Employee participation in decision making in the mining sector

Research paper submitted in partial fulfilment of the requirements for the MPhil degree in the Faculty of Law of the University of the Western Cape.

By

Daliwonga Byron Lester
Student Number: 2836481

Prepared under the supervision of

Professor Kitty Malherbe
DECLARATION

I declare that Employee participation in decision making in the mining sector is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Daliwonga Byron Lester

Signature: ...........................................

Date: ..........................................

Supervisor: Professor Kitty Malherbe

Signature: ...........................................

Date: ...........................................
ACKNOWLEDGMENT

A heartfelt gratitude goes to the almighty God for being with me throughout my academic journey. To my Mother Nomathemba Cecilia Gcwabe for your support and unconditional love.

I am greatly indebted to my supervisor Professor Kitty Malherbe, for being patient with me while teaching me legal academic writing. I know there were times where she felt that my work was not progressing as I kept on repeating same mistakes. Thank you for your patience and criticism which was always accompanied by compliments when necessary. Thank you for sending me to conferences where I learned more about my topic and for referring me to relevant contacts such as Prof Weiss, and Prof Du Toit. Under your supervision I have grown and learned a lot.

I would have not been at this stage if it was not for Professor Israel Leeman who tirelessly read my drafts before submission to my supervisor. I am fully aware that reading my work has been time consuming but thank you for your teachings and positive feedback. Because of you my grammar is better than it was two years ago.

I would also like to thank Prof Manfred Weiss, for his contribution to this work. I feel very fortunate and privileged to have someone of his status contributing to my work, words cannot express how grateful I am.

To my UWC extended family Noluvwe Mhaleni, Sive Siko, Chantel Botes, Thabang Moshoeshoe, Sthembiso Xhasa, Bonani Mfeya, Carebee Bosman, Samantha Abselon, Amaan Phiri, Marx Moto, Teddy Totana, Cikizwa (Ciki) Mnyateli, Litha Malgas, Mveli Dyum and Ntombi Maphaphu. Thank you guys for your support, love and friendship, without you my journey at UWC would not have been a memorable
one. Last but not least Mr. Zipho Mlambo for being my Mentor and playing a big brother role.
DEDICATION

I would like to dedicate this work to my late Grandmother Rebecca Thozama Lester and my late father Daniel Mzwandile Lester. I am where I am because of your upbringing. Every time when I graduated I wished you were there with me to see how I have turned out. I know that you are always there in spirit and I promise to work harder and become better than I am today. May your souls rest in peace.
Key Words

- Collective bargaining
- Employer's organisations
- Employees participation
- Labour legislation
- Mine employees
- Mine owners
- Mining Sector
- Trade Unions
- Workplace Forum
# LIST OF ACRONYMS AND ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AMCU</td>
<td>Association of Mineworkers and Construction Union</td>
</tr>
<tr>
<td>ANC</td>
<td>African National Congress</td>
</tr>
<tr>
<td>ANCYL</td>
<td>African National Congress Youth League</td>
</tr>
<tr>
<td>BCEA</td>
<td>Basic Condition of Employment Act 75 of 1997</td>
</tr>
<tr>
<td>CCMA</td>
<td>Commission for Conciliation, Mediation and Arbitration</td>
</tr>
<tr>
<td>CMSA</td>
<td>Chamber of Mines South Africa</td>
</tr>
<tr>
<td>COSATU</td>
<td>Congress of South African Unions</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>LRA</td>
<td>Labour Relations Act 66 of 1995</td>
</tr>
<tr>
<td>MHSA</td>
<td>Mine Health and Safety Act 29 of 1996</td>
</tr>
<tr>
<td>NUM</td>
<td>National Union of Mineworkers</td>
</tr>
<tr>
<td>PMG</td>
<td>Platinum Group Metals</td>
</tr>
<tr>
<td>PTB</td>
<td>Pulmonary Tuberculosis</td>
</tr>
<tr>
<td>SAMRASS</td>
<td>South African Mines Reportable Accidents Statistical System</td>
</tr>
<tr>
<td>SAP</td>
<td>Structural Adjustment Programme</td>
</tr>
<tr>
<td>UASA</td>
<td>United Association of South Africa</td>
</tr>
</tbody>
</table>
# Table of Contents

Declaration ........................................... i  
Acknowledgments ...................................... ii  
Dedication .............................................. iv  
Key words ................................................. v  
List of abbreviations .................................. vi  

## CHAPTER 1

1.1 Introduction ....................................... 1  
1.2 Research question ................................... 5  
1.3 Objectives of the research ....................... 5  
1.4 Significance of the research ..................... 5  
1.5 Research methodology ................................ 6  
1.6 Structure of the research paper .................. 7  

## CHAPTER 2

The theories of employee participation in decision making 8  
2.1 Introduction ......................................... 8  
2.2 Common Law of Employment ..................... 8  
2.3 Constitution of South Africa .................... 9  
2.4 Labour Relations ................................... 11
2.5 Participation and Employee participation

2.5.1 Forms of participation

2.5.2 Objectives of participation

2.5.3 Advantages and Disadvantages of participation

2.6 Employee participation in South Africa

2.6.1 South African Labour Relations

2.6.2 The Labour Relations Act

2.6.3 Collective Bargaining

2.6.4 Workplace Forums

2.7 Chapter Conclusion

CHAPTER 3

Mine workers’ participation in decision making

3.1 Introduction

3.2 Challenges faced by mine workers

3.2.1 Health and Safety in the mines

3.2.2 Safety in mines

3.2.3 Health and illnesses on mines

3.2.4 Income levels

3.2.5 Living conditions

3.2.6 Legislation addressing challenges of mine workers

3.3 Employee participation

3.3.1 Statutory requirement for collective bargaining

3.3.2 Collective bargaining in the mining sector

3.3.2.1 Centralised collective bargaining
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.3.2.2 Decentralised collective bargaining</td>
<td>44</td>
</tr>
<tr>
<td>3.3.2.3 Decentralised collective bargaining in the mining sector</td>
<td>45</td>
</tr>
<tr>
<td>3.3.2.4 The effect of majoritarianism in the mining industry</td>
<td>46</td>
</tr>
<tr>
<td>3.3.2.5 Representation of constituency by Shop Stewards</td>
<td>48</td>
</tr>
<tr>
<td>3.3.2.6 Trade union rivalry</td>
<td>50</td>
</tr>
<tr>
<td>3.3.2.7 Economic implications</td>
<td>51</td>
</tr>
<tr>
<td>3.3.3 Workplace Forums</td>
<td>52</td>
</tr>
<tr>
<td>3.3.3.1 Statutory requirement for workplace forums</td>
<td>52</td>
</tr>
<tr>
<td>3.3.3.2 Workplace Forums in the mining sector</td>
<td>53</td>
</tr>
<tr>
<td>3.3.3.3 Problems with establishment of workplace forums</td>
<td>54</td>
</tr>
<tr>
<td>3.3.3.4 A greater role for workplace forums in the mining sector?</td>
<td>57</td>
</tr>
<tr>
<td>3.4 Chapter Conclusion</td>
<td>59</td>
</tr>
</tbody>
</table>

**CHAPTER 4**

Conclusion and Recommendations                                       61
4.1 Conclusion                                                        61
4.2 Recommendations                                                    62
Bibliography                                                           67
CHAPTER 1

1.1 Introduction

According to a Statistics South Africa report, South Africa is rated amongst the world’s and Africa’s most important mining countries. It has the world’s largest reserves of coal, Platinum Group Metals (PGM) and coal.\(^1\) South Africa’s rich endowment of minerals played a key role in the evolution of its economy as its mineral industry, based mainly on gold, coal, diamonds and PGM, has made a vital contribution to its economy.\(^2\)

Leon highlights South Africa’s mining domination both regionally and globally. He states that the South African mining industry contributes US$357bn towards the economy; its mining industry is the biggest in Africa and it has the world’s largest mineral reserves which are estimated at US$2.5tn.\(^3\) The mining sector accounts for roughly 5.3% of South Africa’s Gross Domestic Product (GDP) and also employs an estimated 500,000 employees directly and a further 500,000 indirectly. Its centrality to the South African economy is based on the fact that nearly 60% of the country’s export revenue comes from mining, minerals and secondary beneficiated products.\(^4\)

Despite the mining sector’s dominant position in Africa and in the world as well as being the biggest contributor to the South Africa’s GDP, Leon argues that between 2001 and 2008 the value added to GDP by this sector remained flat. Furthermore, by October 2011, South African mine production had fallen by 12.7% year on year.\(^5\)

In terms of accidents and ill-health, mining is regarded as the most hazardous industrial sector due to the fact that mining has a poor record in these respects compared to other economic sectors such as railways, construction and manufacturing.\textsuperscript{6} Hermanus argues that mine working environments are challenging as they can degrade rapidly and can also change as mining progresses.\textsuperscript{7} He further points out that in this industry ergonomic hazards are common as miners handle heavy equipment and do heavy work. In addition, there are also other threats contributing to unsafe working conditions, such as dust and noise which are associated with rock breaking, as well as blasting which releases harmful gases into the underground environment.\textsuperscript{8} The dangers associated with working in mines are illustrated in case law, such as, \textit{Mankayi v Anglogold Ashanti Ltd.}.\textsuperscript{9} In this case the applicant who was a mineworker employed by Anglogold Ashanti, contracted tuberculosis and chronic obstructive airways, regarded as ‘compensatable’ diseases in terms of the Occupational Diseases in Mines and Works Act (ODIMWA).\textsuperscript{10}

In 2012 the mining sector experienced unprecedented unrest. There were a number of particularly violent strikes, one which at the Lonmin platinum mines in Marikana ended in tragedy with number of lives being lost. On 16 August 2012, 34 of protesting mine workers were killed, in addition to ten people who were killed in the week leading up to the tragedy, taking the death toll to 44; furthermore, 70 were injured and more than a total 250 arrested.\textsuperscript{11}


\textsuperscript{7}Hermanus MA (2007) 531.

\textsuperscript{8}Hermanus MA (2007) 531.

\textsuperscript{9} (2011) 32 \textit{ILJ} 545 (CC).

\textsuperscript{10} Act 78 of 1973.

Leading to the incident was the march on 11 August by striking workers against the dominant trade union called National Union of Mineworkers (NUM), accused of selling out its constituency. NUM was losing members to a new trade union called Association of Mineworkers and Construction Union (AMCU). The tension in the area mounted as security guards and police were killed apparently by striking Marikana mineworkers and this tension has been blamed for leading to the massacre.\textsuperscript{12}

McGregor argues that the Marikana incident should be seen in the broader context of labour and other problems within the mining sector; problems such as rising costs and fluctuating metal prices. It should also be viewed in the context of social discontent over lack of basic service delivery, inequality and poverty. According to her, miners are poorly paid and their work is dangerous.\textsuperscript{13}

South Africa’s Labour Relations Act (LRA)\textsuperscript{14} was formed to give effect to and regulate the rights conferred by section 23 of the Constitution.\textsuperscript{15} The LRA is the principal labour legislation which regulates collective rights such as the right to strike,

\begin{itemize}
  \item \textsuperscript{12}Bond P & Mottiar S ‘Movements, protests in South Africa’ (2013) 31 Journal of Contemporary Africa Studies 292.
  \item \textsuperscript{13}Mcgregor K ‘Comment and analysis: Africa massacre at Marikana’ (2012).
  \item \textsuperscript{14}Labour Relations Act 66 of 1995.
  \item \textsuperscript{15}Section 1 LRA. Section 23 of the Constitution of the Republic of South Africa, 1996 provides:
    \begin{enumerate}
      \item Everyone has the right to fair labour practices.
      \item Every worker has the right-
        \begin{enumerate}
          \item to form and join a trade union;
          \item to participate in the activities and programmes of a trade union; and
          \item to strike.
        \end{enumerate}
      \item Every employer has the right-
        \begin{enumerate}
          \item to form and join an employers’ organisation; and
          \item to participate in the activities and programmes of an employers’ organisation.
        \end{enumerate}
      \item Every trade union and every employers’ organisation has the right-
        \begin{enumerate}
          \item to determine its own administration, programmes and activities;
          \item to organise; and
          \item to form and join a federation.
        \end{enumerate}
      \item Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).
      \item National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).
    \end{enumerate}
\end{itemize}
to organise and the right to engage in collective bargaining. Chapter 8 of the LRA
also gives protection to employees against unfair labour practices and unfair
dismissals. Chapter 3 of LRA regulates employers’ organisations and trade unions,
and chapter 5 provides for the establishment of participative structures in the form of
workplace forums.

