

# Small enterprises, the Labour Relations Act and collective bargaining in South Africa

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## 1 INTRODUCTION

One intention of the Labour Relations Act 66 of 1995 (LRA) is to promote the participation of small enterprises in the collective bargaining system in South Africa. This article sets out to explore the extent to which it can succeed in this aim. It examines, firstly, the nature and role of small enterprises and argues that the significance of small enterprises in the economy and employment creation has been exaggerated. Secondly, it identifies the sections in the LRA pertaining to collective bargaining and small enterprises and contests the claim that the latter are adequately accommodated by the legislation.

These arguments are preceded by a look at the historical background to the LRA and are followed by a discussion of the major issues of dispute likely to beset collective bargaining under the new legislation.

## 2 THE CONTEXT

### 2.1 International trends

In one respect the LRA was caught in a time-warp, largely due to its narrow national focus (in spite of reliance on foreign advice and reference to overseas legal practice). The world of the 1980s was undergoing deep structural transformations, being shaped by international forces of such magnitude that no single (industrial) country could escape their fall-out. South Africa's re-integration into the world market could only but place even greater pressure on South Africa to conform to international trends. With globalisation, individual countries were drawn more dramatically into the imperatives of the world market. One result, over the last three decades, has been the sharp decline in the power of governments to shape independent national policies. Among other changes, there has been a dramatic increase in capital movements (undermining, among other things, exchange rate policies), a rapidly changing technology, product market differentiation on a new scale, deep social and cultural changes (postmodernism) and in many countries, huge labour migrations.

These massive changes naturally affected not only the power of governments of national states but also the trade union movements bounded

by those states. This was primarily expressed in terms of declining union power and membership and, where industrial relations were concerned, a move away from centralised bargaining. Unions were unable to contain the fundamental shifts that were taking place. Some proved themselves, though, better able to deal with the new situation. Those union federations which recognised the fundamental and qualitative changes in progress were better able to cope with them. They adapted their strategies rapidly to deal with the changes and directly participated in the restructuring of production which was reflected in union membership. German trade unions, for example, took this approach and, in marked contrast to Britain and Holland, membership of German unions did not decline noticeably during the 1980s (Visser 1994: 82).

In my view, South African unions did not show the prescience of the German unions, in spite of the fact that South Africans in the early 1990s were better placed to see the changes coming. Instead, they chose to shore up the system of centralised bargaining in the face of strong countervailing pressures. The LRA, then, was drawn up paying little attention to the drama taking place on the world stage of which South Africa was, of course, very much a part.

## 2.2 Politics and struggle in South Africa: explaining the LRA

It is not particularly controversial to argue that the LRA does not address the needs of small enterprises (representatives of small enterprises certainly have this perception). There are a number of reasons for this which relate to the power of small enterprises effectively to represent their own interests. I want to argue, though, that there were particular historical circumstances which ensured that the interests of small enterprises were not taken more seriously, at least at the level of labour legislation. The political climate at the time the new LRA was drawn up precluded a more sympathetic consideration of their specific requirements. This, in spite of the fact that other agencies of government<sup>1</sup> recognised the economic importance of small enterprises and their perceived potential role in creating entrepreneurial opportunities for blacks and serving to reduce unemployment. How do we explain this?

The historical circumstances of the LRA's gestation gave its birth a significance far greater than one normally associated with legislative changes. The timing of its construction was not only of legal and social importance but also of political and symbolic significance. As is well recorded, the labour movement played a key role in the ending of apartheid. In a sense, the LRA can be seen as the culmination of an historic labour struggle and a reward for the labour movement's political role in ending apartheid. The LRA reflects these sentiments rather than the post-apartheid reality, which only slowly came to be recognised, as election promises encountered insuperable barriers regarding their implementation.

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<sup>1</sup> Eg, the Department of Trade and Industry investigated ways of promoting small business in South Africa which resulted in the National Small Business Act 102 of 1996.

In large part, this can be explained in terms of the vectors of political power, both leading to and during the time of the LRA's formulation, which shaped it. The LRA resulted from negotiations between large employers and organised labour (at a time of its considerable political influence) and this shaped the character of the legislation, such that it excluded the voices of other interested parties. It is true that certain details of the legislation seem to run counter to my general characterisation. However, by focusing on the bigger picture, we will be better able to understand the assumptions behind the legislation, and why, at a fundamental level, it failed to address the interests of certain parties, in this case small and medium enterprises, notwithstanding certain assertions in the Explanatory Memorandum of the Draft Labour Relations Bill as published by the Ministry of Labour (henceforward, the Draft Bill 1995: 116-7).

