through consultation and joint-decision-making.¹¹⁰ Regrettably, after almost 20 years the LRA *prima facie* has not succeeded in giving effect to this object and goal. Du Toit adds that the challenge has largely been obscured by the controversy surrounding the provisions for the establishment of workplace forums in chapter V of the LRA, and that workplace forums, originally, were presented as serving an unfortunate purpose:

... that of facilitating "major restructuring of the economy" by promoting a shift from "adversarial collective bargaining on all matters to joint problem-solving and participation on certain [production-related] subjects". This would be done by creating a "second channel" of industrial relations, partly modelled on the works councils of Germany and the Netherlands. The message thus sent to unions was ominous: restructuring and job losses that unions would fight tooth and nail in the bargaining arena were expected to find greater acceptance if negotiated with "non-adversarial" workplace forums. Not even the fact that the LRA ultimately gave unions all but absolute control over workplace forums could disarm unions' suspicions or

108 Du Toit *et al Labour Relations Law* (2006) 45; Du Toit *et al Labour Relations Law* (2015) 53.

109 Olivier 1996 *ILJ* 805.

110 Du Toit *et al Labour Relations Law* (2006) 341; Du Toit *et al Labour Relations Law* (2015) 387.

dispel the belief that workplace forums, however constituted, would inevitably serve as cats' paws for employers and sow divisions among workers.¹¹¹

The quotation makes clear that the move away from adversarialism was unsuccessful, as trade unions did not relinquish their control over production-related issues, such as restructuring. Trade unions, *de facto*, have prevented workplace forums from being set up, by exercising their veto power or by not initiating the process for the establishment of a workplace forum. If the provisions of the LRA are compared with those of the EEA, it is clear from the EEA that the obligation to consult on employment equity "does not affect the obligation to consult and reach 'consensus' with a workplace forum, where one exists":¹¹² unlike the LRA, the EEA does not define the content of the duty to consult. It can therefore be deduced that the meaning of "consultation" ¹¹³ under the LRA is:

- (i) putting a proposal rather than completed decisions to employee representatives;
- (ii) disclosing all relevant information;
- (iii) allowing representatives to respond to these proposals; and
- (iv) responding to alternative proposals and, if not acceptable to the employer, explaining its reasons for the rejection thereof.¹¹⁴

The EEA's Code of Good Practice recommends a more informal approach, which includes the opportunity to meet and report back, a reasonable opportunity to meet employers, and to request, receive and consider information. The Code suggests that a workplace forum or consultative forum representing both designated and non-designated employees should either be utilised or established.¹¹⁵ However, there is no reliable data which shows the extent to which employment equity issues are discussed by the (few) workplace forums that exist.¹¹⁶

111 Du Toit 2007 *ILJ* 1426.

112 Hepple 2012 *SALJ* 265-266.

113 Also see s 85(1) of the LRA.

114 Hepple 2012 *SALJ* 266.

115 Hepple 2012 *SALJ* 266.

116 Hepple 2012 *SALJ* 266.

These concerns with regard to workplace forums, however, are not unique to South Africa. In Italy and France, trade unions have a priority right to monitor candidates for election to works councils and thus retain control over the process of selection and ensure a direct link with the trade union. In Sweden, trade unions retain the sole power within structures in the workplace.¹¹⁷

3.4.2 Trade union opposition and mistrust

In South Africa the reason for the non-establishment of workplace forums is the Congress of South African Trade Unions' (COSATU's) continuing opposition.¹¹⁸ COSATU is of the view that workplace forums undermine or clash with shop steward committees and, therefore, weaken the trade union organisation.¹¹⁹ Trade unions mistrust the workplace forum system in the sense that they feel that it might have an impact on their power in the workplace:¹²⁰ thus they fear that consultation will leave power in the hands of the employer.¹²¹ If trade unions with an existing and strong base in the workplace leave matters to the workplace forum (so the argument goes) the employer will be in the driving seat because for matters listed in section 84 it is required that an employer must simply *attempt* to reach consensus and no agreement, therefore, is necessary. From this it is clear that the matters for consultation by workplace forums are not the same as those reserved for collective bargaining.