The LRA does not say that much about the nature of collective bargaining and on
how it should take place. It also does not compel collective bargaining and as the
result of this the courts have no role in determining whether an employer should
bargain collectively with a trade union, what to bargain about or at which level they
should bargain.\textsuperscript{16}

With the objective of promoting orderly collective bargaining the LRA prioritises
bargaining at sectoral level. This is done through the establishment of bargaining
councils and statutory councils. Bargaining councils have powers to extend their
agreements to all employers in their sector and level the competitive playing fields on
their own terms.\textsuperscript{17}

There are two levels of collective bargaining, namely centralised collective
bargaining, and decentralised collective bargaining. Centralised collective bargaining
is about concluding agreements at the bargaining and statutory councils (thus,
national level) whereas decentralised collective bargaining agreements are not only
concluded at bargaining and statutory councils but may be concluded at plant level
as well.\textsuperscript{18}

\textsuperscript{16}Venter R, Levy A, Conradie M et al \textit{Labour Relations in South Africa} (2012) 370; SANDU \textit{v Minister
of Defence and Others} 2007(4) BCLR 398 (SCA).

\textsuperscript{17}Du Toit D ‘What is the future of collective bargaining?’(2007) 28 \textit{ILJ} 1420.

Some parts of the South African mining industry uses the centralised bargaining system, which Bhorat and Oosthuizen argue is a poor bargaining system inherited in the 1980s and continued after 1994. They argue that it is ineffectual in dealing with plant specific issues, in other words the demands which are specific to particular mines that cannot be dealt with through national bargaining.19

Chapter 5 of the LRA deals with workplace forums which are created to provide opportunity to all employees including non-union members to use statutory rights of participating in managerial decisions that may affect them.

1.2 Research question

Are the channels (collective bargaining and workplace forums) provided by labour law for employee participation in the mining sector effective? How they can be improved?

1.3 Objectives of the research

The main objective of this research is to assess the effectiveness of the channels (collective bargaining and workplace forums) created by the LRA for employee’s participation in decision making in the mining sector. Problems related to employee participation will be examined to determine whether they are structural or due to shortcomings in the LRA. If it is found that there are shortcomings of the labour legislation in this regard, recommendations on how the shortcoming can be addressed will be made.

1.4 Significance of the research

The significance of this research paper is that it attempts to determine the efficacy of the current statutorily protected channels for employee participation in the mining sector against the backdrop of prevalent theories on employee participation. Although many labour law authors have commented on the role of workplace forums in South Africa, the relative advantages of workplace forums have not been analysed through the lens of the theories on employee participation.

1.5 Research Methodology

According to Christensen the various approaches to collecting data have been categorised as either descriptive or experimental, depending on the goals of the research. Descriptive research focuses on describing an event, situation or some phenomenon, while experimental research attempts to identify a cause-and-effect relationship.20 This research project adopts the descriptive research approach.

Another approach distinguishes between qualitative and quantitative research. Quantitative research study focuses on numerical data that have been collected to answer a research question; whereas qualitative research study collects non-numerical data for example written records to answer the research question.21

This research is qualitative and is based on primary and secondary sources. The primary sources are labour legislation and case law.22 The secondary sources are academic papers, journal articles and books. In addition, media reports and internet resources are used to provide a contextual background for the issues raised in the research paper. Where necessary, reference to models adopted in other jurisdictions is made on a case study basis.

22 Although there is not much case law on the topic of workplace forums, for reasons that will become apparent in chapters 2 and 3.
1.6 Structure of the research project

Chapter 1 provides background information to this research project. It states the research question, the objectives and the methodology of the research paper.

Chapter 2 consists of a literature review, setting out the current legal position and academic commentary on employee participation in decision making. It will provide an overview of the platforms that are created by labour legislation for employee participation in decision making, with specific reference to collective bargaining and workplace forums.

Chapter 3 focuses on the mining sector and identifies the challenges that mine workers are facing, such as, injuries, levels of wages, working conditions and their respective trade unions. It also provides an overview of the means that are at their disposal to overcome these challenges. The suitability of the worker participation measures discussed in chapter 2 for the mining industry will be determined.

Chapter 4 provides conclusions and recommendations with regards to employee participation in the mining sector.
Chapter 2

The theories of employee participation in decision making

2.1 Introduction

This chapter focuses on the literature and theories written on employee participation in decision making within the workplace. It seeks to provide a clear understanding on the topic by looking at the challenges and advantages of employee participation in decision making within the workplace. This chapter will also visit theories written about collective bargaining and workplace forums as the two most effective forms of employee participation in South Africa. These two forms have been designed to perform at different levels of participation: collective bargaining at sectoral level as well as plant level and workplace forums at plant level. They are meant to support each other. According to Grogan, the Labour Relations Act (LRA) aims to move collective bargaining from plant level to sectoral level, and create new plant level institutions, namely workplace forums. Rather than having adversarial bargaining within a particular enterprise, workplace forums are created to promote participative management.

2.2 Common Law of Employment

The common law of employment precedes the LRA. The South African common law contract of employment originated from contract of *locatio conductio* (letting and hiring) of Roman law. There were three types of *locatio conductio* namely; (a) *locatio conductio rei* (the letting and hiring of a specific thing for a money payment) (b) *locatio conductio operis* (the forerunner of the independent contractor); and (c) *locatio conductio operarum* (the letting and hiring of personal services in return for

---

remuneration).\textsuperscript{24} The common law of employment had its shortcomings; it created circumstances for employers to exploit employees, as it gave employers the balance of power and employees had limited rights.\textsuperscript{25}

The common law of employment has been criticised for lagging behind conditions in modern industry, commerce and for failing to recognise fundamental human rights. It was ill-suited to the collective relationship between employers and unionised workforces that spread throughout the industrialised world during the 19th century. The common law ignored the nature of the employment relationship, and deprived employees of the legal right to demand better conditions of employment.\textsuperscript{26} In countries with vast numbers of unskilled and unemployed people who are desperate for jobs, the imbalance of bargaining powers favours the side of employer.\textsuperscript{27} It also did not cater for the inequality in bargaining power between employer and employee. The common law did not discourage exploitation of labour nor did it give employees a say in management decisions which affect their working conditions, and, lastly, it did not provide protection for job security.\textsuperscript{28}

\subsection*{2.3 Constitution of the Republic of South Africa}

The South African Constitution\textsuperscript{29} with an entrenched Bill of Rights has an impact on all branches of the law, as it provides a platform for citizens to challenge legislation and actions taken by the state which infringe on their rights. Chapter 2 of the Constitution, the Bill of Rights, is the important and relevant chapter of the

\begin{footnotesize}
\textsuperscript{24} \textit{Locatio conductio operarum} applied only menial workers e.g. painters and sculptures. \textit{Locacio conductio rei} applied to slaves. Grogan J (2011) 2.

\textsuperscript{25} For example, an employee would let her or his labour potential to the employer and the employer would decide its value. Swanepoel B \textit{South African human resource management: Theory & Practice} 4\textit{ed} (2008) 89.

\textsuperscript{26} Swanepoel B (2008) 90.

\textsuperscript{27} Wallis M \textit{The LRA and the common law} (2005) 9 \textit{Law Democracy & Development} 181.

\textsuperscript{28} Grogan J (2009) 3.

\textsuperscript{29} Constitution of the Republic of South Africa, 1996.
\end{footnotesize}
Constitution for the purpose of this research with specific reference to section 23 on labour relations rights.

Section 27 of the interim Constitution\(^{30}\) precedes section 23 of the 1996 Constitution. The core content of section 27 is carried over into section 23 of the 1996 Constitution and the major changes are contained in the formulation of the right to bargain collectively, the right to strike and the exclusion of the right to lock-out.\(^{31}\)

Section 23 provides the foundation to the LRA as section 23 is mainly about facilitating the relationship between employers and employees and provides rights for both these parties. It is therefore essential that the provisions in the LRA on collective bargaining and workplace forums as channels for employee participation be evaluated in terms of the provisions of section 23.

As was stated in chapter 1, the significance of this research paper is that it attempts to determine the efficacy of the statutorily protected channels for employee participation in the mining sector against the backdrop of prevalent theories on employee participation.

Therefore, the following sections of the research paper introduce the more prevalent theories on labour relations and employee participation in decision making in the workplace.

\(^{30}\)Interim Constitution, 1993.

\(^{31}\)Interim Constitution, Section 27 (1): ‘Every person shall have the right to fair labour practices. (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers’ organizations. (3) Workers and employers shall have the right to organize and bargain collectively. (4) Workers shall have the right to strike for the purpose of collective bargaining. (5) Employers’ recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to Section 33 (1).’
2.4 Labour Relations

Venter et al describe labour relations as ‘a multifaceted, intricate and complex discipline that is characterised by a number of salient features.’ It is about interactions between three core players namely, employers, employees and the state. These interactions occur within a particular political, social and economic framework.

There are many theories with regards to labour relations. However, Venter et al point out that there are three major theories on labour relations namely, the unitarist approach, the pluralist approach and the Marxist approach. The unitarist approach believes in working together for the common goal as it views the organisation as a cohesive whole. As a result, there should be no serious conflict of interest between the employer and employees and there should be no power struggles between the parties. This approach views trade unions as problematic and unnecessary.

The pluralist approach is almost the opposite of the unitarist approach as it recognises that organisations have many aspects with different views. Therefore it accepts that it is impossible to prevent conflict, but that conflict can be managed through various institutional arrangements. Unlike the unitarist approach, trade unions are accepted as an appropriate forum for co-ordinating these different interests.

---

38Singh PN & Kumar N Employee Relations Management (2011) 15.
The Marxist approach is based on class conflict, and believes the conflict in the employee and employer relationship is the reflection of societal structures whereby the rich exploit the poor, and that because of this conflict is inevitable.\textsuperscript{40} Trade unions are viewed as a natural response of workers to their exploitation. In general, the Marxist approach advocates for the ownership of production to be shared amongst the people equally.\textsuperscript{41}

It is submitted that the pluralist approach is prevalent in South Africa, due to the inevitable conflict as a result of the history of inequality during the Apartheid era. Trade unions’ contribution to the emancipation of black employees is undeniable. South African labour legislation recognises the important role that unions play in today’s employees’ struggles. It also recognises the diversity within the country and workplaces. The following section looks at theories on participation and employee participation as they are central to this research.

\textbf{2.5 Participation and employee participation}

Different theorists, writers and academics have provided interesting and different analyses of the terms ‘participation’ and ‘employee participation’

Saxena defines ‘participation’ as ‘a voluntary process by which people, including the disadvantaged (in income, gender caste or education), influence or control the decisions that affect them.’\textsuperscript{42} Anstey defines 'employee participation’ as

\begin{quote}
‘a process recognizing the needs and rights of employees individually and collectively to participate with management in organizational decision making areas beyond those usually associated with collective bargaining.’\textsuperscript{43}
\end{quote}

\textsuperscript{40}\textit{Sivarethinamohan R} \textit{Industrial relations and labour welfare: Text and Cases} (2010) 17.
\textsuperscript{41}\textit{Sivarethinamohan R} (2010) 17.
\textsuperscript{42}\textit{Saxena P} 'What is meant by people’s participation' in Cornwall A \textit{The participation reader} (2011) 31.
\textsuperscript{43}\textit{Anstey M} \textit{Employee Participation & Workplace Forums} (1997) 1.
Strauss’s definition of participation is ‘a process which allows employees to exert some influence over their work and the conditions under which they work’.\textsuperscript{44} What is evident from the above definitions is the fact that participation involves participants (people), it is a voluntary process and it is about influencing workplace decisions.