The Congress of South African Trade Unions (COSATU), the pre-eminent trade union federation, was committed, broadly speaking, to two positions: that the legislation be comprehensive in its coverage and that it be informed by the principle of centralised bargaining. First, unions wished to ensure that the scope of the legislation encompassed workers previously excluded from the provisions of the old Act, in particular, farm workers and domestic labour. Second, as the Explanatory Memorandum states, "(t)he Bill promotes . . . bargaining at a central or industry level" (Draft Bill 1995: 122) and it was through bargaining councils that this would be achieved. Where references are made to small and medium enterprises, they have less to do with taking serious account of their specific needs but, rather, are concerned to attract them into collective bargaining forums, based on the principle of centralised bargaining.

Little thought was given either to the specific needs of different regions and sectors of the economy or the extent to which the LRA could be effectively implemented. For example, simply extending the scope of the legislation to farm workers and domestic workers cannot ensure that their bargaining capacity is improved or that their unionisation would be made any easier. But the unions' position was consistent with their view that all workers must necessarily enjoy the same rights within a common framework. Although the Act, in its final form, did not meet all the union demands (Du Toit *et al* 1996: 29-32), it could nonetheless be judged as reflecting a shift in the balance of power between trade unions and employers in favour of the former.<sup>2</sup>

The original political negotiations mirrored this, as the ANC pressed hard its view of a centralised and unified state. But the ANC was forced to take account of the realities of regional power and made some concessions

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2 Two main types of objection are advanced by left wing unionists and critics. One employs a functionalist mode of analysis and asserts that the legislation simply serves to reproduce the capitalist system based on the exploitation of labour. A second argues that certain details of the LRA, such as the commitment to workplace forums, are likely to weaken rather than strengthen trade union power. The first position is inherently ideological and cannot be rebutted by recourse to argument. The second is open to debate but, in my view, it tends to focus on detail rather than the changed balance of power which the legislation reflects.

in this regard, even before the new state emerged (further changes, particularly in economic policy, came later). The unions, on the other hand, were not faced with opposition from a range of vested interests and merely had to deal with one powerful lobby, that is representatives of large employers, who could live with the legislation's broad sweep. The union movement did not have to take serious account of farmers or small enterprises and, in spite of good intentions, could not apply its mind methodically to the problems of the unemployed (which, of course, a government is forced to do). But, this did not mean that the reality of these problems could be wished away. The LRA was thus, from its inception, driven by organised labour and big industrial interests (see Du Toit *et al* 1996: 27) and was not obliged fully to account for those sectors of the economy, including the unemployed, which lay outside these two areas.

However, in post-apartheid South Africa the labour movement, as with the ANC, has been forced to redefine its role. As the ANC soon discovered, for example, there is a chasm between an oppositional role, with a clearly identifiable enemy (but ill-defined policies), and the responsibilities of a party in power, which must be to lead and to govern, with all the constraints faced by such responsibilities. Similarly, the labour movement came to find itself in a much more ambiguous situation once its primary political goal had been attained and its political influence had begun to ebb. Its relation to the state (and its political allies) and employers had to change. They were forced to recognise, notwithstanding the influential role of former unionists in government, that the government could not pursue the unions' corporate interests. Also, employers could no longer simply be portrayed as part of the apartheid problem. In addition, macro-economic issues were no longer the sole concern of a discredited government but ones which the unions had to take more seriously.

### 2.3 From RDP to GEAR

The end of apartheid has resulted in a discursive shift from the language of opposition to one of construction. In economic policy, the focus shifted from redistribution and development to growth and this has transformed the rhetoric of economic discourse. The emphasis in government policy has shifted from the Reconstruction and Development Programme (RDP) to a macro-economic policy, Growth, Employment and Redistribution (GEAR). The concern with social services (housing, education, health) has lost ground to the needs of economic growth, currency stability and low inflation (as a necessary condition for postponed RDP programmes). The promised fruits of victory have given way to talk of budget-cutting and productivity. It was soon recognised that the RDP was not a short-term panacea. According to Wohlmuth, "a ten year time-frame (had been) a bit too optimistic" (1996: 19). The shift in the government's priorities has not gone unnoticed by critics within the ANC. It has been reported that senior ANC cadres believe "that government has sold out on the Reconstruction and Development Programme . . . with most departments judged to have fouled up what was once the central component of the ANC's manifesto" (Edmunds and Rossouw 1997: 5).

There is ambivalence in the LRA's position on the question of its function in promoting an environment conducive to economic growth. "It seeks to balance the demands of international competition and the protection of the fundamental rights of workers" (Draft Bill 1995: 116), but it is not made clear how these possibly opposing aims might be reconciled. More importantly, it aims "to give effect to the stated goals and principles of the RDP endorsed by the government" (*ibid*). This too is unclear. It could be interpreted as giving due attention to the unemployed who are clearly seen to be one of the potential beneficiaries of RDP. But the Act is not intended to deal with the unemployed. The comment thus appears as vague except to suggest an ideological commitment to a range of policies associated with such rhetoric, particularly regarding a more prominent role for trade unions in both production and politics. The LRA appears, then, as an expression of sentiments since superseded by events. However, it is not inconceivable that bargaining councils could assume a more flexible character than intended in facing up to GEAR and the problems of small enterprises and unemployment.