The reluctance of trade unions to establish workplace forums may be because of past experience, their role in collective bargaining and the diffusion of powers.¹²² Trade

117 Finnemore *Introduction to Labour Relations* 255.

118 See COSATU'S view expressed already in 1997 regarding the establishment of workplace forums: "The new LRA makes provision for workplace forums, triggered by majority unions, as vehicles for workplace democracy. While it is significant that this legislation institutionalises workers' rights to workplace democracy, workplace forums as outlined in the legislation hold many dangers for unions (and employers). We strongly support the argument that workplace forums should be *union-based* rather than independently elected. In other words, the powers of information, consultation and joint decision-making should be conferred directly on the shopstewards [sic] committee; alternatively, the shopsteward committee should nominate members to the workplace forum. Otherwise there is a danger that the workplace forum will either become a substitute for the shopsteward committee, or will be a very weak consultative forum. A workplace forum independent from union structures will be a recipe for division" (COSATU 1997 <http://www.cosatu.org.za>).

119 Du Toit *et al Labour Relations Law* (2006) 45; Du Toit *et al Labour Relations Law* (2015) 54.

120 Steadman 2004 *ILJ* 1189.

121 Finnemore *Introduction to Labour Relations* 255.

122 Du Toit 2000 *ILJ* 1564.

unions are also of the opinion that in the absence of a duty to bargain workplace forums may erode the existing collective bargaining structures.¹²³ The matters listed in section 86 are limited to operational issues and not to strategic issues. Consequently, though the workplace forum and the employer have joint decision-making power, potentially the forum is limited to the matters expressly listed in section 86.

3.4.3 *Failure to reconcile*

Olivier contends that the LRA failed to reconcile the tension between "workplace unionism/collective bargaining and the workplace activity", and also failed to meet the "need to democratise the workplace and the need to increase efficiency and productivity".¹²⁴ Brassey suggests that a workplace forum is "a misshapen beast that no one seems keen to ride".¹²⁵ It has become apparent that the introduction of the system of workplace forums was met with distrust on the part of both labour and capital: as labour thought the process of collective bargaining would be compromised and capital was concerned that the managerial prerogative would be undermined in the workplace forum.¹²⁶ The system ultimately put forward was one in which the powers of workplace forums were diluted: safeguards were built in to ensure that they operated in favour of the trade union movement.¹²⁷ The perceived trade-off appears to be quite unsuccessful as the position regarding workplace forums and their legitimacy is regarded as neither fowl nor fish.

3.4.4 *Biggest flaw*

The biggest flaw, as suggested by commentators, is that trade unions normally negotiate with employers on matters listed in sections 84 and 86, but now the negotiation could take place to the workplace forum, in which the employer must attempt to reach consensus or is subject to joint decision making (rather than

123 Steadman 2004 *ILJ* 1191.

124 Olivier 1996 *ILJ* 807.

125 Brassey *et al Commentary on the Labour Relations Act* A5-1.

126 Davis and Le Roux 2012 *Acta Juridica* 319.

127 Davis and Le Roux 2012 *Acta Juridica* 319.

bargaining and reaching agreement). Hepple points out that the number of matters listed for joint decision making in a South African workplace forum is extremely limited in comparison with the extensive powers a German works council has regarding co-determination.¹²⁸ The list of co-decision matters can be extended by means of collective agreements, but no evidence exists that employers would be willing to agree to these extensions.¹²⁹

3.4.5 Size of workplace and majoritarianism

Other peculiar aspects of the system include that there must be more than 100 employees in the workplace and that any representative trade union may apply to the CCMA for the establishment of a workplace forum.¹³⁰

First, this excludes many workplaces due to the size requirement. Second, the dominant role of trade unions severely threatens the aim of the LRA, that of promoting employee participation.¹³¹ Olivier is of the view that the fact that only majority trade unions (or trade unions who together represent the majority of employees) may apply for the establishment of a workplace forum is "an extraordinary requirement given the realities of the South African scenario", and that the relatively modest level of union membership makes it "wholly inappropriate to require that majority unions should serve as the compulsory trigger for the establishment of a forum".¹³²

The dependency on majority trade unions to initiate a workplace forum disempowers non-unionised employees, because most members of the workplace forum will come from the trade union, which serves the interests of its members and threatens the promotion of the needs of the employees as a whole.¹³³ Brassey adds that the provision in the LRA for workplace forums, which was included in the hope that negotiations might take place "to enlarge the corporate cake before dividing it up (so-called integrative bargaining)", was unfortunate, and it is also subject to a majoritarian