There are three broad arguments that support participation namely, humanistic, power-sharing and organisational efficiency.\textsuperscript{45} In terms of the humanistic argument, it is argued that participation assists to satisfy employees’ non-pecuniary needs and contributes to a sense of competence, self-actualisation and self-worth.\textsuperscript{46} The power-sharing argument advocates participation for ideological and moral reasons. It further argues that ‘the traditional autocratic relationships are inherently unjust and inconsistent with the values of a democratic society’.\textsuperscript{47} Regarding organisational efficiency, Strauss states that participation may change how employees do their jobs, how they and their unions relate to their employer, and how they perceive their jobs.\textsuperscript{48}

Hyman and Mason distinguish between two processes, which are, employee participation and employee involvement. They refer to employee participation as state initiatives to promote the collective rights of employees to be represented in organisational decision making, or the result of the efforts of employees to establish collective representation in corporate decisions. Employee involvement is referred to as practices and policies which come from management and sympathisers of free market commercial activity and which purport to provide employees with the

\textsuperscript{45} Strauss G (1998) 8.
\textsuperscript{46} Strauss G (1998) 8.
\textsuperscript{47} Strauss G (1998) 8.
opportunity to influence and where appropriate take part in the decision making on matters which affect them.\(^{49}\) With these different theories come different forms of participation.

### 2.5.1 Forms of participation

There are many different forms of participation which are used worldwide, but differ by countries, such as:

(a) participation in development which is regarded as a way of mobilising people of a country to be associated in a development effort.\(^{50}\)

(b) Suggestion schemes are popular with both management and employees because they cover a wide range of issues, such as, use of materials, safety at work, administrative procedures, efficiency and cost saving, organisation of product, and the invention of new equipment and techniques.\(^{51}\)

(c) Indirect participation through collective bargaining is regarded by Anstey as the form of employee participation which is most evident worldwide.\(^{52}\) Anstey states that employers participate in collective bargaining for two reasons, which are ‘market control through which they seek to remove wages from competition and managerial control through which behaviour in the workplace is regulated by procedural arrangement’.\(^{53}\) Collective bargaining is the means to ‘more predictable workplace behaviour and therefore production, legitimizing rules and substantive conditions of employment through the negotiation process’.\(^{54}\)

---


\(^{50}\)International Labour Office *Workers' participation in decisions within undertakings* (1981) 9.

\(^{51}\)Bennett R *Employee Relations* (1997) 84.

\(^{52}\)Anstey M *Employee Participation & Workplace Forums* (1997) 4.


\(^{54}\)Anstey M (1997) 4.
(d) Profit sharing is considered to be some kind of bonus payment and in practice it is seldom combined with greater participation decisions.\textsuperscript{55}

(e) With joint consultation, management retains control over the decision making process, but involves the workforce in decision making as it seeks to utilise the energy initiative of the workforce.\textsuperscript{56}

(f) Indirect participation, in the form of worker directors and works councils, is a form of participation that occurs through representation, usually at higher levels in the organisation and which tends to be power centred.\textsuperscript{57} Trade unions have been doubtful about the efficacy of worker directors. They argue that worker directors do not offer new levels of influence over decisions affecting employees' lives; instead, they foresee them diluting the challenge of trade unions.\textsuperscript{58} Anstey also states that a management board deals with operational issues while worker directors' involvement is only at a supervisory board level on matters of policy and long-term strategic planning and that, as a result, they have little meaningful power.\textsuperscript{59} When it comes to works councils, they consist of elected employee representatives who are empowered to engage management on matters important to employees.\textsuperscript{60}

(g) Financial participation allows employees to become part-owners of companies through being allocated shares in their firms as supplements to wages. This

\textsuperscript{55} International Labour Office (1989) 9.
\textsuperscript{56} Bennett R (1997) 85.
\textsuperscript{57} Anstey M (1997) 6.
\textsuperscript{58} Anstey M (1997) 6.
\textsuperscript{59} Anstey M (1997) 6.
\textsuperscript{60} Anstey M (1997) 7.
motivates employees to greater efforts because they have a direct interest in their employer’s profitability.\textsuperscript{61}

(h) Direct participation has been described as task rather than power oriented because of the involvement of employees and their supervisors directly at points of service delivery or production.\textsuperscript{62} Quality circles are the most common form of direct participation. They are small group meetings that are created voluntarily to perform quality control functions in the workplace. A quality circle works under the leadership of its supervisor and it meets to solve work related problems and its meetings are held on company time.\textsuperscript{63} According to Anstey a quality circle operates alongside formal structures in the enterprise and does not demand major shifts in power relations in traditional hierarchically structured organisations.\textsuperscript{64}

(i) Workplace forums generally focus on non-wage matters, such as, work methods, restructuring, changes in the organisation of work, introduction of new technologies and work methods, physical conditions of work, and health and safety.\textsuperscript{65}

The above discussed forms of participation are from the global perspective, not all of them feature in the South African context of participation. Only two of the above mentioned forms feature in South Africa namely: collective bargaining and workplace forums. They are all important as they serve a specific purpose depending on the approach that the country adopts whether it is pluralist, Marxist or unitarist. The following section will look at the objective of employee participation.

\begin{footnotesize}
\textsuperscript{61} Bennett R (1997) 87. However, it has been suggested that employee participation in company capital, through employees’ shareholding, lacks greater participation in decision making as it is aimed at fuller identification with the undertaking - International Labour Office (1981) 9.

\textsuperscript{62} Anstey M (1997) 7.

\textsuperscript{63} Anstey M (1997) 7.

\textsuperscript{64} Anstey M (1997) 7.

\textsuperscript{65} Anstey M (1997) 7.
\end{footnotesize}
2.5.2 Objectives of participation

There are three main groups of objectives of participation: ethical or moral objectives, socio-political objectives, and economic objectives.\textsuperscript{66} In the ethical or moral context, participation is designed to promote individual fulfilment or development in line with a conception of human rights and dignity.\textsuperscript{67} Socio-political objectives vary widely and are mostly presented under the label of industrial democracy, which is motivated by the democratic system which encourages participation, not only to vote for the conduct of public affairs, but also at the place of employment.\textsuperscript{68} Economic objectives relate directly or indirectly to increasing the efficiency of business by allowing the interaction between labour and management. They also aim to improve the quality and quantity of production and the utilisation of labour, equipment and raw material as well as introduction of new techniques.\textsuperscript{69} Participation is seen as a mechanism to reduce areas of conflict between labour and management to improve labour relations.\textsuperscript{70}

The purposes of participation include the improvement of the quality of working life and to increase business efficiency. Bennett argues that participation should enhance motivation of employee regarding their employers' activities.\textsuperscript{71}

2.5.3 Advantages and disadvantages of participation

Bennett states that the principal argument in favour of participation points to its mobilisation of talents, expertise, resources and the experiences of employees who are encouraged to develop their decision making capacities and are also

\textsuperscript{66}International Labour Office (1989) 9.  
\textsuperscript{67}International Labour Office (1989) 10.  
\textsuperscript{68}International Labour Office (1989) 11.  
\textsuperscript{69}International Labour Office (1989) 17.  
\textsuperscript{70}International Labour Office (1989) 17.  
\textsuperscript{71}Bennett R (1997) 81.
encouraged to become more involved with the efficient management of the company.\textsuperscript{72}

Other advantages include that it:

- 'Encourages responsible and flexible attitudes among employees and positive responses to change.
- Assists staff development.
- Enables management to receive valuable feedback from employees about day-to-day operations.
- Involves a greater number of people in taking decisions and hence a lower risk of important factors being overlooked.'\textsuperscript{73}

Bennett further argues that participation can be motivated for on the grounds of promotion of the democratic ideal and social justice within a nation.\textsuperscript{74} It is also beneficial to management in that:

- 'Its efficiency should increase as employees become involved in decision making.
- Loyalty and commitment to trade unions may be replaced by greater employee loyalty to the firm.
- The management of change is facilitated, since employees are made aware of the environmental circumstances that create the need for change.
- The machinery of participation (committees, works councils, quality circles, etc.) provides a means for channelling conflict into peaceful institutional procedures.'\textsuperscript{75}

Not only can participation be beneficial to management, but to employees as well. It provides employees with power, information, knowledge and rewards.\textsuperscript{76} In terms of power, this means that employees are given power to make decisions that would add quality to their working lives, and this power also makes them influential as it allows them to have an input in decisions made by management.\textsuperscript{77}

\textsuperscript{72}Bennett R (1997) 81.
\textsuperscript{73}Bennett R (1997) 82.
\textsuperscript{74}Bennett R (1997) 82.
\textsuperscript{75}Bennett R (1997) 82.
\textsuperscript{76}Konrad AM 'Improving the practice of management' (2006) Ivey Business Journal http://iveybusinessjournal.com/topics/the-workplace/engaging-employees-through-high-involvement-work-practices#.U3I0OXb3Eqx
\textsuperscript{77}Konrad AM (2006).
With regards to information, participation provides them with substantial information on both the quantity and quality of the employer’s business.\textsuperscript{78} When it comes to knowledge, employees can acquire new skills and abilities from the training and development that would be provided by the company. It is the company’s responsibility to ensure that they provide such training, as they would assist in ensuring that employees take right decisions when faced with situations of making important decisions.\textsuperscript{79}

With regards to rewards, this is about the employer rewarding employees for using the information, power and knowledge gained through participation for the good of the employer.\textsuperscript{80} There are also criticisms of employee participation. Levine shares the following possible disadvantage of employee participation:

- "Workers may be less informed than managers, and the premises upon which they make their decisions may be different. The rewards motivating workers to share their ideas may be larger than the value of the ideas themselves.
- Once becoming committed to a decision, employees may be reluctant to change it.
- Participation is time consuming, and if decisions are made by groups, reaction to changing environments may be particularly slow.
- Once a precedent of participation is established, withdrawal of the right to participate becomes difficult.
- Cohesive, participative groups may unite against management to restrict production and prevent change."\textsuperscript{81}

It is submitted that the advantages of employee participation outweigh the disadvantages, especially as participation takes both parties to the employment relationship into consideration, where previously employees were not heard and participation seeks to fill that gap.

\begin{flushright}
81 Levine DI ‘How business and employees can both win: advantages and disadvantages of employee involvement’ (1999) Institute for Research on Labour and Employment \url{http://www.irle.berkeley.edu/cohre/levine/adv.html#adv}.
\end{flushright}
Whereas the focus in this section has mainly been on employee participation from a global perspective, the next section will focus on employee participation in South Africa.

2.6 Employee participation in South Africa

2.6.1 South African labour relations

In the South African context there is a tripartite relationship in labour relations which comprises of employees, employers and the state. The role of employers is to purchase labour and provide work. The employees’ role is to provide their labour to employers in exchange for a wage. The state’s role is to enforce, monitor and regulate the statutory frameworks that guide the interaction between employees and employers.\textsuperscript{82} In South Africa, the main legislation used to monitor and regulate labour relations is the LRA.

South Africa is a member of the International Labour Organisation (ILO). The principal purpose of the ILO is to provide for the international regulation of labour standards with the aim of promoting social justice and peace and to end unfair competition based on exploitative and inhumane conditions of labour.\textsuperscript{83} As a member of the ILO, South Africa is obligated to abide by the objectives of the ILO.\textsuperscript{84} Those obligations are evident in section 1(b) of the LRA and section 2 (b) of the Basic Conditions of Employment Act (BCEA).

\textsuperscript{82}Venter R, Levy A & Conradie M et al \textit{Labour Relations in South Africa} (2012) 84.
\textsuperscript{84}Du Toit D et al (2006) 68.
2.6.2 The Labour Relations Act

The purpose of the LRA is to advance social justice, economic development and the democratisation of the workplace by fulfilling its primary objects which are:

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

The LRA aims to encourage collective bargaining and remove it from the plant to the sectoral level. Workplace forums are created as the institutions at plant level. The next section will focus on these two forms of participation, collective bargaining and workplace forums, with their intended levels of participation.