### 3 SMALL ENTERPRISES

Small and medium enterprises comprise the majority of firms in most industrialised countries and have done so for a long time, but it is only comparatively recently that they have been accorded the attention their numbers deserve. In fact, they have come to be seen as a key component of any modern economy although this was not always the case.

#### 3.1 The small enterprise as icon

Before the 1970s, it was generally accepted that the engine of economic growth was to be found in increasingly large corporations with all the benefits attributed to them, such as economies of scale. According to Lane, the number of small enterprises in any country was regarded as directly proportional to the country's economic backwardness and, "until the 1970s, both academic and general social interest in them was scant" (Lane 1995: 101).

What gave rise to a change in this perception was the general economic crisis caused by the 1973 oil price rise and the subsequent recession in the industrialised countries. During the recession, there was a growth in small enterprises relative to large ones (partly due to the unemployed setting up their own businesses), which focused attention on their contribution to the economy and their future potential. At the same time, the rise to power of the political right, best represented by the shopkeeper's daughter, Britain's Margaret Thatcher, provided small enterprises with ideological endorsement. Small enterprises came to symbolise individualism and entrepreneurialism and owners of such companies were considered "culture heroes" (Lane 1995: 101).

When we come to examine their importance, it is therefore essential that we bear in mind how such perceptions shape our evaluation of small enterprises. It is clear that, in South Africa, protagonists of small enterprises

are inclined to allow their analyses to be clouded by certain preconceptions as to their imagined benefits.

### 3.2 What is a small enterprise?

From a policy point of view, if small enterprises are to be targeted for special treatment, it is important to agree on what they are and which among them are likely to succeed from such support. In most instances, the main criterion for distinguishing the category of enterprise is employee numbers. There is unfortunately no agreement as to what constitutes a small firm (see Table 1) either in the international literature or material available in South Africa. For example, the government of the UK alone uses at least 40 different definitions (Storey *et al* 1987: 8 fn 1).

**Table 1** Definition of small enterprise (no of employees and assets and turnover)

	Micro	Small	Medium
SBDC		< 200 assets < R2m	
VOSLOO		< 100	100-500
NMC		< 50 turnover < R1 m	
SUNNYSIDE GROUP		< 21 assets < R100000 turnover < R¼ m	
MTI	< 5	5-100	101-200 assets ≤ R10m
EC	< 10	10-99	100-499

SBDC Small Business Development Corporation

NMC National Manpower Commission

MTI Ministry of Trade and Industry

EC European Commission

Likewise in South Africa, there is no one definition of a small business as is clear from Table 1. Classification can be broken down further according to country context<sup>3</sup> and by different sectors within industry. Other distinctions also need to be made, most importantly between independent small enterprises and those tied to larger companies either directly through share-holdings or through contractual obligations or as dependants on specific large companies.

3 Storey (1995: 14) notes that the European distinctions between SMEs and large enterprises are inappropriate for Greece, Ireland, Spain and Portugal which have relatively few large companies. This suggests that definitions need to be tailored to circumstances.

### 3.3 The significance and performance of small enterprises

As has already been suggested, the importance of small enterprises in economies might have been overstated and the evidence from both Europe and South Africa supports this. Research in Europe is more extensive than it is in South Africa and it is helpful to consider some of the overseas findings before referring to South Africa.

In some economies, it is true, small and medium enterprises make an important contribution to economic development and hold their own with the larger corporations. Japan and Italy (as well as some others such as Hong Kong and Taiwan), which boast technologically sophisticated small firms, are good examples of this (Weiss 1988: 4) but, in most countries in Europe, the evidence suggests that there has been a relative decline in small enterprises both in numbers and importance (Weiss 1988: 16), although Britain is an important exception (Storey 1995: 8).

Those small firms that do make any serious contribution to economic growth comprise only a fraction of the total. According to Storey *et al*, "only a few individuals have either the ability or the desire to be the engine of economic recovery" (Storey *et al* 1987: 326). In another context, Redding notes that in South Korea (where large corporations dominate the economy), "the survivors tend to have expanded rapidly, and it is on their shoulders that the economy rests, rather than on the large number of newcomers churning around at the bottom" (Redding 1988: 10).

Contrary to what some observers believe, the importance of small enterprises in job creation is not particularly impressive (Rainnie 1989: 2; Storey *et al* 1987: 325; Lane 1995: 111) and, even then, it is only a very few which make a contribution to it (Storey *et al* 1987: 325). According to Lane (1995: 111), for Britain, Germany and France, the "annual contribution to employment creation (by small firms) is very modest indeed".