128 Hepple "Comparing Employee Involvement" 90.

129 Hepple "Comparing Employee Involvement" 90.

130 Section 80 of the LRA.

131 Van der Walt 2008 *SA J Bus Man* 47.

132 Olivier 1996 *ILJ* 810.

133 Olivier 1996 *ILJ* 811.

override "that has served to make a complete dead letter of the elaborate set of provisions".¹³⁴

3.4.6 Failed proposed amendments

Although the reasoning behind workplace forums was to move away from adversarial behaviour¹³⁵ and promote employee participation, only a limited number of workplace forums have been established. An attempt to develop a more flexible approach was proposed in the 2000 version of the *Labour Relations Amendment Bill*¹³⁶ (which proposed amendments to sections 78 and 80 of the LRA),¹³⁷ making the formation and functioning of workplace forums less dependent on majority unions and ensuring that many more workplaces potentially could benefit from the establishment of workplace forums. One proposal was that a workplace forum could be established in a workplace of fewer than 100 employees.¹³⁸ Another was that a registered trade union could apply to establish a workplace forum where the majority of employees in the workplace were not trade union members. This establishment could be successful only if non-union members and a majority of the employees as a whole supported the application.¹³⁹ A third proposal was that where no registered trade union was present in the workplace, the majority of employees could apply to establish a workplace forum.¹⁴⁰

These proposals were intended to enhance the opportunity for unionised as well as non-unionised employees to establish workplace forums. Unfortunately, they were not adopted. The speculation is that the unions felt it would undermine the efforts of unions to organise if a workplace forum could be established by a majority of employees where there was no registered trade union in the workplace¹⁴¹ or where a registered trade union could apply for the establishment of a workplace forum where

134 Brassey 2013 *ILJ* 833.

135 Van der Walt 2008 *SA J Bus Man* 46.

136 *Labour Relations Amendment Bill*, 2000.

137 Olivier "Inchoate Regulation" 455.

138 Steadman 2004 *ILJ* 1175.

139 Steadman 2004 *ILJ* 1175.

140 Steadman 2004 *ILJ* 1175.

141 Steadman 2004 *ILJ* 1175.

the majority of employees are non-union members and with the support of a majority of employees.¹⁴²

Another possible reason for the non-acceptance of the proposals is that employers were concerned about the over-regulation of small business - especially the fact that a workplace forum, in terms of these proposals, could be established in workplaces with fewer than 100 employees.¹⁴³

It appears that the amendments also failed to address the following issues:¹⁴⁴

- (i) the preference afforded to majority unions;
- (ii) the enforceability and status of workplace agreements;
- (iii) the overlapping functions that existed between trade unions and workplace forums (including the matters identified for consultation and joint decision making in terms of section 84 and 86 of the LRA); and
- (iv) "the lack of a right to initiate" consultation and decision-making.

3.4.7 Management concerns

However, trade unions were not alone in being concerned about the proposals, as concerns were also voiced by the management representatives, who were of the view "that the drafters had adopted a method of enforcement rather than enablement, and that the principles of voluntarism had been ignored".¹⁴⁵ Further, the model was perceived as introducing "far-reaching new rights for employees going to the heart of business effectiveness and efficiency while there was no corresponding protection for employers against the abuse and misuse of these rights by employees".¹⁴⁶ The management representatives also argued that although the LRA provided some protection against the disclosure of confidential information, the protection was inadequate, and "no recourse was provided for in the case of 'other abuses'".¹⁴⁷ Employers were also concerned about disputes automatically becoming disputes of

142 Steadman 2004 *ILJ* 1176.

143 Steadman 2004 *ILJ* 1176.

144 Slabbert *et al Managing Employment Relations* 5-155.

145 Steadman 2004 *ILJ* 1175.

146 Steadman 2004 *ILJ* 1175.

147 Steadman 2004 *ILJ* 1175.

right, the possibility that employees would be incapable of understanding the issues raised in the workplace forums, and the ability and readiness of trade unions to participate effectively through the use of shop steward representatives.¹⁴⁸