2.6.3 Collective Bargaining

Labour law can be divided into individual labour law and collective labour law. Individual labour law is the law that governs the relationship between individual employees and their employers. It is concerned with the rights and duties of the individual parties to the employment relationship and the rules are aimed at ensuring individual justice in the workplace. Collective labour law governs the relationship between employers and organised labour. It provides a framework for collective bargaining between the bargaining parties in this case which are trade unions and

---

85 LRA, section 1.
employers or employers’ organisations, to formulate industrial policy, to determine mutual agreements in relation to conditions of employment, wages and other matters of mutual interest.\textsuperscript{88} Collective labour law rules recognise the modern industrial society, and that both employers and employees have different and opposing interests, and tend to protect and promote their particular interests.\textsuperscript{89}

There are defining features of collective bargaining. The first one is its concern with power imbalance between the employees and the employers; it does not function if there is imbalance between bargaining parties.\textsuperscript{90} Secondly, if parties do not come to terms, the use of power is used as the last resort; collective bargaining encourages conciliation.\textsuperscript{91} Finally, it becomes a requirement in situations whereby an action considered inappropriate is taken by one party without the party seeking consensus from the other.\textsuperscript{92}

Chapter 3 of the LRA concerns the promotion of collective bargaining. Venter defines collective bargaining as a ‘mechanism for organised groups of workers and their employers to resolve conflicting interests and pursue agreement over common interests’.\textsuperscript{93} For Grogan, collective bargaining is ‘the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation’.\textsuperscript{94} The inclusion of the right to collective bargaining signifies

\begin{footnotes}
\item[93] Venter R et al (2012) 479.
\item[94] Grogan J (2011) 343.
\end{footnotes}
the recognition that collective bargaining should have the status of a fundamental right and no longer be a mere social objective.\textsuperscript{95}

The main purpose of collective bargaining is the regulation of the terms and conditions of employment between the employer and the employee (trade unions), and the primary objective of trade unions in engaging in collective bargaining

‘seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and as to be compatible with the physical integrity and moral dignity of the individual, and also that jobs should be reasonable secure.’\textsuperscript{96}

Another purpose of collective bargaining is to serve as a method of dispute resolution.\textsuperscript{97}

For the purpose of collective bargaining there are two agents, namely, trade unions and employers’ organisations. A trade union is described as

‘any organisation whose membership consist of employees, which seeks to organise and represent their interests both in the workplace and society, and in particular, seeks to regulate their employment relationship through the direct process of collective bargaining with management.’\textsuperscript{98}

The function of trade unions is to represent their members in collective bargaining with their members’ employers and to represent their members in their grievances and disciplinary matters. Trade unions also appoint officials to bodies which ensure employers’ compliance with their statutory obligations.\textsuperscript{99}

\textsuperscript{98} Venter R et al (2012) 86. LRA section 213 define a trade union as ‘an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers, including any employers’ organisations’.
\textsuperscript{99} Grogan J (2011) 312.
Du Toit places an emphasis on the important role that trade unions play in collective bargaining. He states that ‘if the law plays a permissive role in collective bargaining, then it will be up to the interaction of the two involved parties to determine its effect and content, and this makes effective trade unionisation crucial’. What makes trade unionisation crucial is the fact that employers in general are bearers of power and can do without collective bargaining while the other party, the employees, cannot, and it is therefore essential for them.

Trade unions' counterparts are employers or employers' organisations. The LRA states that an employers' organisation is an association of employers for the purpose of regulating relations between employers and employees or trade unions. Du Toit highlights three important aspects of collective bargaining. First, it has value for participants (employees and employers): for employees, it is the means of maintaining certain standards of distribution of work, of stability of employment and of rewards; for employers, it is a means of maintaining industrial peace. Secondly, the bargaining arena allows trade unions to engage with broader issues and exert political pressure. Finally, it has an instrumental role in labour market regulation.

The LRA fails to expressly provide for a duty to bargain just like its predecessor the 1956 LRA. Current labour legislation does not give courts powers of compelling employers to bargain collectively. Trade unions are granted a fixed list of organisational rights, such as, access to an employer's premises, stop-order

---

100 Du Toit D 'What is the future of collective bargaining?' (2007) 28 ILJ 1411.
102 LRA, section 213.
Apart from that, the rest is left to the parties to decide how their bargaining relationships are to be structured. Collective bargaining is voluntarily and parties cannot be compelled to bargain, because the current LRA imposes no general duty on employers to bargain collectively. The LRA does not compel bargaining nor does it require the state to bargain with public sector trade unions. Steenkamp et al argue that ‘the constitutional drafter envisaged the freedom to engage in collective bargaining, rather than the right and reciprocal duty to do so.’ The LRA recognises union led strikes as a way of exercising economic power as a response to an employer who refuses to bargain.

The LRA aims to encourage collective bargaining and remove it from the plant to sectoral level. It envisages workplace forums to fill the participation gap at plant level. The next section focuses on workplace forums which are about employee participation at plant level.

2.6.4 Workplace forums

Workplace forums are created as the institutions of employee participation in decision making at the plant level. Whereas collective bargaining is intended to

---

105 LRA, section 12.
107 Steenkamp A et al (2004) 954. However this does not apply in the military sector. In SANDU v Minister of Defence and Others; Minister of Defence and Others v SANDU 2007 (4) BCLR 404 (SCA), the Supreme Court of Appeal declared that the Minister of Defence is obligated to negotiate with SANDU within the military bargaining council on all matters of mutual interest. The court’s decision was based on the fact that the LRA does not apply to the National Defence Force or to personnel employed in the intelligence community.
be reserved for trade unions and employers’ representatives for matters of mutual interest, issues relating to the distribution of the profits of the enterprise and to changes in general conditions of service of employees, workplace forums are designed to encourage workers participation and at plant level.\textsuperscript{112}

Section 79 of the LRA provides that a workplace forum -

(a) ‘must seek to promote the interests of all employees in the workplace, whether or not they are trade union members;
(b) must seek to enhance efficiency in the workplace;
(c) is entitled to be consulted by the employer, with a view to reaching consensus, about the matters referred to in section 84; and
(d) is entitled to participate in joint decision-making about the matters referred to in section 86.’

The main goal of workplace forums is to provide employees with a voice in certain aspects of decision making outside of the collective bargaining process. What motivates this goal is the idea that the workplace forums will increase profitability and production which will result in increased job satisfaction and a reduction of workplace disputes.\textsuperscript{113}

Before the LRA, workplace forums did not exist in South Africa. They were created in terms of the LRA to supplement collective bargaining. With regard to the establishment of workplace forums, section 80(1) of the LRA states that they can be established in any workplace provided that the employer has more than 100 employees. The applicant must be a registered trade union or trade unions acting together which represent a majority of the employees within the workplace with more than one hundred employees.\textsuperscript{114} As was stated above, they serve four main

\textsuperscript{112}Grogan J (2011) 329.
\textsuperscript{114}LRA, section 80(2).
functions: promotion of interest of all employees, enhancing efficiency at the workplace, consultation and participation in joint decision making.\textsuperscript{115}

Workplace forums are designed to supplement collective bargaining rather than undermine it. They provide an opportunity, not only for union members, but for all employees in a workplace to exercise for their statutory rights of participation in decision making that may affect them.\textsuperscript{116}

Even though workplace forums seem to be a good idea in terms of involving every employee in an organisation, South Africa has experienced a slow rate of establishment of workplace forums since their introduction by the LRA.\textsuperscript{117} Steenkamp et al state that there appears to be a general sense that even though plant level participation is a commendable proposition, trade unions are less interested in committing themselves to this form of participation, fearing that bodies like workplace forums will undermine their independence and their role in collective bargaining.\textsuperscript{118}

Workplace forums have the benefit of allowing trade unions to interact with managerial decision making at an early stage, rather than being confronted with a final decision that the management has taken without a trade unions’ presence.\textsuperscript{119} Furthermore it gives trade union access at an early stage to all kinds of information that concerns their members.\textsuperscript{120} Lastly, trade unions do not have to waste time fighting to establish and defend the rights to participate as these rights are

\textsuperscript{115}LRA, section 79.
\textsuperscript{116}Taylor E (1996) 643.
\textsuperscript{120}Section 89 LRA. In addition, section 83 requires regular meetings between the employer and the workplace forum, where the employer has to present a report on its employment and financial situation.
institutionalised; instead they can focus their energies on strategies for making their participation effective.\textsuperscript{121}

Workplace forums enjoy certain rights, such as, that in respect of certain issues they have the right to consultation;\textsuperscript{122} employers cannot just ask for the forums’ opinion on a proposed decision, the employer needs to consult with the aim of reaching consensus.\textsuperscript{123} Workplace forums may suggest alternatives to work related matters and if the employer rejects them, reasons have to be provided.\textsuperscript{124} Section 86 of the LRA compels the employer to engage in joint decision making with the forum on certain issues.\textsuperscript{125}

Smith argues that these forums appear to give employees a stronger and freer voice in the workplace. On the surface, the LRA appears like it is meaning to facilitate the beginning of a co-operative labour relationship between the employer and


\textsuperscript{122}LRA, section 84 provides a list of matters for consultation:’ (1) Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to any of the following matters, (a) restructuring the workplace, including the introduction of new technology and new work methods; (b) changes in the organisation of work; (c) partial or total plant closures; (d) mergers and transfers of ownership in so far as they have an impact on the employees; (e) the dismissal of employees for reasons based on operational requirements; (f) exemptions from any collective agreement or any law; (g) job grading; (h) criteria for merit increases or the payment of discretionary bonuses; (i) education and training; (j) product development plans; and (k) export promotion.’\textsuperscript{123}Section 85(1).

\textsuperscript{124}Section 85(2) and (3).

\textsuperscript{125}LRA, section 86 provides a list of issues for joint decision making: ‘(1) Unless the matters for joint decision making are regulated by a collective agreement with the representative trade union, an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning, (a) disciplinary codes and procedures; (b) rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees; (c) measures designed to protect and advance persons disadvantaged by unfair discrimination; and (d) changes by the employer or by employer, appointed representatives on trusts or boards of employer controlled schemes, to the rules regulating social benefit schemes.’
employees; however, these provisions might not be the vehicle for true democracy in the workplace. Participation in decision making cannot be seen as industrial democracy in the sense that the collective voice of the employees will determine business decisions to be implemented, but rather as something that reflects possibilities of influencing management’s decisions.  

The perceived weaknesses of workplace forums fall into a number of categories, the most prominent of which may be classified as structural and theoretical. The structural problem starts with section 80 (1) of the LRA which requires that workplace forums can be established in workplaces comprised of at least 100 workers. This high threshold has been criticised as it is estimated that about 74 per cent of employees in the formal sector are excluded. This further gives powers to majority unions operating in large companies to initiate the establishment of workplace forums. Minority unions and non-union employees are expected to go along, and lastly this section excludes medium sized and small companies.

The second structural weakness is found in section 81 of the LRA, which is the prominent role (to negotiate on behalf of the rest of employees irrespective of their union affiliations) given to a union that has the majority of the workers at a plant. This provision seems to be an attempt to secure the status of majority unions in power and this could have the effect of weighting the forum’s composition with union officers.

---

128 Manamela ME ‘Regulating workplace forums in South Africa’ (2002) 14 SA Merc LJ 730
129 Manamela ME (2002) 730
130 Smith CM (2000) 615.
The third structural weakness is regarding joint decision making. The LRA does not give workplace forums rights to initiate joint decision making or consultation, it can only respond to the move made by the employer.\textsuperscript{131} The forum only holds the right to be consulted on changes that management has announced a desire to implement; they lack powers to demand that an employer should engage in joint decision making with it on issues that the forum wishes to raise on its own. The forums’ activities are largely reactive not proactive.\textsuperscript{132} Manamela further states that 'a representative trade union and employer may conclude a collective agreement that confers on the workplace forum the right to joint decision making in respect of additional matters and / or remove any matter from the list of matters requiring joint decision making.'\textsuperscript{133}

The last structural weakness has to do with the LRA’s separation between productive and distributive issues; it is unclear whether the forum or union should step in as the employee’s representative with regards to disputes.\textsuperscript{134} Section 84 of the LRA may be interpreted to require that any issue not explicitly within the forum’s jurisdiction falls within the collective bargaining process. Smith argues that this could have an impact on co-operative solutions to issues and it could also give unions power to bargain collectively over topics that might be characterised as issues that should be discussed by the forum.\textsuperscript{135}

Historically in South Africa unions have operated mainly local, but recently statutory provisions have developed centralised bargaining councils. However, at plant level supplementary bargaining by unions has continued. Currently, therefore, workers

\begin{thebibliography}{99}
\item Manamela ME (2002) 731.
\item Smith CM (2000) 615.
\item Manamela ME (2002) 731.
\item Smith CM (2000) 615.
\item Smith CM (2000) 616.
\end{thebibliography}
potentially have two different representatives operating on the shop floor, and confusion may arise as to whom the employees should turn to when a given dispute arises.\textsuperscript{136}

2.7 Conclusion

This chapter has looked at the theories regarding participation and employee participation, as well as two channels of participation, namely; workplace forums and collective bargaining. The theories examined encourage participation between employers and employees as they align participation with democracy. The channels (collective bargaining and workplace forums) are not complementing each other as they are intended to. Trade unions prefer collective bargaining, as they fear that workplace forums may undermine them. The following chapter will explore further the employee participation platforms created by the LRA to see whether they are effective with regards to balancing the interests of the employee and employers in the South African mining sector.