Among other problems, there is a high failure rate among small enterprises, considerably higher than for larger ones (Storey *et al* 1987: 3). Mortality occurs most dramatically in the first few years and evidence from Britain suggests that, of the firms that fail in the first ten years, 50% fail within two and a half years, 33% in the next two and a half years and the rest in the following five years (Storey *et al* 1987: 11).

### 3.4 Small enterprises in South Africa

There is general consensus in South Africa that small and medium enterprises play an important economic role and can make a positive contribution to growth (Ministry of Trade and Industry 1994; NMC 1991; NMC Annual Report; Vosloo 1994). They currently employ a sizable proportion of the labour force (depending on how one estimates this) and make a not inconsiderable contribution to the GDP. It is further contended that small and medium enterprises can serve to reduce unemployment and also help meet the aims of the Reconstruction and Development Programme.

Vosloo (former Managing Director of the Small Business Development Corporation (SBDC)) argues that the advantages of small enterprises are numerous: they use less capital per worker, promote local development,

provide important links for medium and large businesses, are more innovative, grow faster than older firms, create jobs at a faster rate, have higher growth rates, act as vehicles for entrepreneurial talent, serve specialised markets not catered for by large companies and contribute to political stability (Vosloo 1994: 166-68).<sup>4</sup> Further, relatively low amounts of capital are required for SEs and they are easier to establish in rural and small urban areas (NMC 1991: 8).

Where RDP objectives are concerned, the National Manpower Commission (since superseded by the National Economic Development and Labour Council (NEDLAC)) (NMC 1991: 9-10) emphasised the potential of small enterprises to redistribute opportunities, realise black aspirations, play a socialising role, help in the provision of housing and promote entrepreneurship. It is generally accepted in the South African literature that small firms can achieve these aims and therefore need to be encouraged.

While small enterprises are generally viewed positively, it is recognised that SEs face certain difficulties which do not apply to larger companies. Among others are the inability to raise capital and the high cost of it, the lack of purchasing power, shortage of entrepreneurial and managerial skills, low administrative capability and the inability to offer professional services (NMC 1991: 10). In addition to these problems, owners of small enterprises argue that they are severely constrained by regulations which govern their operations. Some even insist that the requirements and restrictions they face are so severe as to threaten their companies' existence.<sup>5</sup>

It is commonly believed that SEs have negative attitudes towards legislative restrictions which apply to their organisation and activities. They are therefore hostile to the institutions which seek to impose conditions on their operations. There "is an antagonistic attitude *vis-à-vis* industrial councils, trade unions, the Department of Labour and other authorities" (MTI 1994: 26). Any proposals intended to promote SEs must therefore take seriously into account both the general lack of resources of all kinds and the restraints which they claim threaten their success.

Numerically, by all accounts, the percentage of small businesses in South Africa is impressive although once again there are differences as to their significance. In its 1990 Annual Report, the SBDC claimed that there were a total of 1,4m businesses in South Africa, the informal sector accounting for 70% (NMC 1991: 7-8). For 1991, Vosloo estimated that there were 3 310 730 business entities, the informal sector comprising 75,5% (Vosloo 1994: 169). According to the SBDC, 85% of informal and formal businesses could be regarded as small (NMC 1991: 8) based on their

4 The MTI (1994: 9) makes the same point, that SEs provide "less scope for polarisation" than bigger firms and hence contribute to labour peace.

5 Eg. Nina Kruger writes in a letter to the *Sunday Times*, November 27 1994, *Business Times* ("Labour laws threaten our business"), that her business will be forced to close should the union and the industrial council insist on their conditions being met.



criterion of small. It needs to be noted that the informal sector is the major constituent of small enterprises (mostly micro-enterprises).

The contribution of small enterprises to the economy and employment depends on how wide the definition small enterprise is, particularly where employment is concerned. While all figures need to be treated with caution, as "the statistical base . . . is still very poor . . ." (MTI 1994: 8), they are useful as orders of magnitude. *Beeld* (NMC Annual Report: 41) reports that SMEs contribute 29% to the GDP, an estimate in line with the SBDC's range of 25%-35% for small enterprises (NMC 1991: 8). According to the SBDC, small enterprises account for 38% of employment opportunities and are responsible for an estimated 75% of new jobs (NMC 1991: 8). Here, small includes the formal and informal sectors.

If one includes the informal sector (most of which should be classified under micro-enterprises), then the contribution of small enterprises to employment is almost certainly significant but if one distinguishes between the formal and informal sectors (see Table 2), the picture looks very different. Using Vosloo's figures, small and medium enterprises in the formal sector (up to 500 employees) account for 20,9% of total employment compared with large businesses (approximately 0,00023% of all firms) which employ 31,3% of the labour force. The informal sector accounts for 30,4% of employment. Excluding the informal sector, small and medium enterprises (up to 500 employees) make up 97,5% of businesses and account for 30% of employment. Large businesses then account for 45% of employment, the rest being employed by the state (Vosloo 1994: 169-70).