The fear of the unknown is noted by Du Toit *et al*¹⁴⁹ as one of the negative reactions to workplace forums: both labour and management were (and still are) uncertain as to how workplace forums would perform with regard to certain issues.¹⁵⁰ According to Steadman, these issues include the democratisation of firms, empowerment, the improvement of industrial relations, the enhancement of economic performance, the definition of a workplace, the representation of non-unionised employees, the disclosure of information, the relationship with collective bargaining structures, how deadlocks will be resolved, and so forth.¹⁵¹

4 Concluding remarks

It is evident from the discussion that the position regarding collective bargaining and workplace forums is still problematic. It is suggested that for a dual system to work, the following far-reaching changes should be implemented, after buy-in is obtained from the social partners:

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

148 Steadman 2004 *ILJ* 1175-1176.

149 Du Toit *et al* "Workplace Forums".

150 Steadman 2004 *ILJ* 1176.

151 Steadman 2004 *ILJ* 1176.

- The power of trade unions over the establishment of workplace forums should be relinquished 20 years after the inception of the LRA.¹⁵² Earlier it was noted that even the fact that trade unions were given ultimate control over workplace forums could not disarm union suspicions. From the recent amendments in the 2014 *Amendment Act*, it is evident the legislator is attempting to move away from unbridled majoritarianism, for example by giving an arbitrator the power to grant minority unions (who meet certain conditions) access to the organisational rights that are presently available only to majority trade unions.¹⁵³ The same principle should be applied to the establishment of workplace forums: the requirement for majority trade unions to be party to the establishment of a workplace forum thus falls away. In addition, it is proposed that if the dual system of collective bargaining and workplace forums continues there should be an amendment regarding the representivity of trade unions on workplace forums. A compromise model could grant trade unions a number of seats on the workplace forum: employee representatives would have 50% representation on such a forum and trade union representatives the remaining 50%; the casting vote in the case of a deadlock would be exercised by an independent, elected chairperson.¹⁵⁴ These measures would ensure, when the workplace forum consults or engages with an employer on issues of joint decision-making and a vote is taken, that the process would function smoothly. At least, there should be significant agreement from the side of the trade unions. Another consequence would result in production issues being limited to the domain of workplace forums and non-productive issues to collective bargaining. The model is based on the German model of "quasi-parity co-determination", which can be found in certain industries and refers to the arrangement whereby "shareholders and employees can appoint an equal number of representatives on the supervisory board, but the right to appoint the chair belongs to the shareholders – thus tilting the power balance slightly

152 Given the political climate in South Africa this might be extremely difficult to achieve, especially if in 2015 South Africa has a coalition government and a tripartite system for regulating labour law generally.

153 See ss 21(8A) and 21(8C) of the *Labour Relations Amendment Act* 6 of 2014.

154 Such a chairperson could, for example, be a CCMA commissioner or a mediator or arbitrator.

in favour of shareholder representatives".¹⁵⁵ It is suggested that the model¹⁵⁶ could be adapted towards such a compromise model to establish representation on the workplace forum without tilting the balance in favour of either employee representatives or trade union representatives by appointing an independent chairperson. Such a model would attach greater legitimacy to the process, and might reassure trade unions that they are not redundant or that their role in the workplace is not being usurped by the workplace forum. Also, the dependency for the establishment of a workplace forum on the agreement of a majority representative trade union should be scrapped.

- It is a concern that industrial action is possible after the consultation process (in terms of section 84 of the LRA) has failed. Thus, retaining the right to strike reflects a serious doubt as to whether the distinction between distributive issues (reserved for bargaining and strikes) and non-distributive ones (for workplace forums) realistically can be maintained. The right to strike exists in respect of matters for consultation once there is an issue in dispute in terms of section 64 of the LRA. Strike action is possible in respect of the employer's proposal itself and not in respect of alleged procedural defects in the consultation process (which must be referred to arbitration in terms of section 94 of the LRA).¹⁵⁷ The inclusion of the right to strike in the latter instance has been criticised as straining the co-operative relationship. Not only could it ruin the whole endeavour but it also introduce adversarial elements into the relationship between workplace forums and employers.¹⁵⁸

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

156 Although this model is based on supervisory co-determination, the manner in which it operates should be noted and could be useful in the context of how a deadlock between trade union representatives and employees (as suggested) could be resolved if we amend the provision regarding workplace forums and move to a position where a compromise could be reached in doing away with the majority representative requirement but still utilising workplace forums (in an amended format).