\textsuperscript{136}Smith CM (2000) 618.
Chapter 3

MINE WORKERS’ PARTICIPATION IN DECISION MAKING

3.1 Introduction

Mine workers are faced with different challenges ranging from poor working conditions to socio-economic conditions. This chapter focuses on the major challenges which have been linked to recent unrest in the mining sector, such as poor and dangerous working conditions and low income levels. In addition the chapter examines whether the platforms created by the LRA, particularly workplace forums are appropriate to address these challenges.

3.2 Challenges faced by mine workers

3.2.1 Health and safety in the mines

The mining sector has a history of fatalities. However, statistics show a decline in the number of occupational fatalities in the mining sector in South Africa from 94 fatalities for 100,000 workers in 1992 to 35 fatalities for 100,000 workers in 2008.\(^{137}\)

The number of fatalities continued to decline, as in 2011 there were 116 reported deaths for the year, compared to 128 in 2010 and 168 in 2009.\(^{138}\) An overall decline of 31% in the fatality rate from 2012 to 2013 has also been recorded.\(^{139}\) Despite the decline in the number of occupational fatalities, the fatality risk is still high.

---


The Mine Health and Safety Act 29 of 1996 (MHSA) was enacted by the legislature to address work related fatalities and health related issues in the mining sector.

Section 1 of the MHSA states the objects of the act as follows:

a) to protect the health and safety of persons at mines;

b) to require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines;

c) to give effect to the public international law obligations of the Republic that concern health and safety at mines;

d) to provide for employee participation in matters of health and safety through health and safety representatives and the health and safety committees at mines;

e) to provide for effective monitoring of health and safety conditions at mines;

f) to provide for enforcement of health and safety measures at mines;

g) to provide for investigations and inquiries to improve health and safety at mines; and

h) to promote—

   i) a culture of health and safety in the mining industry;

   ii) training in health and safety in the mining industry; and

   iii) co-operation and consultation on health and safety between the State, employers, employees and their representatives.  

The following sections examine the challenges mentioned earlier faced by mine workers that have been linked to recent instances of labour unrest in the mining sector.

3.2.2 Safety in mines

Safety in mines is a major concern and both the state and employers have attempted to reduce the dangers of working in the mines. The MHSA requires employers to report incidents and dangerous occurrences that take place at the mines.  This information is then captured into the South African Mines Reportable Accident
Statistical System (SAMRASS) and analysed in order to improve the working conditions in South African mines.\textsuperscript{142}

A recent publication by the Department of Mineral Resources shows a decrease in fatalities by 31\% from 2012 to 2013.\textsuperscript{143} The publication further reported on fatalities by commodity between 2012 and 2013. The commodities were grouped into gold, platinum, coal and other mines. Gold mines’ fatality rates improved by 33\%, platinum by 30\%, other mines by 40\%, while coal remained the same as the previous year.\textsuperscript{144}

Safety in the mines remains a concern still. In a recent incident which took place at a Harmony Gold mine, 17 miners were trapped 1.7 kilometres below ground. Eight workers were found dead inside the mine and one miner has not been accounted for. This incident has been regarded as one of the most devastating since that of 2009, where nine employees were killed in a rock fall in a platinum mine.\textsuperscript{145} This recent accident is an indication that mines still have a lot to do in order to improve safety of the employees.


\textsuperscript{143}\textit{Department of Mineral Resources ‘Yours in health and safety: Quarterly newsletter of the mine and safety inspectorate’ 2013 2 http://www.dmr.gov.za/mhsi-newsletters/summary/131-newsletters/1017-health-and-safety-newsletter-april-to-june-2013.html. The fatalities were classified as: Miscellaneous, general accident, transportation and mining, and fall of ground. Miscellaneous deaths (5\% of fatalities) comprised of 1 employee who was found dead and the cause of death was unknown. There were 8 mineworkers deceased as a result of general accidents (42\%) compared to 14 of 2012, a decrease of 43\%. Transportation and mining incidents comprised 16\% of fatalities and there were 3 deceased compared to 7 of 2012, constituting a 57\% decrease. Fall of ground incidents leading to fatalities (37\%) was the only category that did not show an improvement and rose to 7 fatalities compared to the 5 of 2012, an increase of 40\%.}

\textsuperscript{144}\textit{Department of Mineral Resources 2013 2.}

\textsuperscript{145}\textit{Price C ‘Eight dead one missing in South Africa mine blaze’ AFP 06 February 2014 available at http://www.google.com/hostednews/afp/article/ALeqM5g-53I29ydwRc_qdEJLGvbgGWurXhw?docid=c2e9058b-e536-4c3b-b702-4677f8108a5.}
3.2.3 Health and illnesses on mines

South African mines are faced with epidemics of tuberculosis (TB), silicosis and noise exposure. Based on the report published by National Institution for Occupational Health, the average rate of pulmonary tuberculosis (PTB) in 2012 was 192/1000. Black male miners’ PTB rates increased from the early 1990s to 368/1000 in 2007. However, there has been low annual decrease to 289/1000. The rate of white male miners contracting PTB remained lower than of the black man miners at 43/1000 in 2012. Silicosis rate in gold miners has also increased from 320/1000 in 2009 to 368/1000 in 2012.

With regards to noise exposure, the recent data indicates no improvement as the industry noise levels range from 63.9 to 113dba and approximately 73.2% of mine employees are exposed to noise levels.

To combat these challenges the South African Chamber of Mines has implemented a programme called Mining Industry Occupational Safety and Health (MOSH), the aim of the programme is to reduce the increasing epidemic of noise exposure, dust exposure, fall of ground and dangerous transport machinery.

---

150 Chamber of Mines of South Africa ‘MOSH adoption’ available at http://www.bullion.org.za/content/?pid=65&pagename=Health. However there are no progress reports available regarding this initiative at the time of writing.
3.2.4 Income levels

Mineworkers income levels are another area of concern and that has been evident during the recent labour unrest in the mining sector. With reference to the Marikana massacre, Brand argues that the alleged cause of the conflict was poverty combined with low incomes.\textsuperscript{151} He argues that rock-drill operators are regarded as unskilled employees and are underpaid. They suffer from abuse not only from the mine owners but labour brokers who can take up to R5 000 from their wages.\textsuperscript{152}

A finding of research conducted by the Labour Research Service reveals that the monthly minimum wage in the mining sector by commodity group in 2012, was R4 222 for gold mines, R4 852 for coal mines, R6 540 for diamond mines and R5 396 for platinum mines. The research also reveals that the mining sector has the highest median minimum wages in comparison with the other sectors.\textsuperscript{153}

Dissatisfaction over wages has been the biggest contributor to the labour unrests in the mines. In 2012 the coal mining industry was hit by a strike, where about 100,000 employees downed their tools for better pay.\textsuperscript{154} The gold industry also experienced strikes as its employees downed their tools in 2012 for better pay.\textsuperscript{155} Both the coal and gold industries have resolved the payment grievances. The platinum sector’s grievances remained unresolved; specific reference can be made to the strike at Lonmin platinum mines, where rock drill operators who were members of NUM were

\begin{footnotesize}
\begin{enumerate}
\item ‘SA Coal mining heat by a strike at Umlabu Colliery’ Mineweb 24 October 2014 available at http://www.mineweb.co.za/mineweb/content/en/mineweb-fast-news?oid=160740&sn=Detail
\item Njani S ‘Gold fields evict workers as mining strikes spreads’ Mail & Guardian 03 October 2012 available at http://mg.co.za/article/2012-10-03-gold-fields-evicts-workers-as-mining-strike-spreads
\end{enumerate}
\end{footnotesize}
dissatisfied with their union’s preferred across the board increase of 10% over the proposal that would see the workers getting higher increases. Rock drillers demanded a massive increase, they refused to work.\footnote{Anstey M ‘Marikana – and the push for a new South African pact’ (2013) 7 SA Journal for Labour Relations 138.}

The strike still continues, as the bargaining parties have not reached an agreement. This strike has had a negative impact on the mining companies, as well as their clients. It was reported that if this protracted strike continues, Impala Platinum as the world’s second largest platinum producer would have to cut its supply to its customers to 40% of demand in the coming months, with similar consequences for Anglo American Platinum and Lonmin.\footnote{"Impala Platinum warns of platinum supply cut" South Africa Labour news 08 May 2014. Available at \url{http://www.salabournews.co.za/index.php/home/70-labour-news/17350-impala-platinum-warns-of-platinum-supply-cut.html}.}

### 3.2.5 Living Conditions

Mine workers’ living conditions are a matter for concern. There is a deterioration of formal structures and, as a result, many mine workers live in shacks and informal settlements.\footnote{Ngcukaitobi T Strike law, Structural violence and Inequality in the Platinum hills of Marikana (2013) 34 ILJ 839; The Bench Marks Foundation ‘Communities in the Platinum Minefields’ Policy Gap 6 August 2012 118. \url{http://www.benchmarks.org.za/research/rustenburg_review_policy_gap_final_aug_2012.pdf}.}

Many mine workers are still living in congested mine hostels, where mine workers share rooms. However there is a commitment shown by mining companies to improve these living conditions. For example, Lonmin Plc are planning to convert and upgrade hostels into single room as well as family units. 26 hostel blocks have
already been converted into 542 bachelor units. They have also completed 1728 units of affordable employee houses.\textsuperscript{159}

3.2.6 Legislation addressing challenges of mine workers

In chapter 2, the statutory employee participation channels found in the LRA, collective bargaining and workplace forums, were outlined. Many of the challenges of mine workers outlined above are issues that are considered to be suitable for employee participation.

As was stated above, section 1(d) of the MHSA states that one of the main objectives of the MHSA is ‘to provide for employee participation in matters of health and safety through health and safety representatives and the health and safety committees at mines’. Section 25 requires that health and safety representatives be elected and appointed in all mines with 20 or more employees,\textsuperscript{160} and health and safety committees created in all mines with 100 or more employees.\textsuperscript{161}

A link between the employee participation through health and safety representatives and committees appointed and established in terms of the MHSA, and workplace forums established in terms of the LRA, is created by section 84(5) of the LRA, which states:

\textsuperscript{159} Lonmin Plc Annual report and accounts for the year ended 30 September 2011 available at https://www.lonmin.com/Lonmin_Annual_Report_2011/Root/business_review/transformation_02.html
\textsuperscript{160} Section 29 regulates the election and appointment of health and safety representatives. The rights and powers of health and safety representatives are outlined in section 30.
\textsuperscript{161} Section 34 regulates the establishment of health and safety committees. The rights and powers of health and safety committees are outlined in section 36. A detailed examination of the rights and powers of health and safety representatives and committees in terms of the MHSA falls outside the scope of this research paper.
Subject to any applicable occupational health and safety legislation, a representative trade union and an employer may agree,
(a) that the employer must consult with the workplace forum with a view to initiating, developing, promoting, monitoring and reviewing measures to ensure health and safety at work;
(b) that a meeting between the workplace forum and the employer constitutes a meeting of a health and safety committee required to be established in the workplace by that legislation; and
(c) that one or more members of the workplace forum are health and safety representatives for the purposes of that legislation.