In terms of employment, large businesses remain very important and account for approximately the same number of employed people as the informal sector (it is the informal sector, then, that assumes considerably more importance than formal small enterprises where employment is concerned). If one excluded medium-sized enterprises as defined by Vosloo (100-500 employees), the contribution of small enterprises to employment in the formal sector is unlikely to be impressive. If one uses the criteria for small enterprises as provided by the respondents in the Industrial Council Research Project survey (average less than 15 employees) (Du Toit *et al.*, 1995) or that of the Sunnyside group (up to 20 employees), the significance of small enterprises in the formal sector declines further.

Finally, assuming the figures arrived at by Vosloo and the SBDC are accurate and comparable, it appears that employment in small enterprises in the formal sector (including micro-enterprises) is very small indeed (Table 2). Discounting the differences in their definitions of small enterprises (Vosloo <100 and the SBDC <200) we come to the surprising result that formal sector small enterprises account for less than 8% of total employment! Taking the formal sector alone, small enterprises would account for 10,9% of employment. If this is the case, arguments in favour of small enterprises in the formal sector that rely on their current contribution to employment, rather than their estimated potential, are called seriously into question.

**Table 2 Employees (%) by sector and size**

	Formal & Informal	Formal only
Small	7,6	10,9
Medium	13,3	19,1
Large	31,3	45
State	17,4	25
Informal	30,4	

Sources: Vosloo 1994; SBDC (NMC 1991)

Other research confirms that small enterprises make a limited contribution to the South African economy and, in addition, suggests that there is no likelihood of this changing in the short term. In work undertaken for the World Bank, Levy found that, taking manufacturing employment alone, small enterprises (10-99 employees) account for about 20% of the total for manufacturing, which is below "international norms" (Levy, 1996: 1). He is pessimistic about their ability to make any greater contribution to the economy or make a difference to employment – their "potential impact in the immediate future (is limited)" (Levy 1996: 2). This is compounded by the apartheid government's deliberate denial of educational opportunities for the majority of the population, as education is found to be a key in successful small ventures. Evidence around the world indicates that "most successful SMEs generally are run by highly educated and experienced entrepreneurs" (*ibid*). His findings lead him to conclude that "South Africa's policymakers" will have to rely on larger companies "as key movers towards an efficient, outward-oriented and labor-demanding path of industrial development" (*ibid*: 3).

## 4 THE LABOUR RELATIONS ACT

### 4.1 Collective bargaining and small enterprises

Collective bargaining is not only shaped by legislation but is informed by a variety of other factors, in particular the relative power of the antagonists, the structure of the economy and organisation of industry. One notable factor that is evident in Europe is the change in collective bargaining that is being driven by a sectoral and organisational change in the structure of the economy towards the service sector and flexible organisation of production in manufacturing. There seem to be links between these changes and the shift in the nature of bargaining, most notably, towards greater decentralisation (Ferner and Hyman 1993a: xx). There is every reason to believe that industry in South Africa is moving in the same direction and in this respect the LRA represents legislation driven by ideas of a former era, paying little attention to these structural transformations.

When it comes to small enterprises in Europe, unions are poorly represented and the law alone is not sufficient to ensure compliance with its provisions. Small enterprises escape the regulatory net, even where the

institutional power of trade unions and employers' organisations is relatively strong and legislatively guaranteed (Ferner and Hyman 1993b: 529; Rainnie 1989: 6; Weiss 1993: 109). Even in a highly regulated country such as Germany, statutory obligations to establish works councils in firms with five or more employees are ignored by most small enterprises (Weiss 1993:109). To what extent, then, can one hope that the LRA will succeed where more established systems have failed?

## 4.2 South Africa

A likely consequence of any law that does not accord with reality is that adherence to it will be diminished and might well bring the legislation into disrepute. The apartheid era is an excellent example of how the law failed to express the then current situation and was forced to adapt to changed realities. In fact, the present LRA has emerged from the conflict between capital, labour and the state and to this extent can be seen as more practical compared to the formerly more ideological legislation and *ad hoc* amendments to it.

It is quite likely that industry, in this case small enterprise, will simply disregard the legislation if its provisions are too onerous and I would guess that neither the state nor the unions would be able to do much about it, as European examples suggest. This obviously has serious implications for bargaining councils as well as trade unions.

The legislation is lacking in specifics when it comes to small enterprises. It does not offer them something concrete but neither is there any dramatic new promise or threat in the legislation. While there are changes of emphasis, for the most part the status *quo ante* seems to be the case.