157 See in this regard Du Toit *et al Labour Relations Law* (2015) 416.

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

- In addition it is suggested that workplace forums be allowed to initiate the consultative process by submitting proposals to the employer (unlike under the current dispensation by which the employer alone has this power).¹⁵⁹ This is a departure as it allows the workplace forum to raise issues in respect of matters listed in section 84 of the LRA and, thus, would be in line with the German position whereby works councils and employers enjoy equal status in raising matters for consultation and joint-decision-making.¹⁶⁰ It is proposed that section 85 of the LRA should be amended to call for consultation "in good time",¹⁶¹ as is the position in Germany. Currently the provision does not specify when the employer must consult with the workplace forum. For the change to meaningfully affect the way in which employers consult with workers, it should shift from merely notifying the forum of any proposal to considering legitimately and in good faith suggestions the workplace forum makes. The demand is for a committed process in which "voice" of the workplace forum is taken into consideration and its proposals are taken seriously: a change which calls for better regulation.
- On the other hand, it is suggested that if matters in terms of section 84 of the LRA are maintained then the either option of strike action would be limited or the dispute would be subjected to mediation and possibly arbitration after mediation.
 - (i) Immediate strike action would fall away as these issues would not be "strikeable" in terms of the limitation of section 65(1)(c) of the LRA, as the dispute would be considered a "rights dispute". This would thus force the parties¹⁶² to continue with mediation (possibly followed by advisory arbitration) when consultation was unsuccessful or there was a dispute that prevented consensus. The situation would be dealt with in a similar manner as when a refusal to bargain takes place. A dispute concerning an alleged refusal to bargain¹⁶³ is subject to advisory arbitration, but

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

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

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

162 If a workplace forum is in place, the LRA should be amended regarding the resolution of disputes by limiting the right to strike regarding issues that are the subject of consultation and joint decision-making.

163 See s 64(2) of the LRA in this regard.

advisory arbitration is not final and binding and so parties who are subject to it are not denied their rights to strike (which may simply be delayed).

(ii) It is proposed that in cases where consultation in terms of section 84 of the LRA is unsuccessful the dispute should be referred to compulsory mediation, where an independent mediator would facilitate the process. It would then be up to the parties to reach an agreement. Further, it is proposed that when mediation is unsuccessful the parties should refer the dispute to advisory arbitration. The position would be similar to the situation of the arbitration committee in the German system. It should be noted that it is not ideal that there should be a strike after unsuccessful section 84 consultations, but in the context of the need to uphold fundamental rights and the existing hostility of trade unions, it is proposed that strikes should be allowed only after mediation and advisory arbitration have proven to be unsuccessful. An advisory award should be obtained from the CCMA (as in refusal to bargain cases) before notice of a proposed strike or lock-out is given.

(iii) In the case of section 86 matters, the employer may not unilaterally implement a proposal, and the right to strike over such issues also does not exist. The parties are subject to an alternative dispute resolution process to settle disputes concerning matters with reference to joint decision making. It is proposed that in order to address the inclusion of the right to strike in consultation matters the limitation should be applied to consultation matters (with regard to the use of strike action). Currently the level of dispute resolution is different when it comes to matters relating to consultation and joint decision making.

(iv) In summary, strikes should be limited in cases of consultation. After consultation was unsuccessful a dispute should also be referred to mediation and if the parties cannot reach an agreement the dispute be referred to advisory arbitration. Only after advisory arbitration would the parties be able to give notice of industrial action.

In closing, it is suggested that further research is required to assess whether workplace forums (in whatever shape or form) would provide the means by which the labour relations environment could transcend its existing state. In other words, the extent of the conflictual relationship in workplaces where workplace forums are adopted should be monitored over time. The legislature should as a matter of urgency re-evaluate the role and place of workplace forums in the South African labour law framework.