For issues relating to relating income or salary, although minimum wages are determined in terms of the Basic Conditions of Employment Act 75 of 1997 (BCEA), employee participation by way of collective bargaining on wage increases occurs in terms of the LRA.\textsuperscript{162}

It can therefore be said that, although other legislation regulates aspects of the challenges faced by mine workers, the LRA remains the main legislation making provision for and regulating employee participation in decision making on mines. The following section scrutinises the effectiveness of the channels created by the LRA in the mining sector in addressing the employee challenges.

3.3 Employee participation

3.3.1 Statutory requirement for collective bargaining
One of the key institutions of employee participation is collective bargaining; its primary role is to provide a platform where remuneration and working conditions of

\textsuperscript{162} See chapter 2 above and 3.3.1 below.
employees can be negotiated by trade unions and employers.\textsuperscript{163} Power relations between the parties would then determine the outcome of the negotiations.\textsuperscript{164}

The LRA promotes voluntary self-governance through collective bargaining. There is a legal and institutional process in place for intervention when the collective bargaining process fails; bodies, such as the CCMA (Commission for Conciliation, Mediation and Arbitration), are there to intervene in such instances.\textsuperscript{165} Bargaining councils have the responsibility to monitor the enforcement of their agreements and are also involved in resolving disputes.\textsuperscript{166} In sectors where collective bargaining does not exist or is weak, the state intervenes, and in those cases conditions of employment are set through ministerial determinations.\textsuperscript{167} In other words, the LRA does not really state the rules of engagement, such as at what level the bargaining should take place, and what issues it should cover. A discretion to determine these issues is given to the parties that are involved in a bargaining council, that is, registered employer organisations and trade unions. These registered employer organisations and trade unions are the ones that can establish bargaining councils.

There are two levels of collective bargaining, namely, centralised collective bargaining, and decentralised collective bargaining. Centralised collective bargaining is about concluding agreements at the bargaining and statutory councils, whereas

\begin{flushleft}\textsuperscript{163} \textit{LRA}, section 28.  \\
\textsuperscript{164}Maree J ‘Trends in the South African collective bargaining system in comparative perspective’ (2011) \textit{35 SAJLR} 7.  \\
\textsuperscript{165} \textit{LRA}, section 112.  \\
\textsuperscript{166}Budlender D \textit{Industrial relations and Collective bargaining: Trends and developments in South Africa} IOL working paper 2 (2009) iii.  \\
\textsuperscript{167}Budlender D (2009) iii.\end{flushleft}
decentralised collective bargaining agreements can not only be concluded both at statutory councils and at plant levels as well.168

3.3.2 Collective bargaining in the mining sector

In the South African mining industry centralised bargaining is used, although there are some exceptions. Bhorat and Oosthuizen argue that it is a poor bargaining system, inherited in the 1980s and continued after 1994. They argue that it is ineffectual in dealing with plant specific issues; in other words, there are demands which are specific to the plants or mines and which cannot be dealt with through national bargaining.169

Bargaining councils in the private sector cover employees who are classified as unskilled or semi-skilled while managers, technicians and associate professionals are excluded.170 Chapter 8 of the BCEA allows the establishment of sectoral determinations. In instances whereby employees and employers of a specific sector are already covered by collective agreement concluded at a bargaining council, the Minister of Labour does not establish sectoral determinations;171 as the result of this, the mining sector does not have a sectoral determination.

171 BCEA, section 55(7).
3.3.2.1 Centralised collective bargaining

Centralised collective bargaining happens at the sectoral level. In the mining sector this form of bargaining is dated back to 1915. It has always remained informal, and operates on agreements between the participating parties (Chamber of Mines South Africa and trade unions). The centralised collective bargaining system has been used in gold mining and coal mining; the coal mining forum covers 60 to 65 per cent of employees, and the collective bargaining forum for gold mines covers about 90 per cent of the workforce.

A centralised bargaining system is used by the Chamber of Mines South Africa (CMSA), which is the employers’ organisation that seeks to represent the employers’ interests. Every two years centralised negotiations on conditions of employment and wages are held between the Chamber of Mines, which represent the majority of gold and coal mine employers, and the recognised trade unions. However, the diamond, platinum and base metal mines, as well as some of the smaller gold and coal mines, negotiate on decentralised bases.

Based on the report from CMSA, there are three recognised unions in the gold mining industry, namely, the National Union of Mineworkers (NUM), Solidarity and UASA. These three unions are part of prior agreements, and the Association of Mineworkers and Construction Union (AMCU) has also been invited to join the

---

bargaining process. Before 2005 CMSA used to have separate negotiations with each of the three unions.177

Negotiations for different categories of employees take place in one forum. The negotiations usually standardise conditions of employment and wages. However, in instances where some mines face financial constraints then flexibility may occur, by providing variable rates.178

Section 23(1)(d) of the LRA provides for the extension of collective agreements to non-union members has always been applied.179 The thinking behind the extension of collective agreements is to avoid unfair competition in a industry.180 The extension of collective agreements has been challenged by AMCU. In Chamber of Mines South Africa v AMCU & Others181, the application was on the basis that AMCU members were bound by a collective agreement which was entered between the applicant and the other unions. AMCU contested that they were bound by the agreement.182 AMCU argued on the basis of majoritarian rule as it claimed to be a majority union on some of the mines.183 However, it was proven that NUM had more members.184 The court ruled in favour of the applicant and the majoritarian rule was upheld.

177 Chamber of Mines South Africa (2013).
179 In terms of section 23(1)(d), a collective agreement also binds ‘employees who are not members of the registered trade union or trade unions party to the agreement if-
(i) the employees are identified in the agreement;
(ii) the agreement expressly binds the employees; and
(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.’
181 (2014) 3 BLLR 258 (LC).
182 Para 2.
183 Para 24.
184 Para 40.
The coal industry also recognises three unions, namely, NUM, Solidarity and UASA. Their bargaining agreement shows that its bargaining council covers more than wage issues and conditions of employment.\(^{185}\)

The LRA does not enforce bargaining topics between the bargaining parties; this depends on them considering the matter as one of mutual interest. Du Toit et al state that:

“A matter of ‘mutual’ interest is one in which the trade union and employer parties have a material and simultaneous interest. In addition it must be related to the employment relationship and an issue that can be reduced to, or regulated by, a collective agreement.”\(^{186}\)

As much as this form of collective bargaining has not experienced the same level of problems relative to decentralised collective bargaining,\(^{187}\) it does not cover plant level issues, as stated earlier. This form of collective bargaining, just like any other form, experiences challenges during the negotiation phase between the parties. In September 2013, the gold mining industry was hampered by strikes as wage negotiations broke down. Mine workers were demanding a wage increase of between 60 and 100 percent.\(^{188}\)

3.3.2.2 Decentralised collective bargaining

Decentralised collective bargaining takes place at the plant level.\(^{189}\) This form of bargaining has a negative impact on collective bargaining coverage, where there is

---

\(^{185}\) Chamber of Mines South Africa (2013).
\(^{187}\) See below at 3.3.2.2.
no provision for the extension of collective agreements. The collective agreement would only cover and benefit the majority union and its members.190

3.3.2.3 Decentralised collective bargaining in the mining sector

The platinum mining industry makes use of company based bargaining. The principle of majoritarianism applies, whereby unions with 50 + 1 per cent or more of the workers within the category sign a recognition agreement which will allow that union to do the bargaining on behalf of every member and non-member.191 This system was intended to limit union rivalry in the sector.192

Section 18 of the LRA empowers majority unions, as it allows them to acquire organisational rights, and also gives employers and majority unions the right to decide on representativeness thresholds. Section 18 of LRA reads as follows:

(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.

As a result of this, smaller unions may not be recognised and they are excluded from bargaining and deprived of potential benefits. Kruger and Tshoose argue that because of this section of the LRA minority unions are marginalised, and diversity

190 Unless the majority union and the employer can agree to extend the agreement to non-parties at the workplace in terms of section 23(d) of the LRA. Du Toit D, Maree J & Theron J et al Collective bargaining in South Africa past, present and future (2010) 21.
191 LRA, section 18.
and pluralism are not as respected as they should be according to democratic principles.  

Adding to the exclusion of minority unions is section 25 which makes provision for agency shop agreements. In terms of this section members of minority unions might find themselves in a position where they are forced to pay required monthly agency fee to the majority union, if they enjoy the benefits negotiated for by the majority union. Section 26 of the LRA also contributes to the marginalisation of smaller unions. This section concerns closed shop agreements, that require all employees covered by the collective agreement creating the closed shop to be or become members of the majority trade union.

3.3.2.4 The effect of majoritarianism in the mining industry

Hartford has commented on the failures of decentralised collective bargaining in the mining industry. His first argument is that of the heavy reliance on the practice of union majoritarianism, whereby the union with the majority membership in the plant gets to bargain on behalf of all employees, and is regarded as the sole representative of all employees’ views. This practice has the following characteristics:

‘[A] high degree of centralisation of bargaining at commodity sector or company level; a heavy unspoken reliance by companies on the majority union to manage employee expectations; a merging of bargaining units in some instances to support the majoritarian practice and create a semi-closed shop environment for the majority union; a raising of thresholds for entry of minority unions to gain recognition making the majority union stable and secure as the sole bargaining partner; and finally an agency fee to be paid by nonunionised employees to the coffers of the majority unions pro rata on their membership representativity.’

---

194 Hartford G ‘The mining industry strike wave: What are the causes and what are the solutions?’ (2012) 6 available at
Majoritarian rule always gives the union that has a majority of employees an upper hand when it comes to negotiations. As a result a union is able to manipulate the negotiations to benefit its members.

According to Hartford, these trends have evolved over the last three decades and the LRA gave statutory legitimacy to them. As a result negotiating parties find themselves in a co-dependent comfort zone, and this comfort zone had the following features at both the company and sectoral levels:

“[S]ignificant material benefits to labour union representatives; heavy management reliance on union driven collective processes which trumped any real and sustained direct employee engagement; little actual verification of union constituency based accountability on the ground to its membership; growing production line management disownship of employee communications in favour of reliance on HR and majority union to drive communication to employees; almost a complete absence of independent verification of employee sentiment and views; and a system of stakeholder engagement forums at sector, company, mine and shaft level – all of whom were so comfortable in their routinised, co-dependent relationship that they dismally failed to probe and hear the signals of arising discontent amongst employees.”

This practice has made the union leadership powerful and alienated groups of workers, such as migrant workers. These workers have been victims of a wage bargaining practice that came from a reliance on percentage based wage adjustments whereby senior employees in the bargaining unit received a lesser percentages wage adjustment than junior entry level employees. This made sense but the actual rand and cents outcome is the opposite because the cash reward from wage bargaining for those at the bottom is less than that for those at the upper levels of the bargaining unit and the wage layers between the bottom and top has grown.

---

http://uscdn.creamermedia.co.za/assets/articles/attachments/41878_2012_10_03_mining_strike_wave_analysis.pdf


3.3.2.5 Representation of constituency by shop stewards

Another problem that is created by this system is the gap between shop stewards and their constituency. Since the democratic transition of 1994, the mining sector has lost the principle of “democratic worker control” and there is no constituency based representation of members by shop stewards.\(^\text{198}\)

NUM has two types of arrangement for shaft stewards. The first is for part-time shaft stewards, who perform their union duties while they remain in their regular jobs.