## 4.3 The Labour Relations Act: provisions for small enterprises

Although the LRA was passed by parliament on 13 September 1995, it only came into effect on Armistice Day (unintentionally, I suspect, but perhaps propitiously) the following year, 11 November 1996.

One of the professed aims of the LRA is to make provision for small and medium enterprises in South Africa's collective bargaining framework. It is implicitly recognised that small and medium enterprises require a special dispensation to cater for their particular circumstances. But does the LRA succeed in giving small and medium enterprises noticeably more rights than was previously the case? Does it adequately take account of the problems of the labour market, the issue of centralised bargaining and the dispute over the latter between capital and labour?

The LRA does not define a small enterprise, leaving this to individual bargaining councils.<sup>6</sup> The legislation impacts on small enterprises in three main ways.

6 Du Toit *et al* 1996: 35 fn 159 suggest that there is an advantage in leaving this to each bargaining council to determine as their needs require.

One, they are exempted from establishing workplace forums which are intended for firms with 100 or more employees in cases where the majority unions instigate them. Although this has been presented as part of the accommodation of small business (Draft Bill 1995: 117), it is almost certainly due to the impracticality of setting up forums in small enterprises.<sup>7</sup> However, it is one of the few examples which does not fit the general tenor of the LRA in terms of comprehensive coverage.

Secondly, the provisions for bargaining councils are intended to cover small enterprises, making some gestural concessions to their needs. In particular, the legislation refers to:

- adequate representation
- extensions of agreements
- exemptions for non-parties (see *infra*).

Thirdly, where a bargaining council does not exist for a sector, the LRA provides for statutory councils to be established by the Registrar, subject to satisfying him/herself that the applicants (employers' associations or trade unions) are representative, whether or not there is any agreement between the parties. The powers of statutory councils are not as extensive as bargaining councils and exclude collective bargaining unless the parties come to agree to it (Du Toit *et al* 1996: 145-149). However, they serve to extend regulation to recalcitrant parties, which would include small enterprises, on a sectoral level. They also serve the purpose of compelling parties to act together in, for example, dispute resolution which could lead to collective bargaining arrangements and subsequently the establishment of bargaining councils. The provision on statutory councils is, then, consistent with extending coverage and is intended "to partly accommodate COSATU's demand for greater compulsion towards centralised bargaining" (*ibid*: 145).

#### 4.4 Bargaining councils

Bargaining councils are the statutory forums governing collective bargaining in South Africa and it is through them that the LRA proposes to regulate small and medium enterprises. They, therefore, serve as a departure point for a discussion of centralised bargaining and small enterprises. However, one could argue that their importance is as much symbolic as real, considering that at present bargaining council agreements cover only a small proportion of the economically active population in South Africa. In 1993, out of an economically active population in excess of 14 million, it was estimated that council agreements (including extensions) only covered about 850 000 (Du Toit *et al* 1995: 90).

In the most important bargaining councils, large employer interests tend to be better represented than those of small firms but this does not

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7 Germany's Manfred Weiss was part of the legal task team which drafted the new legislation and one suspects that he influenced the deliberations with regard to workplace forums. The failure of works councils in small enterprises in Germany (Weiss 1993: 109) probably led to the recommendation of a cut-off point of 100 employees.

apply to all councils. The issue of small enterprise representation on bargaining councils is not in all cases a serious matter of concern. In certain sectors, virtually all the firms are small (and medium) and here they would be effectively represented in bargaining councils. For example, the majority of firms in hairdressing and the electrical trade are small (Du Toit *et al* 1995: 49). But a significant proportion of sectors are dominated by large companies and it is these bargaining councils with which we are mainly concerned.

Three sections of the Act affect small enterprises directly. In the first place, bearing in mind the stated preference for centralised bargaining, the Act aims to encourage small enterprise participation in bargaining councils.

- Section 30(1)(b) requires that a bargaining council constitution provides for adequate representation of small and medium enterprises and the registrar must satisfy himself or herself of such provision before registering a bargaining council (s 29(1)(b)(iii)).
- The legislation allows for the extension of bargaining council agreements to non-parties within the scope of the council (s 32(1) and (2)) if certain conditions are met (relating mainly to representivity of party employers and trade unions in the sector) (s 32(3) and (4)).
- An important change from the current legislation is that it is no longer at the Minister's discretion whether to extend the agreement or not, although the Minister has to be satisfied as to the representivity of the parties to the agreement.
- The decision on exemptions for non-parties is no longer to be decided by the council.
- The collective agreement must provide for an independent body to consider exemptions for non-parties and must set out the criteria which must be applied in considering exemptions (s 32(3)(e) and (f)).