BIBLIOGRAPHY

Literature

Addison and Schnabel 2011 *Industrial Relations*

Addison JT and Schnabel C "Worker Directors: A German Product That Did Not Export?" 2011 *Industrial Relations* 354-373

Anstey *Employee Participation*

Anstey M (ed) *Employee Participation and Workplace Forums* (Juta Cape Town 1997)

Biasi 2014 *IJCLIR*

Biasi M "On the Uses and Misuses of Worker Participation: Different Forms for Different Aims of Employee Involvement" 2014 *IJCLIR* 459-481

Brassey 2013 *ILJ*

Brassey M "Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" 2013 *ILJ* 823-835

Brassey *et al Commentary on the Labour Relations Act*

Brassey M *et al Commentary on the Labour Relations Act* (Juta Cape Town 1999)

Dau-Schmidt, Harris and Lobel *Labor and Employment Law*

Dau-Schmidt KG, Harris SD and Lobel O *Labor and Employment Law and Economies* (Edward Elgar Cheltenham 2009)

Davies and Freedland *Kahn-Freund*

Davies P and Freedland M *Kahn-Freund's Labour and the Law* (Stevens and Sons London 1983)

Davis and Le Roux 2012 *Acta Juridica*

Davis D and Le Roux M "Changing the Role of the Corporation: A Journey Away from Adversarialism" 2012 *Acta Juridica* 306-325

Delport 1995 *De Jure*

Delport P "Korporatiewe Reg en Werkplekforums" 1995 *De Jure* 409-418

Du Plessis, Hargovan and Bagaric *Principles*

Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (Cambridge University Press Melbourne 2011)

Du Toit 1993 *Stell LR*

Du Toit D "Democratising the Employment Relationship (A Conceptual Approach to Labour Law and its Socio-economic Implications)" 1993 *Stell LR* 325-355

Du Toit 1995 *ILJ*

Du Toit D "Corporatism and Collective Bargaining in a Democratic South Africa" 1995 *ILJ* 785-805

Du Toit 2000 *ILJ*

Du Toit D "Collective Bargaining and Worker Participation" 2000 *ILJ* 1544-1575

Du Toit 2007 *ILJ*

Du Toit D "What is the Future of Collective Bargaining (and Labour Law) in South Africa?" 2007 *ILJ* 1405-1435

Du Toit *et al* "Workplace Forums"

Du Toit D *et al* "Workplace Forums in Comparative Perspective" Unpublished Research Report for the South Africa Netherlands Project on Alternatives in Development (2000)

Du Toit *et al Labour Relations Law* (2006)

Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 5th ed (LexisNexis Durban 2006)

Du Toit *et al Labour Relations Law* (2015)

Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis Durban 2015)

Esser 2007 *THRHR*

Esser I "Stakeholder Protection: The Position of Employees" 2007 *THRHR* 407-426

Finnemore *Introduction to Labour Relations*

Finnemore M *Introduction to Labour Relations in South Africa* (LexisNexis Durban 2009)

Godfrey *et al Collective Bargaining*

Godfrey S *et al Collective Bargaining* (Juta Cape Town 2010)

Godfrey, Hirschsohn and Maree 1998 *LDD*

Godfrey S, Hirschsohn P and Maree J "Where is Management Going? Employer Strategies with regard to Worker Participation and Workplace Forums" 1998 *LDD* 85-110

Godfrey, Theron and Visser *State of Collective Bargaining*

Godfrey S, Theron J and Visser M *The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining* (Development Policy Research Unit, University of Cape Town Cape Town 2007)

Grogan *Workplace Law*

Grogan J *Workplace Law* 11th ed (Juta Cape Town 2014)

Hepple "Comparing Employee Involvement"

Hepple B "Comparing Employee Involvement: Divergence, Coherence and Legal Stimulants" in Höland A *et al* (eds) *Employee Involvement in a Globalising World: Liber Amicorum Manfred Weiss* (BWV Berlin 2005) 83-93

Hepple 2012 *SALJ*

Hepple B "Negotiation Social Change in the Shadow of the Law" 2012 *SALJ* 248-273

Klerck 1999 *Transformation*

Klerck G "Adversarial Participation and Antagonistic Cooperation? Workplace Forums, Employee Participation and Lean Production" 1999 *Transformation* 1-35

Ministerial Task Team 1995 *ILJ*

Ministerial Task Team "Explanatory Memorandum to the Draft Labour Relations Bill" 1995 *ILJ* 278-320

Mtayi 1997 *JBL*

Mtayi F "Workplace Forums under the Labour Relations Act" 1997 *JBL* 98-101

Olivier 1996 *ILJ*

Olivier M "Workplace Forums: Critical Questions from a Labour Law Perspective" 1996 *ILJ* 803-814