The other arrangement is for full-time shaft stewards, who are full-time in their union positions.\(^\text{199}\) They do not stay in their mine jobs, but become full-time union operatives who work from an office on the premises or in the union of the mine’s regional offices. They receive higher remuneration and benefits, and often do not ever return to their shop floor positions. Their salaries can be triple their usual monthly salary and this type of position has become a ticket to advancement.\(^\text{200}\)

Shop stewards are elected at shaft level, but the practice is that they do not account directly to the constituency. Instead, the pressure to account to leaders higher up the ranks has intensified. Shop stewards lose touch with underground workers, they prefer to move across mines, shafts and occupy offices which are situated above ground. This shows that the unions may promote the interests of their leadership rather than those of their constituencies.\(^\text{201}\)


\(^{201}\)Hartford G (2012) 8.
There have been allegations of corruption and selling of jobs by shaft stewards. At one of the mines, the Karee mine, members of the NUM alleged that promotions were controlled by shaft stewards, that they demand a bribe in order to facilitate the appointment of a new employee, and that this bribe is then split between the shaft stewards and human resources personnel of the company. Bribes are also used in respect of promotions: union members pay money in order to be promoted.\textsuperscript{202}

When it comes to representation in the decision making structures with management, all key decision making structures are dominated by senior employees who are in the bargaining unit, while those who are directly affected - the ‘rank and file’ - are not present, or at best a tiny minority is present. There are no checks and balances to ensure that the shop stewards cover all employees, and that they uphold the constituency based representation throughout their terms of office. As a result, shop stewards fail to account to their constituency.\textsuperscript{203}

With special reference to the Marikana massacre, Alexander states that the upward mobility of members of NUM has brought serious tensions and new dynamics in the union. In particular, the shaft steward position is under the spotlight as it is a popular recruiting ground for management in the mining industry. Occupational mobility of leading activists and shaft stewards has the potential of negative impact on the servicing of the needs of union members, because it removes skilled shop floor leaders from the union and leaves leadership positions unoccupied.\textsuperscript{204}

\textsuperscript{202}Alexander P (2012) 186.
\textsuperscript{203}Hartford G (2012) 9.
\textsuperscript{204}Alexander P (2012) 184.
A survey conducted by the Human Sciences Research Council (HSRC)\textsuperscript{205} shows that the trust in trade unions has declined. During the illegal strikes in the mining sector, many mine workers voiced dissatisfaction with their trade union leaders, accusing their unions of being too close to management and too willing to compromise on workers’ demands. Trade unions showed a far more significant fall in confidence in 2012 than 2011. In 2011 43\% of South Africans indicated that they trusted trade unions, falling to 29\% in 2012, with 40\% reporting that they distrusted trade unions and 31\% remaining neutral.\textsuperscript{206}

As the result of this distrust, members of trade unions may be inclined to join other unions. In the case of platinum mines, NUM which has been the dominant union, has lost its position to AMCU. This has resulted to inter-union rivalry.

### 3.3.2.6 Trade union rivalry

In the platinum industry the rivalry between NUM and AMCU has been intense, and escalated to deaths and sparked unlawful strikes. Rock drill operators, who were members of NUM, were dissatisfied with their union's preference for across the board increase of 10\% over the proposal that would see the workers getting higher increases. Rock drill operators demanded a massive increase, and subsequently refused to work through NUM as the official union. To back their demands they downed their tools. Thousands of them left NUM to join AMCU.\textsuperscript{207}


\textsuperscript{206} Gordon S et al (2013) 1.

As the result of this move of members to AMCU, NUM lost its recognition rights at platinum mines. At Lonmin, the employer expressed a preference for an agreement that will include all the unions as they wanted to move away from the ‘winner takes it all’ model which was used when NUM was in control. However, AMCU opposed the proposal arguing that it should be entitled to majority status, as was previously enjoyed by NUM.\textsuperscript{208}

\textbf{3.3.2.7 Economic implications}

Prolonged strikes in the mining sector have a negative impact on the mining companies as well as on their clients. It has been reported that if the (at the time of writing) 15-week strike by platinum mine workers continues, Impala Platinum as the world’s second largest platinum producer would have to cut its supply to its customers to 40% of demand in the next three months. This wage strike has also hit Anglo American platinum and Lonmin.\textsuperscript{209} Currently the strike has cost the platinum mine companies about R 15.5 billion in lost revenue. Striking employees have also been affected financially as they lost R 6.9 billion in income.

Looking at the two forums for collective bargaining, it can be concluded that there are valid concerns regarding the representation of ordinary mine workers, whether through centralised collective bargaining or decentralised collective bargaining. The next section examines whether workplace forums as provided for in the LRA provide a viable alternative to collective bargaining as a platform for workers participation in the mining sector. It highlights some obstacles in the creating and use of workplace forums.  

\textsuperscript{208} Marrian N & Seccombe ‘AMCU wants a majority status at Lonmin’ A Business Day Live 06 March 2013 \url{http://www.bdlive.co.za/national/labour/2013/03/06/amcu-wants-majority-status-at-lonmin}.

\textsuperscript{209} ‘Impala Platinum warns of platinum supply cut’ South Africa Labour news 08 May 2014 \url{http://www.salabournews.co.za/index.php/home/70-labour-news/17350-impala-platinum-warns-of-platinum-supply-cut.html}. 
forums, such as, how the infiltration of trade unions has affected the establishment and the functioning of the workplace forums.

3.3.3 Workplace forums

3.3.3.1 Statutory requirements for workplace forums

The aims of South African workplace forums are to encourage power sharing, enhance productivity and to promote shop floor democracy in the workplace. They institutionalise a consultative role.\textsuperscript{210} They provide a platform for employees and employers to discuss non-distributive issues.

Workplace forums’ focus is qualitative, which means that they focus on non-wage matters, such as, work methods, restructuring, changes in the organisation of work, introduction to new technologies and work methods, physical conditions of work, and health and safety.\textsuperscript{211}

Workplace forums have statutory recognition to go beyond the limits of collective bargaining whereby the employees have an institutional voice in managerial decision making.\textsuperscript{212}

The statutory functions of workplace forums are threefold: to enhance efficiency in the workplace, promote the interests of all employees (union members as well as

\footnotesize{\textsuperscript{210}Klerk G Adversial ‘participation and antagonistic cooperation?: workplace forum, employee participation and lean production’ transformation (1999) 40 Transformation 9.}

\footnotesize{\textsuperscript{211}Van Niekerk A, Christianson M, McGregor M et al Law @ work 2 ed (2012) 391.}

\footnotesize{\textsuperscript{212}Van der Walt R ‘Have workplace forums contributed to worker participation? Some management perceptions’ (2008) 39 S Afr. Bus. Manager 45.}
non-union members), and for consultation and participation in joint decision making with the employer.\textsuperscript{213}

Members of workplace forums are elected by employees, with places being allocated on the basis of the occupational structure of the workforce.\textsuperscript{214} The aim is to ensure that employees who are not members of the union in the absence of a closed shop agreement are also represented in the forum.\textsuperscript{215}

After a workplace forum has been established the employer is obligated to share information concerning the company’s performance generally and its future prospects, both employment and financial. Section 89(1) obligates an employer to disclose relevant information that would allow the forum to engage effectively in joint decision making. However, section 89(2) prevents the employer to disclose information which is legally privileged. It is then required of an employer to consult with the forum before implementing any proposal concerning the issues relating to the forum.\textsuperscript{216}

\textbf{3.3.3.2 Workplace forums in the mining sector}

There are no workplace forums in the mining sector; however, there are committees and forums which are enforced by MHSA. Their focus is mainly on the health of employees and their safety.\textsuperscript{217} A report from the Harmony Gold Mines shows that a measure of engagement between the mine and its employees and trade unions


\textsuperscript{214}LRA section 82(1)(b).


\textsuperscript{217}See section 3.2.1.
exists. However, it is notable that there is no mention of workplace forums but rather of what is referred to as ‘future forums’\(^\text{218}\) whose nature and function are unclear. According to the report, there are annual employee engagement surveys, regular meetings with organised labour as required by the employer, quarterly conferences and newsletters, and ongoing ‘future forums’ and use of social media. With regards to engagements with unions, there are annual negotiations, quarterly presentations and ongoing meetings.\(^\text{219}\)

Therefore, there is no evidence of workplace forums existing in the mining sector. However, a similar situation seems to occur in all other sectors in South Africa.\(^\text{220}\)

At mines, shaft level union stakeholder engagement forums are established across the mining industry. They are largely operational forums to deal with work scheduling, safety and production, but have low capacity in people problem solving and low stakeholder management skills, as is reflected in a low people problem resolution rate. There is limited face to face engagement by management with employees outside of the meetings.\(^\text{221}\)

### 3.3.3.3 Problems with the establishment of workplace forums

Very few workplace forums have been established in South Africa.\(^\text{222}\) Trade unions disapprove of them as they feel that they would marginalise their

---


\(^\text{220}\) See below at 3.3.3.3.


influence both over their members and in the workplace.\textsuperscript{223} They also fear that they could serve to co-opt employees and reduce their willingness to oppose employers’ proposals. As a result South Africa has witnessed very few workplace forums being established.\textsuperscript{224}

Trade unions fear that workplace forums will undermine their independence and their traditional role in collective bargaining. Not only that, it is also doubtful that they will agree that conditions of employment be subjected to joint decision making as this will exclude terms and conditions from the right to strike. Trade unions further argue that in many South African companies the level of conflict is so high to an extent that institutionalised participation cannot resolve them.\textsuperscript{225}

The Congress of South African Trade Unions (COSATU), the largest South African trade union federation rejects the idea of workplace forums, and supports the idea of union based engagement rather than independently elected workplace forums It argues that they pose a danger for unions:

‘We strongly support the argument that workplace forums should be \textit{union-based} rather than independently elected. In other words, the powers of information, consultation and joint decision-making should be conferred directly on the shop stewards committee; alternatively, the shop steward committee should nominate members to the workplace forum. Otherwise there is a danger that the workplace forum will either become a substitute for the shop steward committee, or will be a very weak consultative forum. A workplace forum independent from union structures will be a recipe for division.’\textsuperscript{226}

\textsuperscript{223}Manamela ME ‘Regulating workplace forums in South Africa’ 2002 (14) SAMerc LJ 728
\textsuperscript{224}Budlender D (2009)10.
The LRA provides a link between voluntarism and flexibility which are both advocated by union views of employment relations and job creation.\textsuperscript{227}

In the research conducted at Felixton Sugar Mill on employees’ perceptions about workplace forums, it was found that the majority of employees responded positively to the idea of workplace forums. However, it was shown that respondents who were not well trained or educated for their jobs saw no benefits in workplace forums and ones who were suitably qualified understood the benefits.\textsuperscript{228} It can be concluded from these findings that education is a considerable distinguishing factor between the views of these two different groups of respondents with regards to the usefulness of workplace forums. Based on this, it leaves one with a conclusion that the better employees are trained or educated for their jobs the more the need for workplace forums will be apparent.

In South Africa the dominant role given to trade unions threatens the objectives and the position of workplace forums. First, in order for workplace forums to be established a collective agreement needs to be concluded, which involves collective bargaining of which trade unions are part.\textsuperscript{229} Secondly, the LRA allows shop stewards, who may have a mindset of adversarial bargaining which opposes the co-operative approach, to be elected onto workplace forums. Members of trade unions may feel threatened by the principle of workplace forums to serve the needs of all employees regardless of the trade union affiliations.\textsuperscript{230}

\textsuperscript{227}Barcheisi F (1998) 52.
\textsuperscript{230}Van der Walt R (2008) 46.
unions have the power to decide whether or not to establish workplace forums,\textsuperscript{231} and as has been established above, they seem to have opted not to.

Workplace forums are also rejected by the management representatives, who are concerned about the method of enforcement being adopted and the principles of voluntarism being ignored.\textsuperscript{232} Steadman lists the following concerns raised by management representatives about the provisions of the LRA regarding workplace forums:

‘They raised questions about balancing rights and responsibilities, that chapter V proposed 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. They argued that the confidentiality provisions provided some, but inadequate, protection against the disclosure of confidential information, but no recourse was provided in the case of ‘other abuses’. They were also concerned about the extent to which employees would be capable of understanding the issues raised in workplace forums, and the ability and readiness of the unions themselves to participate effectively, through shop steward representatives, in workplace forums. Employers were also concerned about disputes automatically becoming disputes of right.’\textsuperscript{233}

The LRA has not been able to reconcile the tension between workplace unionism or collective bargaining and workplace forum activity, nor has it been able to reconcile the tension between the need to democratise the workplace and the need to increase productivity and efficiency.\textsuperscript{234}

With these above mentioned obstacles in the creation and use of workplace forums, it is important to examine whether they are able provide a complementary participation channel to collective bargaining in the mining sector.

\textbf{3.3.3.4 A greater role for workplace forums in the mining sector?}

\textsuperscript{233}Steadman F (2004) 1174.
The absence of workplace forums in this sector is a problem. It is submitted that if workplace forums were functioning in the mining sector, the recent problems that have been experienced by this sector would have been minimised. Workplace forums can be a viable alternative in addressing the shortcomings of decentralised collective bargaining and particularly the issues caused by majoritarianism. Section 82 of the LRA provides the requirements for constitutions of workplace forums. According to this section, anyone can be a part of the workplace forum, irrespective of their union affiliations. Section 82 (1)(b) requires that the distribution of seats in the workplace forum be the reflection of the occupational structure of the workplace, meaning that workplace forums are open to every employee irrespective of their union affiliation.