The establishment of this body is a precondition for the extension of agreements. But its terms of reference were weakened between the negotiating document (Draft Bill s 35(3)(d)) and the final Act (s 32(3)(e)) in response to union demands. The Draft Bill proposed that the body should take into account "undue hardship" when considering exemptions but this was subsequently omitted from the LRA (Nattrass and Seekings 1997: 45).

The intention of the legislation is ostensibly to incorporate small enterprises into the bargaining council system by ensuring representation. However, it is not clear that these proposals are likely to achieve their intended purpose.

The proposals regarding adequate representation are obviously aimed at encouraging small (and medium) enterprises to become parties to councils in order to ensure that their interests be catered for. However, there is no stipulation of the criteria for adequate representation and no suggestion about how adequate representation might be translated into effective agreements, particularly where small enterprise is likely to constitute a minority as in most bargaining councils.

The section dealing with the extension of agreements leaves the decision in the hands of the parties to the agreement, albeit with SME

“representation”, but which, in practice, would likely mean the exclusion of smaller registered firms from decisions in this matter. More seriously, the firms to be covered by extensions would have no (representational) say in the matter, except by invitation. In other words, there is no mechanism to ensure that bargaining councils take proper account of the needs of non-parties.

The provision for an independent body to consider exemptions is likely to have an unintended consequence in regard to one of the aims of the LRA, that is, drawing small firms into the statutory bargaining forums. Although adequate representation and extensions might act as incentives to participate in bargaining councils, the exemption provision could have the effect of discouraging small enterprises from becoming parties to the council. Why submit to council discipline when one's interests might be better served by appeal to an independent body? It appears that the proposed legislation allows for a duplication of exemption procedures. There is no stipulation in the legislation that small enterprises within the system (ie those that belong to employers' associations party to the council) will have recourse to independent bodies for exemption consideration. Presumably, this would be at the discretion of the parties to the council. It is conceivable, then, that bargaining councils or their sub-committees, would attend to applications from party members and the independent bodies to those of non-parties. It is not certain whether the same criteria would apply in both cases. Small enterprises would likely see their interests better served by an independent body and thus decide against representation on councils where the option might not be accorded them.

In my view, there is no reason to believe that the new proposals are likely to improve small enterprise representation over that which existed in the former industrial councils. The only way this could be achieved is through the requirement that all employers be represented in bargaining councils, which was COSATU's preferred option (unpublished report on the Draft Bill 1995) but opposed by employers. COSATU favours centralised bargaining, to be achieved through all party representation on bargaining councils. Although the thrust of the LRA favours centralised bargaining, it falls short of compelling it, which allows for continued differences over the extent of its implementation.

#### **4.5 LRA: an impediment to small enterprises?**

There are loud voices of opposition to the provisions of the LRA from small enterprises. There is a common perception, because it is widely aired, that it is perhaps the crucial difficulty facing small enterprises. Yet, one needs to ask how the LRA rates as a barrier to entry into the market for small enterprises compared to other impediments. Levy's research, undertaken in 1993, found that “regulatory and industrial relations constraints emerge . . . as moderate-to-low constraints” (Levy 1996: 14), which include trade unions and industrial councils (as they were called at the time). Within this category, 61% of the respondents identified trade unions as the most problematical external agency and 29%, industrial

councils (*ibid*). While Levy (1996: 28) argues for greater “labor market flexibility”, his general conclusions suggest that interventions in favour of small enterprises are unlikely to improve their performance dramatically in the near future (Levy 1996: 25).

## 5 THE FUTURE

Many of the disputes that informed the discussions leading to the LRA will not disappear with its promulgation. We need to revisit the main issues which are likely to persist in the future and the extent to which there is sufficient flexibility in the legislation to accommodate differences.

### 5.1 Centralised bargaining

One of the main disputes between representatives of capital and COSATU which persists is over centralised bargaining and their historic differences as to its merits remain pertinent. COSATU prefers the full incorporation of small enterprises into bargaining councils. Certain spokespersons for capital believe that bargaining councils are inflexible and hence unable to fulfil their promise to small enterprises. Anglo-American Corporation’s Michael Spicer argues that “the track record (of centralised bargaining and industrial councils) is of inflexibility and the destruction of jobs” (SALB 1994: 29).

The International Monetary Fund also opposes strict centralised bargaining and extensions. In the Fund’s opinion, “greater importance should be accorded to regional disparities in the cost of living in nationally negotiated wage agreements, and the statutory extension of such agreements to firms (especially small firms) not party to them should be curtailed” (*Sunday Times, Business Times* 9 April 1995).

The unions reject these views and argue that centralised bargaining can accommodate the needs of small enterprises. Von Holdt (*Business Report, Cape Times*, 20 June 1995) insists, contrary to the views of Michael Spicer, that flexible arrangements can be made in bargaining councils and as an example refers to the agreements in the clothing sector (see also Baskin 1994). He believes that the legislation would help ensure such compromises are met. The substance of the argument seems to be less about flexibility and more about where it will be controlled and exercised, inside or outside bargaining councils.