Olivier "Inchoate Regulation"

Olivier M "Inchoate Regulation of Worker Participation in South Africa: The Quest for an Alternative Approach" in Höland A *et al* (eds) *Employee Involvement in a Globalising World: Liber Amicorum Manfred Weiss* (BWV Berlin 2005) 451-462

O'Regan 1990 *Acta Juridica*

O'Regan C "Possibilities for Worker Participation in Corporate Decision-making" 1990 *Acta Juridica* 113-132

Satgar 1997 *LDD*

Satgar V "The LRA and Workplace Forums: Legislative Provisions, Origins, and Transformative Possibilities" 1997 *LDD* 43-62

Slabbert *et al Managing Employment Relations*

Slabbert JA *et al Managing Employment Relations in South Africa* (LexisNexis Durban 2005)

Smith 2000 *Ga J Int'l & Comp L*

Smith CM "The Right of Revolution: Black Trade Unions, Workplace Forums, and the Struggle for Democracy in South Africa" 2000 *Ga J Int'l & Comp L* 595-625

Steadman 2004 *ILJ*

Steadman F "Workplace Forums in South Africa: A Critical Analysis" 2004 *ILJ* 1170-1202

Summers 1995 *ILJ*

Summers C "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 806-813

Van der Walt 2008 *SA J Bus Man*

Van der Walt R "Have Workplace Forums Contributed to Worker Participation? Some Management Perceptions" 2008 *SA J Bus Man* 45-51

Van Jaarsveld 2009 *THRHR*

Van Jaarsveld M "Contract in Employment: Weathering Storms in Mixed Jurisdictions? Some Comparative Reflections" 2009 *THRHR* 217-240

Van Niekerk 1995 *CLL*

Van Niekerk A "Workplace Forums" 1995 *CLL* 31-39

Wooldridge 2005 *Amicus Curiae*

Wooldridge F "Dual Board System under German Company Law" 2005 *Amicus Curiae*
17-24

Case law

BTR Dunlop Ltd v National Union of Metalworkers (2) 1989 10 ILJ 701 (IC)

South Africa Airways (Pty) Ltd v V 2014 35 ILJ 2774 (LAC)

Legislation

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Labour Relations Act 66 of 1995

Labour Relations Amendment Bill, 2000

Labour Relations Amendment Act 6 of 2014

Skills Development Act 97 of 1998

Internet sources

COSATU 1997 <http://www.cosatu.org.za>

COSATU 1997 *The Report of the September Commission on the Future of the Unions to the Congress of South African Trade Unions*
<http://www.cosatu.org.za/docs/reports/1997/sept-ch6.htm> accessed 10 March 2015

LIST OF ABBREVIATIONS

CCMA	Commission for Conciliation Mediation and Arbitration
CLL	Contemporary Labour Law
COSATU	Congress of South African Trade Unions
EEA	Employment Equity Act
Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILJ	Industrial Law Journal
JBL	Juta's Business Law

LDD	Law Democracy and Development
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
SA J Bus Man	South African Journal of Business Management
SALJ	South African Law Journal
SDA	Skills Development Act
Stell LR	Stellenbosch Law Review
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IN SEARCH OF ALTERNATIVES OR ENHANCEMENTS TO COLLECTIVE BARGAINING IN SOUTH AFRICA: ARE WORKPLACE FORUMS A VIABLE OPTION?

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SUMMARY

Collective bargaining (coupled with the right to strike) has become a primary means to force employers through negotiation to achieve the improvement of standards and conditions of employment. The South African labour market has been plagued by unprotected strikes as well as violent and lawless behaviour during both protected and unprotected strikes. Some have said that the collective bargaining process is in trouble and has failed the objectives intended by the *Labour Relations Act*. The fact that collective bargaining in South Africa and elsewhere is quite adversarial puts these criticisms into the spotlight again. Calls to explore a participatory structure, where distributive and non-distributive issues are separated from each other, supplementary to collective bargaining have been made again. What immediately comes to mind is the system of workplace forums, which has been unsuccessful in South Africa thus far.

KEYWORDS: collective bargaining; workplace forums; co-determination; trade unions; adversarialism; consultation; information; decision-making; joint decision-making; conditions of employment; distributive issues; non-distributive issues

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