Another important fact is that the LRA requires regular meetings between the employer and the workplace forum. Section 83 states the following:

'1) There must be regular meetings of the workplace forum.
2) There must be regular meetings between the workplace forum and the employer, at which the employer must,
   (a) present a report on its financial and employment situation, its performance since the last report and its anticipated performance in the short term and in the long term; and
   (b) consult the workplace forum on any matter arising from the report that may affect employees in the workplace.'

These meetings would provide an opportunity to resolve daily plant level issues before they escalate to bigger problems.

When it comes to the issue of accountability to the constituency, section 83(3) provides a platform for consultation between the workplace forum and the employees of the company. The section states that:
‘(a) There must be meetings between members of the workplace forum and the employees employed in the workplace at regular and appropriate intervals. At the meetings with employees, the workplace forum must report on,
(i) its activities generally;
(ii) matters in respect of which it has been consulted by the employer; and
(iii) matters in respect of which it has participated in joint decision-making with the employer.
(b) Each calendar year, at one of the meetings with the employees, the employer must present an annual report of its financial and employment situation, its performance generally and its future prospects and plans.
(c) The meetings of employees must be held during working hours at a time and place agreed upon by the workplace forum and the employer without loss of pay on the part of the employees.’

These meetings make the workplace forum account to its constituency, as they give employees an opportunity to be up to date with developments of the company. This would further allow the employees to voice their concerns on any work related matters that may rise. It also allows employers to be up to date with employees concerns.

With regards to intra-union rivalry, workplace forums provide less space for union rivalry which is caused by the movement of union members from one union to another. There is diversity in workplace forums as they consist of employees from different unions and ones who do not belong to any union.

With this viable alternative being provided for in the LRA, this paper is in support of the establishment of functioning workplace forums in the mining sector to reduce future dissatisfaction and unrest.

3.4 Chapter conclusion

In the mining sector three employee participation platforms have been evaluated: centralised collective bargaining, decentralised collective bargaining and workplace
forums. Centralised collective bargaining appears to be more effective than decentralised collective bargaining in terms of employee participation in decision making. Decentralised collective bargaining is failing as it has been found that trade unions are failing to represent their constituency. This type of collective bargaining benefits the majority union and its leadership and representatives, such as, shop stewards and their respective unions leaders. Workplace forums do not function at all in the mining sector. There is a need for the establishment of functioning of workplace forums, in order to reduce mining challenges and to close the gap between the employees and employers. It is therefore submitted that before calls that the LRA be amended to address the problems related to collective bargaining in the mining sector highlighted above are considered, consideration should be given to the implementation of the until now neglected provisions of the LRA dealing with workplace forums. The concluding chapter makes some recommendations regarding the establishment of workplace forums.
CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

The stated aim of this research paper is to assess the effectiveness of the channels (collective bargaining and workplace forums) created by labour law for employees’ participation in decision making in the mining sector. As shown above, although provision is made for these channels for employee participation, they are in practice not effective with regard to ensuring employee participation in decision making in the mining sector. From the previous chapter it is clear that one channel (collective bargaining) does exist and function, albeit with significant problems, whereas the other (workplace forums) has not been utilised. These two platforms are supposed to support one another, but collective bargaining has suppressed workplace forums, because bargaining councils are platforms where employers’ organisation and trade unions conduct their negotiations. Trade unions regard workplace forums as threats to their mandates and influence with employers.\textsuperscript{235} This has not only occurred in mining sector but throughout all employment sectors in South Africa.

In the mining sector the dominant position of trade unions is inevitable judging by their powers and the tripartite relationship COSATU has with the ruling party, the ANC, and the SACP. Centralised collective bargaining appears to be functioning better than decentralised collective bargaining. Decentralised collective bargaining is centralised around the union in control and its shop stewards.\textsuperscript{236} Certain individuals (shop stewards) are looking after themselves and neglecting their constituency. As

\textsuperscript{235} See section 3.3.3.3.
\textsuperscript{236} See 3.3.2.2 and 3.3.2.3 above.
the result the constituency has lost faith in its leadership. This is evident in the current inter-union conflict within the sector. This inter-union conflict had a negative impact on South Africa’s economy as production is on stand-still. The conflict has shifted from trade union versus employer to trade union versus trade union. This conflict has not only negatively affected the employers but is paralysing South Africa’s economy as well as the livelihood of mine employees.

4.2 Recommendations

Workplace forums can play an equally important worker participation role than bargaining councils. Workplace forums play a very important role in the development of employees as they open new opportunities of participating in decision making. Workplace forums provide an exposure to issues that were previously the exclusive domain of management and they provide training to employees to help them deal with those complex issues. They empower previously disadvantaged employees.

However the concept seems to be neglected in South Africa by all the parties involved (trade unions, employers and the state). Steadman is of the view that Chapter V of the LRA should be amended to embrace the principles of voluntarism, self-regulation and joint problem solving. Making workplace forums mandatory would be rejected by both employers and unions considering their attitude towards them, and workplace forums should not be imposed as this defeats the spirit of co-

---

237 See 3.3.2.3 above.
238 See 3.3.2.4 above.
239 See 3.3.2.4 above.
240 See 3.3.2.5 above.
242 See 3.3.3.3 above.
operation. However, it can also be argued that the lack of workplace forums in South Africa is due to the LRA making the establishment of workplace forums voluntary.

This paper supports Steadman’s proposal of government created incentives to encourage parties to establish workplace forums; incentives, such as, training opportunities to acquire skills to equip employees and skills development levy rebates to employers. These incentives would ensure that the employees are well skilled when it comes to their jobs, better equipped to participate in workplace forums and in return this would improve and increase the productivity of the company. Both bargaining councils and the CCMA should have a responsibility for promoting the establishment of workplace forums.

Section 80(1) also needs to be amended. There should be no minimum limit on the number of employees who are employed in a plant or company before a workplace forum can be established. The LRA appears to promote workplace democracy in companies that employ more than 100 employees. It is submitted that the threshold is too high, and if that is the case then smaller companies are excluded from workplace democracy.

South Africa can use German works councils as an example. In Germany works councils can be established in any company that has five to more permanent employees with voting rights. This model of workplace democracy has been working

245 See 2.10 above.
for Germany. Manamela further explains how this works in Germany: ‘Every establishment with more than five employees older than 18 years, three of whom have been employed for at least six months is required by law to establish a works council.’ In the absence of an explanation for the minimum threshold for establishing workplace forums in South Africa, consideration should be given to adopting the German model.

The term ‘representative trade union’ is problematic. It is defined in section 78(b) as

‘a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.’

This means that the majority union or two more registered unions acting jointly are given the opportunity to apply for the establishment of the workplace forum. Judging by the unions’ attitude towards workplace forums, the possibility is great that there will not be any workplace forums as the powers are vested in unions to establish them. Thus, section 80 (2) needs to be amended so that ‘representative trade union’ is replaced by ‘employee’ including both unionised and non-unionised employees.

As was stated above, South Africa can learn from the German experience. In Germany the mistrust between trade unions and work councils used to exist, but has since turned into a good relationship. As a result of their good relationship, both pillars of the employee representation system have been strengthened. Weiss explains how this was achieved:

247 Manamela ME ‘Regulating workplace forums in South Africa’ (2002) 14 SAMerc LJ 733
248 See 3.3.3.3 above.
Trade unions in a pragmatic way learned how to cope with the challenge and thereby to optimise the functioning of the system of workers’ representation as a whole. This, of course, was only made possible by the jointly accepted understanding that collective bargaining and workers participation fulfill different functions, that the one cannot simply be substituted for the other, and that each has merits of its own.249

These are the features which characterise relationship between work councils and unions in Germany: First, there is a division of labour between the two parties, day to day challenges and arrangements in the company are left to work councils. Trade unions focus on sectoral collective bargaining.250

Secondly, collective agreements provide a framework that needs to be followed by employers and works councils. In other words, in practice, discretion is given to both employers and work councils to regulate the implementation of collective agreements by way of works agreements. Thirdly, difficult restructuring processes can only be carried out successfully on the basis of co-operation between trade unions and works councils, as it seems to be the only way to get legitimacy from the workforce as a whole. Fourthly, in companies where works councils exist, trade unions play a role of informal supporter; they offer employees information on the advantages of having works councils. Fifthly, works councils have turned out to be efficient in recruiting members for trade unions, and it can be argued that without works councils the dwindling union membership problem would have been a bigger concern.251 Lastly, works councils help to provide information to trade unions in day to day challenges and in return trade unions stay up to date with new developments and challenges.252

249 Weiss M ‘Trade unions and institutionilised worker’s participation: The German experience’ (2005)
19 Law, Democracy and Development 166.
252 Weiss M (2005) 165-166.
One of the weaknesses of collective bargaining is dealing with plant level issues in the mines. The mining sector in South Africa can learn from the German experience on division of functions between unions at sectoral level and workplace forums at plant level. As in Germany, workplace forums could help to provide information to trade unions on daily challenges before they escalate into bigger problem. The cooperation between the two channels of employee participation can create a relationship which ultimately may benefit unions, should workplace forums in South Africa turn out to be as efficient in recruiting members for unions as works councils have been in Germany.
Bibliography

Legislation
Basic Conditions of Employment Act 75 of 1997
Labour Relations Act 66 of 1995
Mine Health and Safety Health Act 29 of 1996

Caselaw
Chamber of mines South Africa v AMCU & Others (2014) 3 BLLR 258 (LC).
Mankayi v Anglogold Ashanti Ltd 2011 (32) ILJ 545 (CC)
SANDU v Minister of Defence and Others 2007 (4) BCLR 398 (SCA)

Books


Singh PN & Kumar N *Employee Relations Management* (2011) Dorling Kindersley (India) Ltd.


**Journal Articles**


Brassey M ‘Labour Law after Marikana: Is institutionalised collective bargaining in SA withering? If so, should we be glad or sad?’ (2013) 34 *ILJ* 823-835.


Klerk G Adversial ‘participation and antagonistic cooperation?: workplace forum, employee participation and lean production’ transformation (1999) 40 transformation 1-35


Ngcukaitobi T ‘Strike law Structural violence and Inequality in the Platinum hills of Marikana’ (2013) 34 ILJ 836-844.


Research reports and discussion papers


Harvey R Marikana as a tipping? The political economy of labour tension in South Africa’s Mining industry and how best to resolve them? SAILA occasional paper 164, (2013)


The bench marks foundation Communities in the Platinum Minefields: A review of Platinum mining in the Bojanala district of the North West Province Policy Gap 6
News Reports


Price C ‘Eight dead one missing in South Africa mine blaze’ AFP 06 Feb 2014 available at http://www.google.com/hostednews/afp/article/ALeqM5g-53l29ydwRc_qdEJLGVbGWuRXhw?docId=c2e9058b-e536-4c3b-b702-4677f810f8a5

SA Coal mining heat by a strike at Umlabu Colliery’ Mineweb 24 October 2014 http://www.mineweb.co.za/mineweb/content/en/mineweb-fast-news?oid=160740&sn=Detail

Internet references


Bhorat H & Oosthuizen M. ‘Is Marikana a forerunner of national labour market instability and disruption?’ Econ 3x3 2012 available at


Hartfot D ‘The mining industry strike wave: What are the causes and what are the solutions?’ http://us-cdn.creamermedia.co.za/assets/articles/attachments/41878_2012_10_03_mining_strike_wave_analysis.pdf (accessed 29 January 2014)


Lonmin Plc Annual report and accounts for the year ended 30 September 2011


Mining News ‘More than 100 recorded deaths in South African mines last year’

Ndlovu N Davies T & Murray J et al Demographic data and disease rate for January to December 2012, National Institution for Occupational Health 2013 8 available at


Taal M, Patel S & Elsley T ‘A mine workers wage: the only argument against R12 500 is greed?’ Labour Research Service (2012)

Thesis