In spite of their differences, there is some evidence of flexibility in the relationship between capital and labour. In addition to compromises in the clothing sector, there is movement over issues of wages. On the question of wage levels, even though there is sharp disagreement within the union movement, there is serious debate about an incomes policy tied to an increased social wage (Von Holdt 1994; Coleman 1994). Further, public works projects (particularly in non-urban areas) are paying task related daily wages below union rates with the agreement of the unions. These initiatives point to some willingness on the part of capital, labour and the state to work together in constructing solutions to the problems facing the South African economy.

## 5.2 The labour market

Two of the intractable problems regarding labour in South Africa are the high rate of unemployment and the extent of economic activity confined to the informal sector. Hence, the labour market is such as to make the establishment of centralised bargaining particularly difficult. These factors, together with the need to encourage black entrepreneurship, place severe constraints on the establishment and maintenance of uniform standards across sectors. In the light of this, centralised bargaining must of necessity be limited in its application, and, similarly, the role of bargaining councils.

However laudable their aims, unions cannot hope to universalise labour regulation in South Africa and I believe that attempts to achieve this will diminish their effectiveness where they are better able to exercise their power. Examples elsewhere in more conducive situations suggest that at best unions can hope to cover no more than 70% of the labour force (I take this figure from Holland, where, in spite of a low union density, the statutory strength of trade unions is considerable and extension of agreements very effective (Du Toit *et al* 1995: 74)). The nature of the labour market in South Africa (with a large percentage of its labour force in the informal sector and high unemployment) is much less homogeneous than in Europe and hence that much more difficult to cover legislatively. The segmented labour market is a harsh reality in South Africa and no legislation or even strong unions can wish it away or hope to include disparate sectors within a single regulatory net.

There is, of course, recognition from individuals sympathetic to the labour movement that there are deep divisions in the South African labour market. Dave Lewis, the co-chairperson of the Labour Market Commission, acknowledged that a central problem for the Commission was how to "set wages in the primary market so that it doesn't permanently close itself off from the secondary markets". His approach seemed to be one of incorporation and flexibility. In his opinion, there was a need to widen "the regulatory net in order to relax it and relaxing it in order to widen it" (interview with Lewis). But it is questionable whether bargaining councils could accommodate the degree of flexibility that this suggests.

It is indeed important that labour standards be ensured (which need not necessarily include wages) and the labour movement has a crucial role to play in this regard. But this cannot be achieved by assuming that structurally, industry is homogeneous, or that there is an undifferentiated labour force.

So, in considering small industry, due regard has to be given to their particular problems which by all accounts are very different from those of large companies. Any demands for a special dispensation requires careful examination of claims regarding small enterprise contribution to economic growth and job creation. Whether the problems of small enterprises can be solved through bargaining councils remains an open question.

## CONCLUSION

The uniform regulation of small enterprises in the face of massive unemployment, a non-homogenous society and a segmented labour market



cannot be achieved with any certainty. The importance of ensuring labour standards cannot be denied but they have to be maintained in the face of these constraints.

The extent to which certain small enterprises should be targeted for special treatment, either in terms of economic incentives or regulatory concessions, depends in part on their ability to demonstrate their contribution to the economy and employment creation. Why subsidise small enterprises or make concessions over labour regulations if they are unlikely to fulfil their promise?

Currently it appears that the informal sector employs more people than small enterprises. If Levy's pessimistic view of small enterprise potential is right, then, rather than pinning one's hopes on the growth of small enterprises, promotion of the informal sector might in the short term be more effective in alleviating poverty and creating employment.

The LRA is not where an examination of small enterprises can begin. Arguments for or against the incorporation of SEs into bargaining councils cannot be judged from within the system itself as there are major parties who do not believe that their interests can best be heard there.

The degree to which SEs will comply with regulations depends, among other things, on union presence at the plant level. The evidence suggests that unions are poorly represented at the lower end of small enterprises (up to 20 employees) (Levy 1996: 14) and it is in these that the legislation is less likely to have any effect. Further, the capacity of bargaining councils to police agreements is limited, which is confirmed by union dissatisfaction with industrial councils' inspectorates (Du Toit *et al* 1995: 38). This evidence might suggest that, rather than treating small enterprises as a single category, they should be dealt with according to their size.

Finally, in terms of its intentions and provisions, the LRA does not make any significant concessions to small enterprises, and bargaining councils are likely to act as impediments to them. In addition, there is a strong case to be made that it acts as a deterrent to entry into the market. As the law stands, any regulatory concessions will have to rely on the parties to bargaining councils, which will be dominated by big enterprises and trade unions. However, with trade unions showing some flexibility and with predictable pressure from black entrepreneurs, one can anticipate compromises being struck.

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